THE 2000 REPORT OF THE ATTORNEY GENERAL

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OPINIONS
OF THE
ATTORNEY GENERAL
AND
REPORT
TO THE
GOVERNOR OF VIRGINIA
2000

COMMONWEALTH OF VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
AT RICHMOND
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The Honorable James S. Gilmore, III
Governor of Virginia
My dear Governor Gilmore:

I have the honor to present to you the Report of the Attorney General for calendar year 2000. During the period covered by this report, the Office of the Attorney General issued 80 opinions, which are contained in this volume, and represented the Commonwealth of Virginia in thousands of legal disputes in state and federal courts, including criminal appeals, habeas corpus actions, and civil suits involving numerous facets of state government.

The official opinions in this volume address a wide variety of legal issues. What they cumulatively represent, however, is a respect for the laws of the Commonwealth, a commitment to equal justice for all citizens, and a means to foresee legal issues in order to prevent problems from arising.

I would like to take this opportunity to highlight some of the accomplishments of the Office during the past year.

Mentoring Virginia's Youth

The Attorney General's mentoring initiative continued its growth and effectiveness. The highlight for 2000 was the Virginia's Future Mentoring Summit held in Richmond, in September, and attended by 2,500 volunteers. The summit was cosponsored by Big Brothers Big Sisters of Virginia, Boys & Girls Clubs of Virginia, The Fairfax Mentoring Partnership: An Initiative of the Fairfax Partnership for Youth, The 4-H Youth Development Program, The South Hampton Roads Alliance for Youth, and Virginia One to One: The Mentoring Partnership. At the summit, General Colin Powell and I announced the unifying of my statewide mentoring program, “Virginia's Future: Building Up the First Generation of the New Century,” with “America's Promise—The Alliance for Youth,” the national organization led by General Powell, who, of course, has since become the Secretary of State. Through this partnership we will continue to deepen the level of commitment to mentor and to build the character and competence of Virginia's youth. To date, the Office has recruited over 4,000 mentors for Virginia's young people since announcing this initiative in 1999.

General Powell and I also announced the establishment or expansion of twelve “Communities of Promise” to help build the character and competence of Virginia's youth. A “Community of Promise” is a town, city or county that commits to fulfilling Five Promises for and with children and youth where they live. The Five Promises are: (1) ongoing relationships with caring adults—parents, mentors, tutors or coaches; (2) safe places with structured activities during nonschool hours; (3) healthy start and future; (4) marketable skills through effective education; and (5) opportunities to give back
through community service. Commitments were announced by representatives from the Eastern Shore, Fredericksburg, Hampton, Henrico County, Martinsville, Newport News, Richmond, Roanoke, South Hampton Roads, Wise County, and Wythe County.

The Office was honored by the United States Office of National Drug Control Policy for our mentoring initiative, receiving a Special Recognition Award.

Consumer Protection

The Office distributed more than $332,000 to five charitable literacy organizations as part of an antitrust settlement reached in 1999 with Toys "R" Us and three major toy makers—Hasbro, Little Tikes and Mattel. The money will be used to purchase books and other educational materials for children in the Commonwealth. These materials will help expand educational prospects and allow for continued mentoring and outreach efforts for Virginia's children.

Our Office continues to protect consumers as the Commonwealth introduces retail choice for electricity. We cosponsored, with the Richmond branch of the NAACP, an electricity symposium to educate consumers on the upcoming changes in electric service, and we spoke before numerous civic and business groups on these issues. In proceedings before the State Corporation Commission, we advocated for equal opportunities for low-income consumers, protections against deceptive and unfair marketing, reasonable rates, and regulations that support consumers' use of renewable energy.

We participated in numerous other regulatory matters. GTE South's rate proceeding before the State Corporation Commission culminated in a settlement that refunds $200 million to Virginia consumers. In a separate matter, we successfully defended against GTE South's appeal of a ruling that saved Virginia consumers an additional $58 million annually. In addition, our Office successfully advocated for a $4 million decrease in workers' compensation insurance premiums to reflect the efforts of the State Police Insurance Fraud Division. We also negotiated a rate settlement with Allegheny Power Company, which will save consumers $2 million annually.

Virginia, along with 49 other states and five territories, reached a settlement in the amount of $34 million with Nine West Group, Inc., to resolve allegations that the company violated antitrust laws in fixing the retail price of women's shoes. Virginia's share of the settlement is $804,308. This money will be distributed in 2001 to organizations across the Commonwealth for their use in promoting women's health, education, vocational and/or safety programs.

Virginia and 30 other states reached a settlement with CIBA Vision, a major manufacturer of contact lenses, whereby CIBA will sell its contact lenses directly to mail order companies, drug stores, pharmacies, and other channels of distribution for consumers. This agreement will remain in place for at least five years. Consumers will receive a rebate of $35 on future purchases of certain CIBA replacement contact lenses, plus free coupons for other CIBA products. CIBA also has agreed to pay $5 million to a settlement fund that will be distributed at the direction of the court.

In October 2000, Virginia and 49 other states entered into a settlement with Mylan Laboratories, Inc., and other companies, to resolve allegations of monopolization
and price-fixing in the generic drug industry. The settlement provides for a recovery to consumers and state government agencies harmed by the anticompetitive conduct through purchases of certain drugs. Virginia's share of the settlement approximates $2.1 million.

The Office concluded its litigation against Publishers Clearing House with the entry of a consent injunction and final judgment. The suit we filed in 1999 alleged that sweepstakes solicitations violated Virginia's consumer protection law. In addition, along with other states, we entered into assurances of voluntary compliance with three other national sweepstakes companies. The settlements provided for injunctive relief, restitution for consumers, and costs and attorney fees.

Virginia, the Federal Trade Commission, and seven other states filed suit against a Nevada-based multilevel marketing company, Equinox International. The complaint alleged that the company engaged in deceptive trade practices, violated state and federal consumer laws, and operated as an illegal pyramid scheme. After trial began in April 2000, settlement was reached with the company and its principal owner. The settlement required the corporation and the owner to surrender all corporate and most private assets to a court-appointed receiver for liquidation. The settlement should yield approximately $28-to-$35 million for consumer restitution and court-approved expenses. The Commonwealth will also recover attorney fees and costs.

The Office published the Virginia Consumer Guide as a resource for citizens of the Commonwealth. The guide provides information about potentially fraudulent transactions, gives tips for spotting consumer fraud, and includes references to governmental agencies that are available to address consumer complaints.

We proposed an amendment to § 57-59, a portion of the “Solicitation of Contributions” law, which was enacted during the 2000 Session of the General Assembly. Section 57-59(C) authorizes the Attorney General to issue a civil investigative demand whenever the Attorney General has reasonable cause to believe that any person has operated, is operating, or is about to operate in violation of the “Solicitation of Contributions” law. We also proposed an amendment to § 59.1-9.10, the civil investigative demand statute, to clarify that information obtained pursuant to that statute may be used by the Attorney General in an enforcement action. This change also was enacted by the 2000 General Assembly. These new provisions will better enable the Attorney General to investigate possible violations of the “Solicitation of Contributions” law and will assist the Office in bringing enforcement actions when violations are found.

Transportation

The Office continued to provide legal support to the agencies falling under the Secretary of Transportation. Major transportation initiatives were undertaken this year pursuant to the Virginia Transportation Act of 2000, including the sale of $375 million in bonds to finance high-priority transportation projects. We continued to be involved in fulfilling the promise of the Public-Private Transportation Act to make building highways more efficient and affordable, and assisting in evaluating projects, such as the Dulles Rail and Route 28 projects in Northern Virginia, the Route 288 project in the Richmond area, and the Coalfields Expressway project in Southwest Virginia.
Legal issues surrounding the construction of a new Woodrow Wilson Bridge across the Potomac River continued to occupy a large share of our time, including everything from litigation over the construction, to negotiation over wetland mitigation sites, to right-of-way issues. We worked with the Secretary of Transportation and senior staff at the Department of Transportation in negotiating and drafting the agreements between Virginia, Maryland, the District of Columbia, and the federal government on the funding, ownership, construction, and future maintenance of this project.

**Economic Development**

The Office provided the necessary and important legal advice required by its client agencies on a daily basis. For example, the Office has reviewed three bond transactions totaling $9 million for the Virginia Small Business Financing Authority, enabling a broad range of small businesses and plants located throughout the Commonwealth to start up or expand operations, thereby contributing to the Commonwealth’s growing economy and low unemployment rate.

The Fair Housing Action Plan continues in place, with our attorneys providing more legal support for the Real Estate Board’s Fair Housing program than at any time in the Office’s history. We assisted with the successful resolution of numerous fair housing complaints involving allegations of discrimination.

The Office participated in helping obtain approximately $25 million in financing to enable public broadcasting stations in the Commonwealth to upgrade their equipment to state-of-the-art digital. The Office worked with members of the Public Broadcasting Board, the Treasury Board, and outside counsel in negotiating the terms of the financing, thereby advancing the quality of public broadcasting in Virginia.

The Office played an integral role in the establishment of “The Aviation World’s Fair Financing Task Force” to facilitate financing capital improvements for the Newport News-Williamsburg International Airport. The capital improvements have been placed on a fast track, because they are necessary for the hosting of the Aviation World’s Fair in 2003. The Office members also worked with the Virginia Veterans’ Care Center in Salem in awarding a contract for the long-awaited “wandergarden” project, which is a botanical walkway used in a therapeutic environment for the elderly, particularly those suffering from Alzheimer’s. It is designed to stimulate the cognitive abilities of the residents at the Virginia Veterans’ Care Center.

The Office also worked with the Virginia College Building Authority on the proposed issuance of approximately $61.7 million of Educational Facilities Revenue Bonds for the 21st Century College Program.

**Environmental Protection**

The year 2000 was another active and high-profile year for our efforts in preserving and protecting Virginia’s natural beauty. We worked with our client, the Department of Environmental Quality, to protect the environment and enforce environmental laws. We obtained a conviction in a prosecution of a sewage release in Goochland County that polluted Tuckahoe Creek.
The United States District Court for the Eastern District of Virginia declared unconstitutional the legislation enacted in 1999 to protect Virginia’s waterways from pollution stemming from garbage and other hazardous waste. We have appealed that decision to the United States Court of Appeals for the Fourth Circuit. Oral argument was held in December and we are awaiting a ruling.

In 2000, we worked to obtain final closure for a large unpermitted waste facility, Sam’s Junkyard, in Prince William County, having won this in court the year before. We also dealt with another pollution hazard—the Osborne Motel, in Independence, Virginia—which resulted in simultaneous litigation on behalf of three state agencies. We obtained court orders and set in motion a multiagency cleanup plan and successful resolution.

We continued our enforcement efforts with Lorton Prison over sewage discharges from the prison. The prison facility is now scheduled to close at the end of 2001. We demanded and obtained an independent engineer to supervise the plant.

For several years, the Fairfax County Water Authority sought to obtain a permit from the State of Maryland to construct a new water intake pipe into the Potomac River from the Virginia shore, to obtain purer drinking water with less sediment for over a million citizens in Northern Virginia. Considering the difficulties and delays encountered in this process, we determined that Virginia must insist on its rights, based on interstate compacts and other authorities, to construct improvements into the Potomac without being subjected to regulatory oversight by Maryland. Accordingly, we filed an original jurisdiction action in the Supreme Court of the United States against the State of Maryland. The Court agreed to hear the case and has referred the matter to a Special Master where the case is now proceeding.

We assisted the Marine Resources Commission and the Secretary of Natural Resources in obtaining a successful resolution of the dispute over horseshoe crab harvesting.

**Virginia ACCESS**

In November, the Office spearheaded a one-of-a-kind partnership between the private high-tech industry and Virginia’s Community Action Agencies serving low-income residents to help make high-tech opportunities available to all citizens. Called Virginia ACCESS (the Alliance of Commonwealth Connections for Education and Self-Sufficiency), the initiative has already received more than $400,000 contributed by industry partners. In planning for Virginia ACCESS, Virginia’s Community Action Agencies surveyed more than 7,000 low-income Virginians and found that only 35% have regular access to a computer and only 25% have regular Internet access, but that 95% recognize that the use of technology would provide educational, employment, and personal advantages. Virginia ACCESS will offer mobile introductory computer classes, access sites at community centers, and ownership opportunities. Virginia ACCESS will partner with local churches, schools, and businesses, mobilizing local resources and involving each community in the project. Virginia ACCESS will begin with two pilot projects, one in Eastern Virginia (covering Caroline, Charles City, King and Queen, King William and New Kent counties, and the cities of Hampton and Newport News).
and one in Western Virginia (serving Alleghany, Amherst, Appomattox, Bedford, Botetourt, Campbell, Craig, Roanoke, and Rockbridge counties, and the cities of Lynchburg, Roanoke, and Salem).

Public Safety

The United States Department of Justice recognized the Office with an award for our success with Project Exile, a comprehensive, multidimensional strategy which has contributed to dramatically reducing the murder rate in Richmond. The U.S. Attorney General's Award for Outstanding Contributions to Community Partnerships for Public Safety was presented to us in July 2000. At that time, Project Exile had removed 752 guns from our streets, and 638 defendants had been indicted, resulting in 465 convictions. Of those convicted, 404 have been sentenced to an average of 59 months in prison. Richmond's homicide rate has dropped by 33% since 1997.

The Office appeared in the highest courts in Virginia and the United States in numerous cases to protect the public's safety and the administration of justice in Virginia. The Criminal Litigation Section successfully defended a capital murder conviction and death sentence in the Supreme Court of the United States in *Ramdass v. Angelone*. The Court upheld the denial of federal habeas corpus relief, ruling that the jury's verdict in the penalty phase of the trial was constitutionally imposed and that the trial judge properly had refused to give an erroneous instruction.

Constitutional law issues figured prominently in our criminal litigation for the year. We assisted in the prosecution of a leader of the Ku Klux Klan who burned a cross in Carroll County. After helping to achieve a conviction, we defended the case on appeal along with other similar cases, *Black v. Commonwealth, Kelly v. Commonwealth*, and *O'Mara v. Commonwealth*, where the Office rejected the notion that cross burning is a form of protected speech and argued that it is actually illegal intimidation of citizens. The Court of Appeals of Virginia sided with the Office and upheld the constitutionality of § 18.2-423, Virginia's law against cross burning with the intent to intimidate. On another matter, in *DePriest v. Commonwealth*, the Court of Appeals of Virginia rejected arguments that § 18.2-361, Virginia's anti-sodomy law, violated the appellants' rights to privacy.

In juvenile law, the effect of the decision in *Baker v. Commonwealth* by the Court of Appeals of Virginia, which held that failure to notify a parent of juvenile proceedings rendered a subsequent conviction in circuit court void, was felt at the trial and appellate levels. In *Moore v. Commonwealth*, however, the Supreme Court of Virginia enforced the curative statute recommended by this Office and enacted in 1996, § 16.1-269.1(E), to preclude assertion of *Baker* claims for offenses that occurred on or after July 1, 1996.

The Correctional Litigation Section provided daily legal advice to the Department of Corrections, Department of Juvenile Justice, and the Virginia Parole Board, and maintained an active caseload of 1,249 cases. The Investigative and Enforcement Section continued to aggressively pursue a wide range of wrongdoers by exercising its own jurisdiction under § 2.1-124, or working in conjunction with the Commonwealth's attorneys throughout the state.
As part of our efforts to fight crime on all fronts, the Victim Notification Program has provided assistance to 2,200 victims of crimes since the program was implemented in 1997. Some of the services provided include case status updates, disposition of information, crisis intervention, accompanying victims and family members to oral arguments in state and federal appellate courts, responding to letters, and acting as liaison between victims and the press and with the Governor's Office in death penalty cases. The Victim Assistance Coordinator met with numerous local victim/witness program directors throughout the year to simplify the coordination process of appellate notification between the Attorney General's Victim Notification Program, the Department of Corrections' Victim Services Unit, and local victim/witness programs, and attended numerous victim-related coalition and advisory council meetings.

We also continued our strong emphasis on crime prevention for our senior citizens through the TRIAD organizations around Virginia. TRIAD is a cooperative effort of seniors, police chiefs and sheriffs, and senior organizations coming together to protect senior Virginians from crime and consumer fraud. During my term, the number of TRIAD jurisdictions increased from 18 TRIADs to a total of 86 TRIADs across the state, a four-fold increase. In 2000, we held TRIAD conferences in Richmond, Roanoke, Harrisonburg, and Culpeper. More than 1,100 senior citizens were trained at these conferences on law-enforcement topics, including telemarketing fraud, homeowner repair scams, personal safety, home security, victim assistance, Medicare and Medicaid fraud, and disaster preparedness.

The purpose of the Office's Computer Crimes Unit is to protect children, consumers and commerce in cyberspace with a focus on illegal possession and distribution of child pornography via computer. The Unit has hosted several informational meetings and has offered training for federal, state, and local law-enforcement agencies. The Unit also receives and directs the handling of Internet fraud complaints from the National White Collar Crime Center's Internet Fraud Complaint Center.

**Government Operations**

The Employment Law Section responded to 32 cases filed in federal or state courts challenging state agency employment actions, and 123 grievances were filed under the state grievance procedure. All court cases (excluding grievances) were either successfully defended or settled on terms acceptable to the agency clients. More than three-fourths of the personnel actions challenged under the grievance procedure were either sustained by administrative hearing officers or settled on terms approved by management.

The Section intensified its efforts to offer training to its clients in employment law and in the effective handling of contested grievances. We presented six mock grievance hearings in different locations throughout the state to train human resource professionals and managers to represent their agencies' interests in grievance hearings. The Section also instituted the monthly publication of a newsletter to educate its clients in employment law matters relevant to the Commonwealth's personnel administration. The Office continued to be active in conducting seminars for its client agencies on a wide range of legal issues, including freedom of information, conflict of interests concerns, the Virginia Administrative Process Act, and others.
The Division of Debt Collection collected $11.1 million that otherwise might have been lost to the Commonwealth. For the second time, the Office was able to return to the client agencies a rebate of fees paid to the Division for debt collections services. A total of $525,000 was refunded.

Child Support Enforcement Section attorneys handled a total of 59,616 cases in state juvenile and domestic relations district courts and 2,617 cases in the circuit courts of the Commonwealth, as well as 9,083 other types of court or administrative cases or legal questions. In addition, Section attorneys handled 1,069 lump-sum child support cases in which the noncustodial parent paid at least $1,000 in a lump sum due to some enforcement action, for a total of $2,958,608 in support payments obtained.

Claims Against the Commonwealth

The Civil Litigation Division’s Trial Section obtained excellent results this past year in a significant volume of trial and appellate court litigation in workers’ compensation, medical malpractice and motor vehicle cases, and in general liability matters, including suits under the Virginia Tort Claims Act and in law enforcement defense work and civil rights actions. Among other significant matters, Section attorneys concluded, without the need for trial, all of the nearly two dozen claims and suits arising out of the University of Virginia pavilion balcony collapse occurring in May 1997. The confidentiality of juvenile court proceedings for witnesses and litigants was upheld in litigation before the Supreme Court of Virginia in In re: Richmond Newspapers, and in Kemler v. Poston. Section attorneys successfully defended the authority of the Judicial Inquiry and Review Commission to regulate the political activity of judges. A constitutional challenge to Virginia’s newly enacted Consumer Real Estate Settlement Protection Act was rebuffed in Fears v. Virginia State Bar. Finally, the Office championed Virginia’s constitutional right to employ actual count census data for its redistricting process by filing suit in Commonwealth v. Reno. In addition, we successfully prevented litigation against state universities by guiding development of policy changes that would permit the student fee funding of religious student groups for secular activities within appropriate constitutional limits.

New Legislation

The Office had success with a number of legislative initiatives proposed to the 2000 Session of the General Assembly and signed into law by you. The Assembly adopted two-thirds of the bills proposed by the Office, most by unanimous votes, including:

Identity Fraud. This law establishes the criminal offense of identity fraud and will serve as an effective deterrent to those considering using another’s identity for their own purposes.

Computer Crime. The Attorney General’s authority under the Virginia Computer Crimes Act is expanded so that he may prosecute the use of computers for fraud, trespass, invasion of privacy, theft, or embezzlement.

Computer Harassment. This will make it a Class 1 misdemeanor to use a computer or computer network to communicate obscene, vulgar, profane,
Criminal Gang Activity. Anyone convicted of participating in a criminal act committed for the benefit of a criminal street gang will now receive punishment of up to 10 years in prison and a $2,500 fine.

Date Rape Drug. This new law puts a dangerous and frequently used "date-rape" drug, GHB (gamma-hydroxybutyrate), into the most tightly regulated category of drugs with the strongest penalties for misuse.

Incapacitated Adults. This law enhances the ability to prosecute cases of neglect and abuse of incapacitated adults.

Homeless Children. This new law will make it easier for homeless children to attend Virginia public schools and to obtain a preschool physical exam.

In 2000, the General Assembly amended § 22.1-203 to require—rather than simply authorize—a daily minute of silence in each of Virginia's public school classrooms. We successfully defended this statute in federal district court against a constitutional challenge brought by the ACLU. The matter is now on appeal.

The General Assembly submitted to Virginia's voters a proposed constitutional amendment designed to provide increased protection for the right to hunt, fish, and harvest game. We successfully defended the proposed amendment—and the ballot question by which it was presented—against a challenge in the Circuit Court of the City of Richmond. The referendum on the amendment was allowed to go forward and the amendment was adopted.

Conclusion

It has been my great honor to serve as Attorney General during the past year. While no one document could cover all the duties, responsibilities and accomplishments of the Office, this review serves as a guide to our continuing efforts to meet our mandate as the Department of Law for the Commonwealth of Virginia. The names of all the dedicated professionals who comprised the Department during 2000 are listed on the following pages. I continue to be grateful for their energetic efforts on behalf of the citizens and government of the Commonwealth.

As the Commonwealth moves forward into the early years of this new century, it does so with an unparalleled opportunity to rekindle a passion for equality and the inalienable rights of life, liberty, and the pursuit of happiness for all Virginians.

With kindest regards, I am

Very truly yours,

Mark L. Earley
Attorney General
## Personnel of the Office

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<tr>
<td>Mark L. Earley</td>
<td>Attorney General</td>
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<tr>
<td>Randolph A. Beales</td>
<td>Chief Deputy Attorney General</td>
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<tr>
<td>William H. Hurd</td>
<td>Solicitor General</td>
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<tr>
<td>Richard B. Campbell</td>
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<td>Francis S. Ferguson</td>
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<td>Judith W. Jagdmann</td>
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<td>Ashley L. Taylor Jr.</td>
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<td>Robert H. Anderson III</td>
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This list includes all persons employed on a full-time basis in the Office of the Attorney General at any time during 2000, as provided by the Office’s Division of Administration. The most recent title is used for employees whose position changed during the year.
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<td>Anne M. Stickley</td>
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<td>Jennifer N. Sturgis</td>
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<td>A. Townsend Tucker</td>
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<td>Mildred R. Tuppince</td>
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<td>Bernadette W. Upton</td>
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<td>John H. Vance</td>
<td>Director of Finance &amp; Operations</td>
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<td>Corrine Vaughan</td>
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<td>Kathleen A. Vaughan</td>
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<td>Janice S. White</td>
<td>Benefits Administrator/Facilities Manager</td>
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<td>Matthew J. White</td>
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<td>Steven C. Wicks</td>
<td>Information Systems Manager</td>
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<td>Abigail T. Yawn</td>
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ATTORNEYS GENERAL OF VIRGINIA FROM 1776 TO 2000

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. ........................................... 1918-1918
John R. Saunders ...................................... 1918-1934
Abram P. Staples ....................................... 1934-1947
Harvey B. Apperson .................................... 1947-1948
J. Lindsay Almond Jr. ................................. 1948-1957

1 The Honorable J.D. Hank Jr. was appointed Attorney General on January 5, 1918, to fill the unexpired term of the Honorable John Garland Pollard, and served until February 1, 1918.
2 The Honorable Abram P. Staples was appointed Attorney General on March 22, 1934, to fill the unexpired term of the Honorable John R. Saunders, and served until October 6, 1947.
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, and resigned September 16, 1957.
Kenneth C. Patty

A.S. Harrison Jr.

Frederick T. Gray

Robert Y. Button

Andrew P. Miller

Anthony F. Troy

John Marshall Coleman

Gerald L. Baliles

William G. Broaddus

Mary Sue Terry

Stephen D. Rosenthal

James S. Gilmore III

Richard Cullen

Mark L. Earley

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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.

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.

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.

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.


The Honorable Richard Cullen was appointed Attorney General to fill the unexpired term of the Honorable James S. Gilmore III upon his resignation on June 11, 1997, at noon, and served until noon, January 17, 1998.
CASES

IN THE

SUPREME COURT OF VIRGINIA

AND

SUPREME COURT OF THE UNITED STATES
The complete listing of all cases handled by the Office of the Attorney General is not reprinted in this report. Selected cases pending in or decided by the Supreme Court of Virginia and the Supreme Court of the United States are included, as required by § 2.1-128 of the Code of Virginia.

Akers v. Commonwealth. Affirming judgment imposing death sentence after reviewing sentence to determine whether it was excessive or disproportionate to the crime of capital murder committed by Akers during a robbery.

Atkins v. Commonwealth. Affirming trial court judgment imposing death sentence after reviewing sentence to determine whether it was excessive or disproportionate to the crime of capital murder committed by Atkins.

Bailey v. Commonwealth. Affirming Bailey's convictions for capital murder of his two-year-old son and first-degree murder of his wife and imposition of death sentence.

Bramblett v. Warden, Greensville Ctr. Affirming conviction for capital murder and ruling that Bramblett's death sentence was properly assessed.

Cherrix v. Warden, Greensville Ctr. Affirming capital murder conviction, along with convictions for forcible sodomy, using a firearm in the commission of a felony, and possession of a firearm by a felon, and denying commutation of the death sentence.

Commonwealth ex rel. Va. Dep't Corr. v. Brown. Reversing and remanding to general district court, ruling that such courts lack statutory authority to issue transport orders for inmates confined in state correctional facilities so that they may appear in civil proceedings.

Commonwealth v. Alexander. Affirming Alexander's conviction for brandishing a firearm and rejecting his claim that he was entitled to a "defense of property" jury instruction.

Commonwealth v. Chatman. Upholding trial court's ruling that a juvenile less than 14 years of age has no constitutional or statutory right to an insanity defense at the adjudicatory phase of a juvenile delinquency proceeding, and reinstating judgment adjudicating Chatman to be delinquent.

Commonwealth v. Dalton. Reversing Court of Appeals' decision setting aside murder conviction and remanding for reinstatement of the trial court judgment, holding that Dalton was not entitled to an accessory-after-the-fact "finding" instruction, because he was not charged with that crime, and it was not a lesser-included offense of murder.

Commonwealth v. Fennell. Reversing Court of Appeals' decision setting aside robbery conviction, holding that Fennell was not entitled to an accessory-after-the-fact "finding" instruction, because he was not charged with that crime, and it was not a lesser-included offense of robbery.

Commonwealth v. Hutchins. Affirming trial court's decision that the Commonwealth did not violate Hutchins' statutory right to a speedy trial, and reinstating his conviction of unlawful wounding.
Dearing v. Commonwealth. Two separate decisions finding harmless error beyond a reasonable doubt the trial court's admission into evidence a statement made to police by a nontestifying co-defendant, implicating Dearing, and affirming his conviction of robbery and use of a firearm in the commission of a felony.

Dobson v. Commonwealth. Affirming conviction for grand larceny, and finding that model jury instruction concerning inference of theft from unexplained possession of recently stolen goods does not unconstitutionally shift burden of proof to defendant.

Dowden v. Commonwealth. Affirming conviction of involuntary manslaughter, finding that the evidence established that Dowden killed his infant son, and that the jury was entitled to infer from the negligent and careless acts committed by Dowden that he showed callous disregard for his son's life.

Fishback v. Commonwealth. Remanding armed robbery case for new sentencing hearing, because trial court erred in refusing to instruct the jury that parole has been abolished in Virginia.

Gray v. Commonwealth. Ruling that the evidence was sufficient to sustain convictions for conspiracy to commit murder and attempted possession of an unregistered firearm silencer.

Hylton v. DeHart. Affirming dismissal of personal injury case, holding that a state trooper is entitled to assert a sovereign immunity defense in a tort action arising from injuries sustained in a vehicular accident.

Jewel v. Commonwealth. Affirming decision that Jewel could be impeached by prior felony guilty pleas which had been accepted by the trial court but for which no sentence had been imposed.


Medici v. Commonwealth. Finding that trial court did not err in admitting evidence of Medici's prior rape convictions in this rape and sexual assault case, but did err in refusing to strike juror who was spouse of person represented by Medici's legal counsel.

Melanson v. Commonwealth. Affirming dismissal of personal injury case on a plea of sovereign immunity. Melanson's mailing of a notice of claim by certified mail, return receipt requested, was not timely.
Moore v. Commonwealth. Affirming finding that Moore, by failing to raise the issue before his indictment, waived the requirement that his biological father be served with notice of his certification hearing in juvenile court.

Moore v. Commonwealth. Reversing convictions for double murders, holding that the circuit court lacked jurisdiction to try Moore as an adult, because the juvenile court failed to notify Moore's biological father, thus rendering transfer to the circuit court ineffectual.

Moore v. Hinkle. Dismissing petition for writ of habeas corpus and affirming decision that Moore had not been denied effective assistance of counsel due to an alleged conflict of interest with his attorney. Moore failed to establish that his attorney's deficient representation prejudiced his case in such a manner that the outcome may have been different but for inadequate representation.


Oulds v. Commonwealth. Affirming conviction for assault and battery on a law-enforcement officer authorized by local ordinance enacted in compliance with § 15.2-1712 to use his police power while engaged in private employment. At the time of the assault, the officer was attempting to arrest Oulds for criminal trespass at a shopping center where the officer was employed as a security guard.


Pitt v. Commonwealth. Affirming conviction for attempted robbery, and holding that any error in admitting a co-defendant's statement to police into evidence at the joint trial was harmless beyond a reasonable doubt. The evidence as a whole, excluding the statement, overwhelmingly proved Pitt's guilt.

Reid v. Warden, Greensville Ctr. Denying petition for writ of habeas corpus challenging Turner v. Commonwealth, and affirming decision that introduction of evidence of prior crimes was not error.


Swisher v. Warden, Greensville Ctr. Denying petition for writ of habeas corpus challenging conviction for capital murder and imposition of death sentence, and affirming judgment.
Taylor v. Commonwealth. Affirming conviction for abduction as a principal in the second degree and rejecting Taylor's argument that she had "justification" or an "excuse" to assist the natural father in taking his illegitimate child. The evidence was sufficient to support the conviction on the theory of accomplice liability.

Thomas v. Commonwealth. Reversing and remanding Thomas's grand larceny conviction on the grounds that the trial court erred in not permitting Thomas to represent himself and the Court of Appeals erred in denying his motion for self-representation.

Turner v. Commonwealth. Affirming Turner's conviction for second-degree murder and finding that there was no conflict of interest where the job application of his court-appointed counsel was being considered by the prosecuting attorney's office during the trial.

Varga v. Commonwealth. Affirming conviction of driving after being adjudicated a habitual offender, relying on a 14-year-old order declaring Varga to be a habitual offender. Varga had not petitioned to have his driving privileges restored following the ten-year revocation period. The habitual offender statutes authorize courts to revoke indefinitely the driving privileges of habitual offenders and to restore those privileges at certain times and under certain conditions.

Virginian Pilot v. Cales. Dismissing petition to compel circuit court to allow newspaper staff access to exhibits introduced during a murder trial.

Williams v. Commonwealth. Affirming ruling that Williams lacked any reasonable expectation of privacy in his boots, which were lawfully seized pursuant to his arrest and stored in the jail property room, and that later examination of the boots by law enforcement officers did not violate his Fourth Amendment rights to be free from unreasonable searches and seizures. The evidence was sufficient to convict Williams of first degree murder, robbery, and statutory burglary.

Young v. Commonwealth. Affirming conviction for possession of cocaine.

Cases Pending in the Supreme Court of Virginia

Alliance to Save Mattaponi v. St. Water Control Bd. Appealing denial of citizens' group standing to appeal a permit issued to the City of Newport News for a reservoir project in King William County.

Barnes v. Commonwealth. Appealing ruling that evidence was sufficient to prove assisted concealment of stolen goods and computer fraud.


Burns v. Commonwealth. Challenging assault conviction asserting that the trial court erroneously applied an objective test to her self-defense claim.

Coleman v. Commonwealth. Appealing decision that Coleman's convictions and punishments for malicious wounding and attempted murder of the same victim did not subject him to double jeopardy.
Commonwealth v. Dotson. Two separate cases appealing decision that the evidence was insufficient to support Dotson's conviction for felony child abuse and neglect of his infant son.


Commonwealth v. Maddox. Appealing decision reversing murder conviction on the grounds that the evidence was insufficient.

Commonwealth v. Winston. Appealing decision refusing to apply harmless error rule to error in jury selection process.

Concerned Taxpayers of Brunswick Co. v. Dep't Env'l. Quality. Appealing decision reversing trial court's affirmance of agency's grant of landfill permit.


Foreman v. Commonwealth. Appealing decision denying that Foreman's statutory right to speedy trial was violated.


Johnson v. Commonwealth. Appealing dismissal of a medical malpractice case against the University of Virginia.


Leary v. Baskerville. Appealing decision that Leary's claim, based on Baker v. Commonwealth, was barred by § 8.01-654(B)(2).


Mattaponi Indian Tribe v. St. Water Control Bd. Appealing denial of Tribe's standing to appeal a permit issued to the City of Newport News for a reservoir project in King William County.

Mauri v. Commonwealth. Appealing decision denying petition on claim that habitual offender adjudication was not properly supported by necessary prior convictions.


Patterson v. Commonwealth. Appealing conviction for capital murder and imposition of death sentence.


Smithfield Foods v. St. Water Control Bd. Appealing dismissal of Board's state enforcement action on a plea of res judicata. The Virginia Supreme Court affirmed the trial court's holding that the doctrine of privity exists between the Board and the Environmental Protection Agency and that the alleged violations of a permit issued pursuant to state and federal law were resolved in federal court.

Va. Ret. Sys. v. Avery. Appealing the issue whether delivery of process by Federal Express may be considered proper "service of process" under Virginia law.

Williams v. Va. St. Bar. Appealing Virginia State Bar Disciplinary Board's suspension of Williams' license to practice law for six months for failure to comply with a disposition order entered after a finding of misconduct.


Cases in the Supreme Court of the United States


Debauche v. Trani. Denying petition for certiorari from Fourth Circuit arising out of a Reform Party candidate's exclusion from the presidential debate held at Virginia Commonwealth University.

George Mason Univ. v. Litman. Denying petition for certiorari from Fourth Circuit on issue of whether Congress may require states to waive their sovereign immunity as a condition of receiving federal funds in this sexual harassment case.

Johnson v. Virginia. Denying appeal of Virginia Supreme Court decision affirming conviction for capital murder and imposition of death sentence.

McLean v. Virginia. Denying appeal of Virginia Supreme Court decision affirming conviction for capital murder and imposition of death sentence.

Orbe v. Commonwealth. Denying appeal of Virginia Supreme Court decision affirming conviction for capital murder and imposition of death sentence.


United States v. Morrison. Appealing Fourth Circuit decision that Violence Against Women Act is unconstitutional. Although there are no Violence Against Women Act claims against Commonwealth parties, Virginia Polytechnic Institute and State University and the State Comptroller were technical parties to the case, but were dismissed in April 2000.

Vinson v. Virginia. Denying appeal of Virginia Supreme Court decision affirming capital murder conviction.

Virginia v. Maryland. Suit pending before a special master against State of Maryland for injunctive and declaratory relief, asserting that Maryland has used its police power to interfere with the exercise by Virginia citizens of riparian rights guaranteed by compact.

Walker v. Virginia. Denying appeal of Virginia Supreme Court decision affirming capital murder conviction.


Williams v. Taylor. Reversing Fourth Circuit decision upholding death sentence.
Section 2.1-118 of the *Code of Virginia* authorizes the Attorney General to render official advisory opinions in writing only when requested in writing to do so by the Governor; members of the General Assembly; judges and clerks of courts of record and judges of courts not of record; the State Corporation Commission; Commonwealth's, county, city or town attorneys; city or county sheriffs and treasurers; commissioners of the revenue; electoral board chairmen or secretaries; and state agency heads.

Each opinion in this report is preceded by a main headnote briefly describing the subject matter of the opinion. For purposes of citing an opinion, each opinion begins on the page on which the headnote preceding the opinion first appears. Cite an opinion in this report as follows: 2000 Op. Va. Att'y Gen. ___.

Opinions of the Attorney General may be accessed on the Internet, beginning with opinions issued in January 1996, at www.vaag.com; on LEXIS-NEXIS, beginning with opinions issued in July 1980; and on WESTLAW, beginning with opinions issued in 1976. The following CD-ROM products contain opinions of the Attorney General: Michie's Virginia Law on Disc, including opinions from July 1980; CaseFinder, including opinions from July 1967; and Virginia Reporter & West's Virginia Code, including opinions from July 1976.
Family assessment and planning team may not refer juvenile for services funded under Juvenile Community Crime Control Act rather than Comprehensive Services Act, where juvenile is eligible under both acts for services not yet funded by either act.

MR. ROBERT W. BENDALL
CITY ATTORNEY FOR THE CITY OF MANASSAS
JULY 28, 2000

You inquire concerning the Virginia Juvenile Community Crime Control Act ('JCA") and the Comprehensive Services Act for At-Risk Youth and Families ('CSA") , and whether a family assessment and planning team may refer a juvenile, who is eligible under both acts for services that have not yet been funded by either act, for services funded under JCA rather than CSA.

In your opinion request, you advise that CSA is a mandatory program, requiring each county and city to participate either individually or in combination with other counties or cities. Furthermore, you advise that the CSA fund is "sum sufficient," meaning that the General Assembly and localities must appropriate sufficient sums of money for three mandated categories of eligible youths. You observe that JCA is a voluntary program, and that funds provided under the act "shall not be used to supplant funds established as the state pool of funds under § 2.1-757." You also observe that the state pool of funds under § 2.1-757 of the Code of Virginia constitutes the CSA fund. You report that a disagreement has arisen concerning whether a youth who is eligible for services under both acts, and who has been referred to a family assessment and planning team for the first time, may receive JCA-funded services. You conclude that when a juvenile is eligible for JCA and CSA services that have not yet been funded by either act, the family assessment and planning team may elect to refer the juvenile for services funded by JCA rather than CSA.

The 1992 Session of the General Assembly enacted CSA "to create a collaborative system of services and funding ... when addressing the ... needs of troubled and at-risk youths and their families." CSA establishes a state executive council and a state advisory team. The state executive council oversees the administration of CSA, including the administration of the policies governing the use and distribution of the state pool of funds established under § 2.1-757(A) and the state trust fund established under § 2.1-759(A).
The state executive council appoints the members of the state advisory team. Prior § 2.1-748(2) authorized the state advisory team to “[d]evelop and recommend to the state executive council state interagency policies governing the use, distribution and monitoring of moneys in the state pool of funds and the state trust fund.” Pursuant to this authority, the state advisory team recommended, and the state executive council adopted, the Comprehensive Services Act for At Risk Youth and Families (“CSA”) Manual. The Office of Comprehensive Services for Youth and Families administers CSA

CSA also requires “[e]very county, city, or combination of counties, cities, or counties and cities [to] establish a community policy and management team” and requires each team to establish one or more family assessment and planning teams. A community policy and management team includes the local agency heads or their designees of the following community agencies: the community services board established under § 37.1-195; the juvenile court services unit; the local departments of health and social services; and the local school division. These community agencies deliver services under CSA and generally are referred to as “stakeholder agencies.”

The state pool of funds established under § 2.1-757(A) funds CSA. The pool consists of General Assembly appropriations. Funds from the state pool are to be allocated to community policy and management teams “in accordance with the appropriations act and appropriate state regulations” and are to be “expended for ... nonresidential or residential services for troubled youths and families.”

Section 2.1-757(B) states:

The state pool shall consist of funds which serve the target populations identified in subdivisions 1 through 5 below in the purchase of residential and nonresidential services for children.... The target population shall be the following:

1. Children placed for purposes of special education in approved private school educational programs ...;
2. Children with disabilities placed by local social services agencies or the Department of Juvenile Justice in private residential facilities or ... special education day schools ...;
3. Children for whom foster care services ... are being provided to prevent foster care placements, and children placed ... in suitable family homes, child-caring institutions, residential facilities or independent living arrangements ...;
4. Children placed by a juvenile and domestic relations district court ... in a private or locally operated public facility or nonresidential program; and

5. Children committed to the Department of Juvenile Justice and placed by it in a private home or in a public or private facility ....

The 1995 Session of the General Assembly enacted JCA to provide funding to localities to implement a continuum of programs and services to meet the needs of youths involved in the juvenile justice system. Section 16.1-309.2 clearly and unambiguously sets forth the intent of JCA:

The General Assembly, to ensure the imposition of appropriate and just sanctions and to make the most efficient use of correctional resources for those juveniles before intake on complaints or the court on petitions alleging that the juvenile is a child in need of services, child in need of supervision, or delinquent, has determined that it is in the best interest of the Commonwealth to establish a community-based system of progressive intensive sanctions and services that correspond to the severity of offense and treatment needs. The purpose of this system shall be to deter crime by providing immediate, effective punishment that emphasizes accountability of the juvenile offender for his actions as well as reduces the pattern of repeat offending. In furtherance of this purpose, counties, cities or combinations thereof are encouraged to develop, implement, operate and evaluate programs and services responsive to their specific juvenile offender needs and juvenile crime trends.

[JCA] shall be interpreted and construed to accomplish the following purposes:

1. Promote an adequate level of services to be available to every juvenile and domestic relations district court.

2. Ensure local autonomy and flexibility in addressing juvenile crime.

3. Encourage a public and private partnership in the design and delivery of services for juveniles who come before intake on a complaint or the court on a petition alleging a child is in need of services, in need of supervision or delinquent.
4. Emphasize parental responsibility and provide community-based services for juveniles and their families which hold them accountable for their behavior.

5. Establish a locally driven statewide planning process for the allocation of state resources.

6. Promote the development of an adequate service capacity for juveniles before intake on a complaint or the court on petitions alleging status or delinquent offenses.

Funding for JCA began in January 1996 with the predispositional and postdispositional components of the formula. The 1996 Session of the General Assembly added the first offender and diversion components, providing additional funding to JCA. The 1999 Session continued to support community programs by adding a hold harmless clause so that no locality would receive less than it received in fiscal year 1998. The 2000 Session added a funding floor to provide a minimum level of funding so that no locality would receive less than the mid-point of the lowest quartile of funding.

To participate in JCA, a county, city or combination of counties and/or cities is encouraged to work toward developing a system of predispositional and postdispositional services "for juveniles before intake on complaints or the court on petitions alleging that the juvenile is a child in need of services, in need of supervision, or delinquent." Community-based services instituted under JCA are required to be administered by a county, city or combination of counties and/or cities, and "may be administered through a community policy and management team established under § 2.1-750 or a commission established under § 16.1-315." "Funds provided to implement [JCA] shall not be used to supplant funds established as the state pool of funds under § 2.1-757."

There are several rules of statutory construction that should be applied to this matter. Obviously, the primary goal of statutory construction is to ascertain and give effect to legislative intent. "[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction." Statutes should not be construed to frustrate their purpose. In addition, the use of the word "shall" in a statute generally implies that its terms are intended to be mandatory, rather than permissive or directive. Finally, when a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute. Statutes are also to be read as a whole rather than in isolated parts.
The General Assembly does not define the term "supplant" as it is used in § 16.1-309.3(C). Consequently, the term must be given its ordinary meaning within the statutory context. "Supplant" generally means "to supersede (another)"; "to take the place of; oust from a position and serve as a substitute." The term "supersede" generally means "to take the place of and outmode by superiority: supplant and make inferior by better or more efficiently serving a function"; "to cause to be supplanted in a position or function."

The General Assembly enacted CSA three years before it enacted JCA. The state advisory team has promulgated the CSA Manual which has been adopted by the state executive council. Stakeholder agencies have been delivering services under CSA pursuant to the CSA Manual for three years longer than JCA has been in effect. Under JCA, the Department of Juvenile Justice is required to "devise, develop and promulgate a statewide plan for the establishment and maintenance of a range of institutional and community-based, diversion, predispositional and postdispositional services." The program funding for JCA continues to be phased in by the General Assembly. The funding for JCA community-based services is to be used "to make the most efficient use of correctional resources ... before intake on complaints or the court on petitions." In order to ensure an efficient use of correctional resources, funds provided to implement JCA may not be used in the place of CSA funding established under § 2.1-757.

It is my view that a family assessment and planning team may not refer a juvenile for services funded under JCA when CSA funding is available for such purposes. Therefore, when a juvenile is eligible under both JCA and CSA for services that have not yet been funded by either act, it is my opinion that the local family assessment and planning team may not refer the juvenile for services funded under JCA rather than CSA.

1Tit. 16.1, ch. 11, art. 12.1, §§ 16.1-309.2 to 16.1-309.10.
2Tit. 2.1, ch. 46, §§ 2.1-745 to 2.1-759.1.
3Any request by a city attorney for an opinion from the Attorney General "shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions." Section 2.1-118.
4Section 16.1-309.3(C).
6See § 2.1-746.
7See §§ 2.1-747, 2.1-748.
8Section 2.1-746(5).
Section 2.1-746(2).


See CSA Manual (Sept. 1998) (unpublished manual, on file with Office of Comprehensive Services for Youth and Families). The CSA Manual sets out a certification requirement, whereby the locality certifies to the state executive council that it is in compliance with the programmatic and fiscal policies established by the CSA and the council. See id. at 32. The CSA Manual states that, upon signing of the certificate by the chairmen of the community policy and management team and the state executive council, the CSA Manual constitutes an agreement between the locality and the state. See id. at 2.

The state executive council established the Office of Comprehensive Services for At-Risk Youth and Families pursuant to its duty under § 2.1-746(9) to "[p]rovide administrative support ... for the establishment and operation of local comprehensive service systems." See CSA Manual, supra, at 7.

Section 2.1-750; see also §§ 2.1-751, 2.1-752.

See §§ 2.1-753 to 2.1-755.

Section 2.1-751.

In addition, § 2.1-759(A) establishes a state trust fund. Monies in the state trust fund are to be expended to develop "[e]arly intervention services for young children and their families" and "[c]ommunity services for troubled youths." Section 2.1-759(A)(1), (2).

See § 2.1-757(C).

Section 2.1-757(A).

1995 Va. Acts, ch. 698, at 1145, 1145-48; id. ch. 840, at 1775, 1776-78; see id. ch. 853, at 1842, 2168-70 (enacting Item 578(J)-(L)).

See id. chs. 698, 840, cl. 3, at 1150, 1780, respectively.


1996 Va. Acts ch. 912, at 1741, 2028-31 (citing Item 478(D)).

1999 Va. Acts ch. 935, at 1796, 2222 (citing Item 497(E)(7)).


Section 16.1-309.3(A).

Section 16.1-309.3(B).

Section 16.1-309.3(C).


Id. at 2295.

Section 16.1-309.4. I am advised that the Department of Juvenile Justice is continuing to develop, but has not yet finalized, such a statewide plan. When the Department completes this process, I must defer to the interpretation of JCA by the agency charged with administering JCA, unless the agency interpretation is clearly wrong. See Forst v. Rockingham, 222 Va. 270, 276, 279 S.E.2d 400, 403 (1981); Dept. Taxation v. Prog. Com. Club, 215 Va. 732, 739, 213 S.E.2d 759, 763 (1975); Op. Va. Att'y Gen.: 1999 at 3, 5; 1996 at 124, 126, 127 n.7.

Section 16.1-309.2.

ADMINISTRATION OF GOVERNMENT GENERALLY: GENERAL ASSEMBLY CONFLICT OF INTERESTS.

CONTRACTS: VIRGINIA PUBLIC PROCUREMENT ACT

Legislators' participation as principal in development team seeking to build student housing on state-supported college campuses would cause him to have prohibited "personal interest" in any contract that is not awarded by educational institution as result of competitive sealed bidding or competitive negotiation.

THE HONORABLE KENNETH R. MELVIN
MEMBER, HOUSE OF DELEGATES
JANUARY 11, 2000

You ask whether a member of the General Assembly is prohibited from participating as a principal in a development team that seeks to build student housing on state-supported college campuses. Your question focuses solely on the General Assembly Conflict of Interests Act and not on other statutes pertaining to obtaining contracts to build student housing.

Section 2.1-639.35(B) of the Code of Virginia, a portion of the General Assembly Conflict of Interests Act, §§ 2.1-639.30 through 2.1-639.61 (the "Act"), states:

No legislator shall have a personal interest in a contract with any governmental agency of the executive or judicial branches of state government, other than in a contract of regular employment, unless such contract is awarded as a result of competitive sealed bidding or competitive negotiation as defined in § 11-37.
A member of the General Assembly would have a “personal interest,” which is prohibited by the Act, as a result of a financial benefit or liability accruing to him due to his interest as a principal in the development team.² Assuming that the principal has an interest in the development team exceeding three percent of the total equity, or receives annual income in excess of $10,000, including dividends and interest income, the General Assembly member would have a “personal interest” in the development team.³

The probative question is whether the member's interest in the development team gives him a “personal interest in a contract” with a governmental agency of the executive branch of state government.

A “personal interest in a contract” is defined in the Act as “a personal interest which a legislator has in a contract with a governmental agency, whether due to his being a party to the contract or due to a personal interest in a business which is a party to the contract.”⁴ Thus, the General Assembly member would have an interest in any contract between the development team and a governmental agency.

Any contract entered into by the development team, of which the General Assembly member is a principal, with an agency of the executive branch of state government is permissible if such contract is awarded as a result of competitive sealed bidding or competitive negotiations, as defined in § 11-37 of the Virginia Public Procurement Act. Conversely, if the contract for construction of the student housing at a state-supported college campus has not been awarded by the educational institution as a result of competitive sealed bidding or competitive negotiation, the General Assembly member would have an interest in a contract which is prohibited by § 2.1-639.35(B). I have examined the various exceptions to § 2.1-639.36 of the Act and find none applicable to your situation.

Bearing in mind the legislative admonition in § 2.1-639.30 that the Act is to be “liberally construed to accomplish its purpose,” assuming the member of the General Assembly has a “personal interest” in the development team, as that term is defined in § 2.1-639.31, I am of the opinion that the General Assembly member would have a personal interest in any contract between the development team and any state college or university seeking to have student housing built, which is prohibited by § 2.1-639.35(B), unless the contract is awarded as a result of competitive sealed bidding or competitive negotiation.
"Legislator" means a member of the General Assembly of Virginia." Section 2.1-639.31.

"Personal interest" means a financial benefit or liability accruing to a legislator or to a member of his immediate family. Such interest shall exist by reason of (i) ownership in a business if the ownership interest exceeds three percent of the total equity of the business; (ii) annual income that exceeds, or may reasonably be anticipated to exceed, $10,000 from ownership in real or personal property or a business; (iii) salary, other compensation, fringe benefits, or benefits from the use of property, or any combination thereof, paid or provided by a business that exceeds, or may reasonably be anticipated to exceed, $10,000 annually; (iv) ownership of real or personal property if the interest exceeds $10,000 in value and excluding ownership in a business, income, or salary, other compensation, fringe benefits or benefits from the use of property; or (v) personal liability incurred or assumed on behalf of a business if the liability exceeds three percent of the asset value of the business." Section 2.1-639.31.

See id.

Id.

ADMINISTRATION OF GOVERNMENT GENERALLY: VIRGINIA FREEDOM OF INFORMATION ACT.

Notification of meeting of board of visitors of state college provided less than 30 days in advance of June 17, 1999, meeting date violates advance notice requirement of Act. Notice identifying location where quorum was physically assembled, but not locations of those participating by telephonic means, was proper. After July 1, 1999, all places from which members participate in electronic communication meeting must be identified in published notice as locations for board meeting. Records custodian must grant access to public records maintained by college to any Virginia citizen, whether or not he is member of college's board of visitors.

THE HONORABLE WILLIAM C. WAMPLER JR.
MEMBER, SENATE OF VIRGINIA
FEBRUARY 17, 2000

You ask several questions regarding application of The Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the "Act"), to a meeting of the board of visitors of a state college ("board" and "college"), held June 17, 1999 ("board meeting"), which was before the newly amended Act became effective on July 1, 1999.

The information presented in the materials enclosed with your opinion request are restated as follows. Notice of the board meeting was announced in the Virginia Register of Regulations on June 7, 1999. Publication of the notice was requested on a "Notice of Meeting" form and date stamped as having been received by the Registrar of Regulations on May 19, 1999, a total of twenty-nine days before the meeting. The notice provided a general, rather than a specific, description of the purpose of the board meeting, and it did not identify the location where board members not in attendance would be connected to the board meeting by telephone.
You further advise that, pursuant to the Act, a board member requested from the rector of the college copies of the following records: employment contracts, compensation agreements, letters of appointment, board minutes, and any similar documents relating to the compensation and employment relationships between the presidents of all public and certain private institutions of higher education in Virginia and their universities, boards or foundations. In addition, the board member requested copies of the same information as it relates to the relationship between the president of the college and the main private foundation of the college and the board. You indicate that the board member making such request of documents and information did not feel his request had been adequately complied with and answered.

In addition to the above information, I have been advised of the following regarding the board meeting. The board members received notification on May 18, 1999, of a special meeting of the board to be held June 17, 1999. The notification advised that members who were unable to attend in person could be connected to the meeting by telephone, and that the location of the telephonic connection would have to be accessible to the public. The cover letter transmitting a facsimile of the Notice of Meeting form was dated May 19, 1999, and advised that the board meeting was to be a telephone meeting. By letter of the same date, the Director of the Department of Information Technology received notice of a special telephone meeting of the board. On May 28, 1999, the college transmitted a press release to the news media concerning the board meeting. On June 17, 1999, the board meeting was held and was open to the public. Eleven of the seventeen board members were present. The six board members who were not present were connected to the meeting by speaker phone. Representatives from the media were present, and the board meeting was tape recorded for the purpose of producing minutes of the meeting.

You first inquire whether the actions of the officials of the college satisfy the advance notice requirement specified in § 2.1-343.1.

The Act was revised substantially by the 1999 Session of the General Assembly, however, received only minor revisions. Section 2.1-343.1(B) provides:

For purposes of this section, "public body" means any public body of the Commonwealth, but excludes any political subdivision or any governing body, authority, board, bureau, commission, district or agency of local government.
State public bodies may conduct any meeting, except closed meetings held pursuant to § 2.1-344, wherein the public business is discussed or transacted through telephonic or video means. Where a quorum of a public body of the Commonwealth is physically assembled at one location for the purpose of conducting a meeting authorized under this section, additional members of such public body may participate in the meeting through telephonic means provided such participation is available to the public.

The remainder of § 2.1-343.1 establishes the requirements under which public bodies other than the local government bodies named in § 2.1-343.1(A) may hold meetings through telephonic or video means. Section 2.1-341 defines "meetings" to include "meetings..., when sitting physically, ... as a body or entity, or as an informal assemblage of ... as many as three members ... of any public body."

Section 2.1-343.1(C) provides:

Notice of any meetings held pursuant to this section shall be provided at least thirty days in advance of the date scheduled for the meeting. The notice shall include the date, time, place and purpose for the meeting and shall identify the locations for the meeting. All locations for the meeting shall be made accessible to the public. All persons attending the meeting at any of the meeting locations shall be afforded the same opportunity to address the public body as persons attending the primary or central location. Any interruption in the telephonic or video broadcast of the meeting shall result in the suspension of action at the meeting until repairs are made and public access restored.

Thirty-day notice shall not be required for telephonic or video meetings continued to address an emergency as provided in subsection F or to conclude the agenda of a telephonic or video meeting of the public body for which the proper notice has been given, when the date, time, place and purpose of the continued meeting are set during the meeting prior to adjournment.

The public body shall provide the Director of the Department of Information Technology with notice of all public meetings
Section 2.1-343.1(C) clearly requires that notice of any meeting be given “at least thirty days in advance of the date scheduled for the meeting.” Section 2.1-343(C) requires every public body to give notice of the date, time, and location of its meetings by placing the notice in a prominent public location at which notices are regularly posted; in the office of the clerk of the public body, or in the case of a public body which has no clerk, in the office of the chief administrator.

A primary rule of statutory construction is that one must look first to the language of a statute. If the statute is clear and unambiguous, it should be given its plain meaning. Section 2.1-343.1(C) clearly and unambiguously provides that “[n]otice of any meetings held pursuant to this section shall be provided at least thirty days in advance of the date scheduled for the meeting.” (Emphasis added.) The use of the word “shall” in a statute generally implies that its terms are intended to be mandatory, rather than permissive or directive. Additionally, when a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute.

Section 2.1-343.1(C) requires that notice of meetings be provided at least thirty days in advance of the meeting date. (In addition, after July 1, 1999, § 2.1-343(C) also now specifically requires that such notice be placed “in a prominent public location at which notices are regularly posted; in the office of the clerk of the public body, or in the case of a public body which has no clerk, in the office of the chief administrator.”) You advise that notice of the June 17 board meeting was provided via the “Notice of Meeting” form, which was received by the Registrar on May 19 and published in the Virginia Register of Regulations on June 7. Therefore, I must conclude that said notice did not satisfy the time requirement established in § 2.1-343.1(C), since the enclosures with your opinion request indicate that the notice was transmitted by facsimile on May 19 for publication in the Virginia Register on June 7.

You next ask whether the actions of the college officials satisfy the content of the notice requirements under § 2.1-343.1.

Section 2.1-343.1(B) permits members of a public body who are unable to attend a meeting of the body to participate in the meeting by telephone, provided a quorum of the public body is physically assembled at one location.
I am advised that a quorum of the board was physically assembled in Washington, D.C., on June 17.

When the notice was given and the meeting held, § 2.1-343.1(C) provided the following with respect to the contents of meeting notices: "The notice shall include the date, time, place and purpose for the meeting and shall identify the location or locations for the meeting." The notice of the board meeting published in the Virginia Register stated the date, time and purpose of the meeting.

You specifically ask whether all the places from which the members participated telephonically were required to be listed in the notice as meeting locations. The meeting notice listed only one location, that being where the quorum was physically present.

As noted above, prior to the 1999 amendments, § 2.1-343.1(C) required listing the "location or locations." This language, using both the singular and the plural, obviously meant that it was permissible to have only one location for an electronic communication meeting. Read together with the language in § 2.1-343.1(B), which allows members to participate by telephonic means where a quorum is present "at one location," it was reasonable to interpret § 2.1-343.1(C) to allow listing one location for an electronic communication meeting. In the case where a quorum was physically present in one location, the location of the meeting would be the location of the quorum. In this case, that location was stated on the notice for the board meeting. I conclude, therefore, that the notice of meeting location was proper under the Act as it existed at the time of the notice and board meeting.

The 1999 amendment to § 2.1-343.1(C) deleted the words "location or." A rule of statutory construction requires the presumption that when the language of a statute is amended, the General Assembly intends to change the then existing law. By amending the statute to require the listing of "locations" for all electronic communication meetings, the General Assembly requires that for every electronic communication meeting after July 1, 1999, multiple locations must be included in the notice. Although the statute does not so specify, I conclude that, by deleting the singular "location" in § 2.1-343.1(C), the General Assembly intended to consider as "locations" for the meeting all places from which members participate in the meeting by telephone, whether or not a quorum is physically present in one location. Accordingly, for telephonic communication meetings after July 1, 1999, all places from which members participate telephonically must be identified in the published notice as "locations" for the board meeting.
You next ask whether the actions of the college officials satisfy the requirements of § 2.1-343.1 regarding the locations of board members participating outside Washington, D.C.

After a quorum is assembled at one location, § 2.1-343.1(B) permits additional members to participate in a meeting through telephonic means, "provided such participation is available to the public." Furthermore, § 2.1-343.1(C) requires that the notice of the meeting identify the locations of the meeting and that the locations for the additional members who are not assembled with the quorum at one location "be made accessible to the public." A quorum of the board was physically assembled in Washington, D.C., and additional members were permitted to participate in the board meeting by speaker phone. The locations of the additional members participating by speaker phone were not made known to the public in the notice. As noted above, however, the Act in effect before July 1, 1999, did not require the listing of more than the one location of an electronic communication meeting where the quorum was present. Consequently, the actions of the college officials did satisfy the requirements of § 2.1-343.1 regarding the locations of board members participating outside Washington, D.C., under the wording of the statute in effect at the time of the board meeting.

Your final inquiry is whether an individual, either as a member of the board who is a citizen of the Commonwealth or simply as a citizen of the Commonwealth, is entitled to have access to the information and documents requested by the board member.

The Act defines "public records" as

all writings and recordings which consist of letters, words or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostatting, photography, magnetic impulse, optical or magneto-optical form, mechanical or electronic recording or other form of data compilation, however stored, and regardless of physical form or characteristics, prepared or owned by, or in the possession of a public body or its officers, employees or agents in the transaction of public business.\(^{[24]}\)

Section 2.1-342(A) requires public records to be "open to inspection and copying by any citizens of the Commonwealth."

Section 2.1-342.01(B) provides:
Neither any provision of [the Act] nor any provision of Chapter 26 (§ 2.1-377 et seq.) of this title shall be construed as denying public access to (i) contracts between a public official and a public body, other than contracts settling public employee employment disputes held confidential as personnel records under subdivision 4 of subsection A; (ii) records of the position, job classification, official salary or rate of pay of, and records of the allowances or reimbursements for expenses paid to any officer, official or employee of a public body; or (iii) the compensation or benefits paid by any corporation organized by the Virginia Retirement System or its officers or employees. The provisions of this subsection, however, shall not require public access to records of the official salaries or rates of pay of public employees whose annual rate of pay is $10,000 or less.25

“Where a statute is unambiguous, the plain meaning is to be accepted without resort to the rules of statutory interpretation.”26 “The manifest intention of the legislature, clearly disclosed by its language, must be applied.”27 “[T]ake the words as written... and give them their plain meaning.”28

Both the former and current provisions of § 2.1-342(A) require the records custodian to “take all necessary precautions for [record] preservation and safekeeping.”29 You advise that a board member requested copies of records pursuant to the Act. The request was made to the then rector of the college for all employment contracts, compensation agreements, letters of appointment, board minutes, or any similar documentation relating to the compensation and employment relationships between the presidents of certain institutions of higher education30 and their universities, boards or foundations. In addition, the board member requested copies of the same information as it relates to the compensation and employment relationship between the president of the college and the main private foundation in support of the college and the board. If the rector of the college is the custodian of the requested records and if the college has such requested records, then I would conclude that an individual who requests records pursuant to the Act, either as a member of the board who is a citizen of the Commonwealth or simply as a citizen of the Commonwealth, is entitled to have access to the information and documents.

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The Notice of Meeting Form provides that the board was to meet on Thursday, June 17, 1999, 11 a.m. to noon, at a specified location in Washington, D.C. The meeting was described as a called meeting of the board to act on a resolution concerning contract and personnel of the college. Public comment was not to be received at the meeting, and an informational release was to be available four days before the board meeting. See id.; see also 15:19 Va. Regs. Reg., supra note 1.

4See § 23-49.1(B). For the purposes of this opinion, I shall assume that the rector of the college is the custodian of the requested records.

5The institutions represented were Christopher Newport University, George Mason University, James Madison University, Longwood College, Mary Washington College, Norfolk State University, Old Dominion University, Radford University, the University of Richmond, the University of Virginia, Virginia Commonwealth University, the College of William and Mary, Virginia State University, Virginia Polytechnic Institute and State University, Virginia Union University, and Washington and Lee University.


12See supra note 1 and accompanying text.

13My conclusion is the same under the provisions of the Act in effect both before and after July 1, 1999. I also note that, under the applicable law in effect both before and after July 1, 1999, the deficiency in the notice does not affect the validity of any action taken at the board meeting. See Nageotte v. King George County, 223 Va. 259, 267, 288 S.E.2d 423, 427 (1982) (board actions are not invalidated by violation of notice requirements of Act); see also § 9-6.14:22(C) (failure to publish required notice of meeting in Virginia Register shall not affect legality of actions taken at that meeting).

141999 Va. Acts, supra note 6: ch. 726, at 1240; ch. 703, at 1171. As previously noted, § 9-6.14:22(C) of the Administrative Process Act also provides that "[e]ach notice shall include (i) the date, time and place of the meeting."

15See supra note 3.


181999 Va. Acts, supra note 6: ch. 726, at 1240; ch. 703, at 1171 (emphasis added).

19Section 2.1-341 defines "meeting" to include "the meetings ... when sitting physically ... as a body or entity, or as an informal assemblage of ... as many as three members" of a governing body.
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22 Richmond v. Sutherland, 114 Va. 688, 77 S.E. 470 (1913).
24 Section 2.1-341. Prior to July 1, 1999, § 2.1-341 referred to “public records” as “official records,” which included “all written or printed books, papers, letters, documents, maps and tapes, photographs, films, sound recordings, reports or other material, regardless of physical form or characteristics, prepared, owned, or in the possession of a public body or any employee or officer of a public body in the transaction of public business.” 1999 Va. Acts, supra note 6: ch. 726, at 1220; ch. 703, at 1151. Section 2.1-342(A) required official records to be “open to inspection and copying by any citizens of the Commonwealth.” Id. at 1221, 1152.
25 Prior to July 1, 1999, § 2.1-342(C) contained substantially the same language that was enacted as § 2.1-342.01(B). See 1999 Va. Acts, ch. 793, at 1427, 1436; ch. 438, at 588, 597.
29 See also 1999 Va. Acts, supra note 25: ch. 793 at 1427; ch. 438, at 588; id., supra note 6: ch. 726, at 1221; ch. 703, at 1152.
30 See institutions listed supra note 5.

ADMINISTRATION OF GOVERNMENT GENERALLY: VIRGINIA FREEDOM OF INFORMATION ACT.

Reconsideration and affirmation of 1998 opinion concluding that Act does not permit Hopewell City Council to hold closed meeting to discuss personnel matters related solely to employees of city manager. Examination of elements that determine existence of employer/employee relationship. Hopewell City Council does not possess required element of control over city employees. Comparison of 1998 opinion with 1979 opinion dealing with employment relationships of local school boards. Employer/employee relationship that exists between local school boards and public school system employees is distinguishable from relationship between Hopewell City Council and city employees. Exemption from Act’s open meeting requirement is reserved to city manager, and not council, for discussion of personnel matters related solely to city employees.

MR. STEVEN L. MICAS
COUNTY ATTORNEY FOR CHESTERFIELD COUNTY
MAY 18, 2000

You request that I reconsider an opinion to the Honorable Riley E. Ingram, Member, House of Delegates, dated December 16, 1998 ("1998 opinion"), concluding that The Virginia Freedom of Information Act, §§ 2.1-340 through 2.1-346.1 of the Code of Virginia (the “Act”), does not permit the Hopewell City Council to hold a closed meeting to discuss personnel matters
related solely to employees appointed, removed, or supervised by the city manager. The 1998 opinion notes that the exception to the open meeting requirement in § 2.1-344(A)(1), which allows public bodies to discuss certain personnel matters in closed meetings, clearly permits a city council to discuss in a closed meeting personnel considerations regarding individuals appointed or employed by council and over whom the council has supervisory authority. The 1998 opinion also notes, however, that the statutory exception is not available to a city council for personnel matters pertaining to city employees it does not appoint or employ, and over whom it does not have supervisory authority, such as employees supervised by the city manager.

In the 1998 opinion, the charter for the City of Hopewell authorized the city council to appoint only the city manager, city clerk, and city attorney. The city manager, however, had appointive, removal and supervisory authority over other city employees. The specific inquiry in the 1998 opinion was whether the Hopewell City Council may meet in executive session to discuss specific city employees other than the three officers appointed by council. In this factual context, it was noted that § 2.1-344(A)(1) allows public bodies to hold closed meetings only for the purposes of "[d]iscussion, assignment, promotion, performance, demotion, salaries, disciplining or resignation of specific public employees of any public body."

The 1998 opinion cites two prior opinions, which conclude that a city council may discuss in a closed meeting personnel matters related to the council’s selection of one of its members as mayor or related to the city attorney whom it appoints. With regard to other employees of the city, however, the term “employee” is not defined in the Act. It is, therefore, necessary to rely on a 1991 opinion which considers the following four elements to determine whether an employer/employee relationship exists: (1) the employer’s selection and engagement of the employee; (2) the payment of wages to the employee; (3) the employer’s retention of the power of dismissal; and (4) the employer’s retention of the power of control. The 1991 opinion concludes that the crucial question in determining the existence of such a relationship is whether the employer has the right to control not merely results but the progress, details, means and methods of the work. "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." Based on an assessment of these four elements, the 1998 opinion concludes that the Hopewell City Council does not have the required element of control over the city employees in question.
and thus may not discuss personnel matters relating to them in a closed meeting.\(^{13}\)

In your analysis,\(^{14}\) you argue that the phrase “employees of any public body” is synonymous with the phrase “employees of any locality.” Thus, you conclude that employees of the City of Hopewell are also employees of the city council. You argue that the interpretation of the term “employees” in the 1998 opinion is too restrictive. Additionally, you argue that a 1979 opinion conflicts with the 1998 opinion because it concludes that a school board may not meet in a closed meeting to discuss the general priority of administrative positions in the school system’s central administrative office, but such board could meet in a closed meeting to discuss personnel matters relating to specific employees of the central office.\(^{15}\) Finally, you contend that the 1998 opinion is inconsistent with the intent of § 2.1-344(A)(1) in that the conclusion fosters open, rather than closed, discussion of city employee personnel issues.

It is clear that the General Assembly has defined neither the term “employee” nor the phrase “individual employees of public bodies” in the context of the Act.\(^{16}\) When the General Assembly intends words in a statute to have a specific meaning, it clearly and unambiguously expresses its intention.\(^{17}\) Therefore, the determination of whether the employees of the City of Hopewell are employees of the city council is subject to the particular facts and circumstances of the individual case. The analysis of the 1998 opinion focuses on the common and ordinary meaning associated with the term “employee.” Use of such term by the General Assembly envisions a relationship between an employer and employee in which the employer exercises a degree of control over the employee.

Based on the facts presented in the 1998 opinion, I remain of the view that the Hopewell City Council does not possess the requisite control over the city employees. I also am unable to agree with your argument that the 1979 opinion, dealing with employment relationships of local school boards, conflicts with the 1998 opinion. A 1985 opinion notes that “[t]he powers to hire, dismiss and set the terms of employment of employees in the public school system are vested in the [local] school board.”\(^{18}\) Specifically, § 22.1-293(A) provides that local school boards “may employ principals and assistant principals”; § 22.1-295(A) provides that public school teachers “shall be employed ... by the school board”; and § 22.1-296 provides that “[e]ach school board shall provide for the payment of teachers, principals, assistant principals and other employees.” I am not aware of any similar statutory provision that vests the Hopewell City Council with similar management responsibility and control over city employees.\(^{19}\)
Furthermore, § 2.1-340.1 of the Act mandates that “[a]ny exception or exemption from [the Act's] applicability shall be narrowly construed.” Thus, taking into consideration that the exemption provided pursuant to § 2.1-344(A)(1) for the discussion of personnel matters related to “employees of any public body” must be narrowly construed, I am constrained to interpret such exemption in a restrictive manner. To define the term “employees” as you suggest such that all employees of a city are automatically regarded as employees of the city council contravenes the expressed mandate of the General Assembly. Accordingly, I am required to construe the term “employees” in a restricted manner when such term is used in the Act. Consequently, it is my opinion that the phrase “employees of any public body” is not synonymous with the phrase “employees of any locality.”

The 1979 opinion, which you suggest contradicts the 1998 opinion, addresses the issue of whether a local school board may meet in a closed meeting to discuss a report prepared by the superintendent regarding the order of priority among administrative positions in the school board’s central administrative office. The 1979 opinion notes that the report did not involve the performance of school board employees, but rather, evaluated the importance of the employees’ positions. Thus, the 1979 opinion concludes that such report was not within the scope of the Act’s exception for discussion of personnel matters in a closed meeting.

You also conclude that the 1979 opinion indicates that it would be permissible to discuss in a closed meeting personnel matters related to specific employees of the central office who are not school board appointees. You rely on the 1979 opinion as analogous to the situation presented in the 1998 opinion, and maintain that the 1979 opinion stands for the proposition that a city council may discuss in a closed meeting the personnel matters of specific city employees as well as appointees of the council. I concur with your conclusion that the 1979 opinion furthers the result of permitting a school board to discuss in a closed meeting the personnel matters of specific school board employees as well as appointees of the school board. As discussed above, however, local school boards are statutorily vested with the requisite management and control powers over public school system employees that evidence an employer/employee relationship. Conversely, the Hopewell City Council considered in the 1998 opinion was not so vested; thus, the facts and corresponding conclusion of the 1979 opinion are clearly distinguishable from the 1998 opinion.

Finally, you argue that the conclusion of the 1998 opinion is inconsistent with the confidentiality purpose of the § 2.1-344(A) exception in that it
leads to the discussion of personnel matters of city employees in open session of a city council meeting.

Your proposition assumes that, because the 1998 opinion concludes that discussion of personnel matters related to city employees who are appointed, removed, or supervised by the city manager does not fall within the Act's exception to open meetings, such discussion must necessarily take place in an open meeting of city council. As noted in the 1998 opinion, the § 2.1-344(A)(1) exception is "designed to protect the privacy of individual employees of public bodies in matters relating to their employment." Accordingly, discussions related to the employee's personnel matters are reserved to the employer and employee. Because it is my opinion that the employees of the City of Hopewell in the 1998 opinion are employees, as that term is commonly defined, of the city manager and not the city council, discussion of personnel matters solely related to them are reserved unto such employees and the city manager.

For these reasons, the conclusion of the 1998 opinion is affirmed.

2. Id. at 10.
3. Id. at 11.
4. Id. at 10.
5. Id.
6. Id. at 9-10.
7. See id. at 10.
14. Any request by a county attorney for an opinion from the Attorney General "shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions." Section 2.1-118.


"Compare § 15.2-1131 (providing that city council may establish personnel system for city administrative officials and employees in city with population exceeding 200,000 upon receipt of recommendation submitted by city manager); 1989 Op. Va. Att'y Gen. 43, 44, 45 (noting as valid, procedure to resolve employee complaints through which employees of local department of social services must address such complaints first to their immediate supervisor; if unsatisfied, then to department's director, and lastly, to local board of supervisors at meeting of full board).


Id.

Id. at 378-79.


ADMINISTRATION OF GOVERNMENT GENERALLY: VIRGINIA FREEDOM OF INFORMATION ACT.

EDUCATION: SCHOOL BOARDS; SELECTION, ETC.

Exemption from Act's open meeting requirement is not available to elected school board to discuss performance and other related matters of individual board members.

THE HONORABLE R. LEE WARE JR. 
MEMBER, HOUSE OF DELEGATES 
JULY 21, 2000

You ask whether § 2.1-344(A)(1) of the Code of Virginia, a portion of The Virginia Freedom of Information Act¹ (the "Act"), permits an elected school board to meet in closed meeting to discuss the performance and other related matters of individual board members.

The General Assembly has determined that the Act "shall be liberally construed to ... afford every opportunity to citizens to witness the operations of government."² The Act requires that "[a]ll meetings of public bodies shall be open, except as provided in § 2.1-344."³ Local school boards are "public bodies" under the Act.⁴ Section 2.1-344(A)(1) allows public bodies to discuss certain matters in closed meetings, including discussion or consideration of "assignment, appointment, promotion, performance, demotion, salaries, disciplining or resignation of specific public officers, appointees or employees of any public body."⁵ "Any exemption from public access to ... meetings shall be narrowly construed and no ... meeting [shall be] closed to the public unless specifically made exempt pursuant to [the Act] or other specific provision of law."⁶
The use of the word "shall" in a statute ordinarily implies that its provisions are mandatory. "[T]he primary objective of statutory construction is to ascertain and give effect to legislative intent." Analysis of legislative intent includes appraisal of the subject matter and purpose of the statute, in addition to its express terms. The purpose underlying a statute's enactment is particularly significant in construing it. Moreover, statutes should not be interpreted in ways that produce absurd or irrational consequences.

Section 2.1-344(A)(1) allows public bodies to discuss certain personnel matters in closed meetings. This exception to the open meeting requirement allows private discussion of personnel matters involving individual employees and is designed to protect the privacy of individual employees of public bodies in matters relating to their employment. Giving § 2.1-344 its required narrow construction, the closed meeting exception is not available to an elected school board for a discussion concerning which members shall serve as the board's chairman and vice-chairman; rather, it is available only to discuss personnel considerations regarding the individuals a public body appoints or employs.

The Act does not define the term "employee" or the phrase "individual employees of public bodies." Prior opinions of the Attorney General conclude that, where no applicable statutory definition of the term "employee" exists, it must be given its ordinary meaning, considering the context in which it is used. A 1991 opinion notes that, at common law, the following four elements determine whether an employer/employee relationship exists: (1) the employer's selection and engagement of the employee; (2) the payment of wages to the employee; (3) the employer's retention of the power of dismissal; and (4) the employer's retention of the power of control. In determining whether an employer/employee relationship exists, the crucial question of control is whether the employer has the right to control not merely the results but the progress, details, means and methods of the work.

It is clear that members of an elected school board are not employees of the board or the locality. 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." Furthermore, "[t]he terms of office for the school board members shall commence on January 1 following their election in the case of a county and on July 1 following their election in the case of a city or town."

Each member of an elected school board is a public officer. A 1978 opinion of the Attorney General lists criteria to be considered in determining whether a position constitutes a "public office":
One important consideration is that, to constitute a public office, the position must be created by the Constitution or statutes. It is a position filled by election or appointment, with a designation or title, and duties concerning the public, assigned by law. A frequent characteristic of such a post is a fixed term of office.\textsuperscript{20}

Clearly, the position on an elected school board is a public office under the above criteria: the position is created by statute—§ 22.1-57.3; it is filled by election by the qualified voters of a city, county or town; and the duties of the position concerning the public are assigned by law.\textsuperscript{21} “[A] public office is a public agency or trust created in the interest and for the benefit of the people.”\textsuperscript{22} Because the powers exercised by public officers are held in trust for the people, such officers are considered servants of the people.\textsuperscript{23}

I am of the opinion that members of an elected school board are public officers. Based on the above, therefore, it is my opinion that an elected school board may not meet in closed meeting to discuss the performance and other related matters of individual members of the board.

\textsuperscript{1}Sections 2.1-340 to 2.1-346.1.


\textsuperscript{3}Section 2.1-343.

\textsuperscript{4}See § 2.1-341 (defining “public body” to include “school boards”).

\textsuperscript{5}Section 2.1-344(A)(1). Section 2.1-344 provides, in part:

“A. Public bodies may hold closed meetings only for the following purposes:

1. Discussion, consideration or interviews of prospective candidates for employment; assignment, appointment, promotion, performance, demotion, salaries, disciplining or resignation of specific public officers, appointees or employees of any public body; and evaluation of performance of departments or schools of public institutions of higher education where such evaluation will necessarily involve discussion of the performance of specific individuals. Any teacher shall be permitted to be present during a closed meeting in which there is a discussion or consideration of a disciplinary matter which involves the teacher and some student and the student involved in the matter is present, provided the teacher makes a written request to be present to the presiding officer of the appropriate board.”

\textsuperscript{6}Section 2.1-340.1 (emphasis added).

\textsuperscript{7}See Andrews v. Shepherd, 201 Va. 412, 414, 111 S.E.2d 279, 281 (1959) (noting that “shall” is word of command, used in connection with mandate); see also Schmidt v. City of Richmond, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965) (noting that “shall” generally indicates procedures are intended to be mandatory, imperative or limited); 1999 Op. Va. Att’y Gen. 15, 15, and opinions cited at 16 n.9.


You inquire whether the following costs and fines are dischargeable in bankruptcy: (1) in a Chapter 13 proceeding, costs imposed for a criminal conviction; and (2) in a Chapter 7 or Chapter 13 proceeding, (a) criminal costs not contingent on a sentence, such as costs associated with completion of probation, a suspended sentence, or parole; and (b) fines or costs imposed for traffic infractions or misdemeanors.
Section 523(a)(7) of the United States Bankruptcy Code specifically excepts from discharge in Chapter 7 bankruptcies criminal fines, penalties, and forfeitures. This statutory exclusion includes traffic or parking fines and similar penalties, both criminal and civil, because $523(a)(7) makes a "fine" nondischargeable. Furthermore, with regard to Chapter 7 bankruptcies, costs arising from a criminal conviction, whether they are part of the criminal sentence or assessed upon terms and conditions, such as probation, parole, or a suspended sentence, are not dischargeable. Accordingly, criminal costs, which may or may not be contingent upon a sentence but are associated with the conviction, and traffic fines are nondischargeable in a Chapter 7 bankruptcy proceeding.

The nondischargeability of fines, penalties, forfeitures, and restitution obligations in Chapter 13 proceedings is determined under Bankruptcy Code § 1328. Exception for those debts specified as nondischargeable by § 1328(a), Chapter 13 bankruptcy debts may be discharged after the debtor successfully completes all payments proposed under the bankruptcy plan. Moreover, § 1328(a)(3) excepts from discharge only a debt "for restitution, or a criminal fine, included in a sentence on the debtor's conviction of a crime." Because this language is more limiting than the comparable provisions in § 523(a)(7), it provides broader relief for the debtor who completes the Chapter 13 plan than is provided the Chapter 7 debtor. Consequently, although § 1328(a)(3) makes criminal fines included in a criminal sentence nondischargeable in a Chapter 13 bankruptcy, criminal fines that are not explicitly made a contingency of the sentence are dischargeable in such proceeding. Additionally, because § 1328(a)(3) limits nondischargeable fines to criminal fines, traffic fines arising from traffic infractions and civil traffic fines are dischargeable in a Chapter 13 bankruptcy.

1 A debtor is not discharged from any debt "to the extent such debt is for a fine, penalty, or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss." 11 U.S.C.A. § 523(a)(7) (West 1993). Compare Kelly v. Robinson, 479 U.S. 36 (1986) (holding that restitution payments are not dischargeable in Chapter 7 bankruptcy) with Pennsylvania Public Welfare Dept. v. Davenport, 495 U.S. 552 (1990) (holding that restitution obligations constitute debts that are dischargeable under Chapter 13).

2 See supra § 523(a)(7); In re Stevens, 184 B.R. 584 (Bankr. W.D. Wash. 1995); see also In re Caggiano, 34 B.R. 449 (Bankr. D. Mass. 1983) (holding that traffic fines, but not associated collection costs, are nondischargeable under Chapter 7); In re Melzer, 11 B.R. 624, 625 (Bankr. E.D.N.Y. 1981) (noting that unpaid fines for parking violations are nondischargeable under Chapter 7).

3 See In re Thompson, 16 F.3d 576, 579 (4th Cir. 1994) (noting that, although certain costs assessed are not part of criminal sentence, such costs are only paid by those defendants who are convicted of crime charged and thus such debt is not incurred absent conviction; accordingly, costs imposed as result of criminal conviction are nondischargeable in Chapter 7 bankruptcy).
You ask whether providing state-funded interpreters to non-English-speaking persons for civil cases in courts of the seventeenth through the twentieth judicial districts and circuits violates the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.\

Section 8.01-384.1:1 of the Code of Virginia provides, in part:

A. In any trial, hearing or other proceeding before a judge in a civil case in which a non-English-speaking person is a party or witness, an interpreter for the non-English-speaking person may be appointed by the court. A qualified English-speaking person fluent in the language of the non-English-speaking person may be appointed by the judge of the court in which the case is to be heard unless the non-English-speaking person shall obtain a qualified interpreter of his own choosing who is approved by the court as being competent.

B. To the extent of available appropriations, the compensation of such interpreter shall be fixed by the court and shall be paid from the general fund of the state treasury as part of the
expense of trial. The amount allowed by the court to the interpreter may, in the discretion of the court, be assessed against either party as a part of the cost of the case and, if collected, the same shall be paid to the Commonwealth. [Emphasis added.]

You note that the 1998 Appropriation Act provides for payments limited to civil proceedings only in the courts of the seventeenth through the twentieth judicial districts and circuits. You also note that there is no acknowledged constitutional right to an interpreter in civil matters. Once a state decides to provide an interpreter at state expense, however, you question whether it may provide a benefit from public funds for litigants and witnesses in only certain judicial circuits/districts without violating the Equal Protection Clause of the United States Constitution.

The Equal Protection Clause was intended as a restriction on state legislative action inconsistent with elemental constitutional premises. The Equal Protection Clause directs that "all persons similarly circumstanced shall be treated alike." But so too, "[t]he Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." The initial discretion to determine what is "different" and what is "the same" resides in the states' legislatures. "A legislature must have substantial latitude to establish classifications that roughly approximate the nature of the problem perceived, that accommodate competing concerns both public and private, and that account for limitations on the practical ability of the State to remedy every ill."

In designating the seventeenth through the twentieth judicial districts and circuits for the purpose of providing such interpreters, it is readily apparent that the General Assembly has neither denied any class of persons a fundamental right nor involved a suspect classification, either one of which would require the application of a judicial "strict scrutiny" test to § 8.01-384.1:1 under traditional equal protection scrutiny. "Suspect" classifications include race and, in modified forms requiring "intermediate" scrutiny, discrimination on the bases of sex, alienage and wealth. "Fundamental" classifications concern basic civil rights, including the right to vote and the right of procreation.

The standard of review, therefore, for an equal protection challenge to § 8.01-384.1:1 is, in my opinion, the rational basis test.

The Equal Protection Clause allows the States considerable leeway to enact legislation that may appear to affect similarly
situated people differently. Legislatures are ordinarily assumed to have acted constitutionally. Under traditional equal protection principles, distinctions need only be drawn in such a manner as to bear some rational relationship to a legitimate state end. Classifications are set aside only if they are based solely on reasons totally unrelated to the pursuit of the State’s goals and only if no grounds can be conceived to justify them.\textsuperscript{10}

"In applying the rational basis test, courts will not overturn a statutory classification on equal protection grounds unless it is so unrelated to the achievement of a legitimate purpose that it appears irrational."\textsuperscript{11} Although I cannot discern any classification created by such allocation of funds by the General Assembly, the mere fact that a classification has been made will not void legislation.\textsuperscript{12} "Statutes create many classifications which do not deny equal protection; it is only ‘invidious discrimination’ which offends the Constitution."\textsuperscript{13}

Consequently, in order to conclude that the discretionary provision of interpreters in civil matters contained in § 8.01-384.1:1 violates equal protection guarantees, the legislature must be found to have acted in a manner bearing no rational relationship to a legitimate state end; i.e., the discretionary provision must be found to be so unrelated to the achievement of a legitimate purpose that it appears irrational. More often than not, a decision made by the General Assembly affects some group at the expense of another, and creates one or more classifications.

The Supreme Court of Virginia has found that constitutional prohibitions against special legislation do not prohibit classifications, as long as the classification is not purely arbitrary. "It must be natural and reasonable, and appropriate to the occasion. There must be some such difference in the situation of the subjects of the different classes as to reasonably justify some variety of rule in respect thereto."\textsuperscript{14} In the facts you present, the decision by the General Assembly to provide such funds for use in the four designated judicial districts and circuits clearly does not create a "classification" between groups in other judicial districts and circuits requiring interpreters.

In assessing the constitutionality of § 8.01-384.1:1, I am also guided by the doctrine that "[a] statute is not to be declared unconstitutional unless the court is driven to that conclusion."\textsuperscript{15} "Every reasonable doubt should be resolved in favor of the constitutionality of an act of the legislature."\textsuperscript{16} Following this doctrine, it has been a long-standing practice of Attorneys General to refrain from declaring a statute unconstitutional unless its unconstitution-
ality 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.

Therefore, based on the above, it is my opinion that the discretionary provision of interpreters in civil cases for non-English-speaking persons in courts of the seventeenth through the twentieth judicial districts and circuits does not violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

1Although the Constitution of Virginia does not contain an equal protection clause similar to that found in the United States Constitution, the antidiscrimination clause of Article I, § 11 of the Constitution of Virginia (1971) and the prohibition against special legislation in Article IV, § 14 provide analogous limitations on legislative authority. Neither of these constitutional provisions, however, provides broader rights than those guaranteed by the Fourteenth Amendment. See Boyd v. Bulala, 647 F. Supp. 781, 785-86 (W.D. Va. 1986), amended, 678 F. Supp. 612 (W.D. Va. 1988), aff'd in part and rev'd in part, questions certified, 877 F.2d 1191 (4th Cir. 1989); Archer and Johnson v. Mayes, 213 Va. 633, 638, 194 S.E.2d 707, 711 (1973).


31998 Va. Acts ch. 464, Item 30(D), at 666, 687. (providing that "[o]ut of the amounts provided in [Item 30(D)] and Items 29 and 31 of this act, shall be paid an amount not to exceed $45,000 each year to implement the provisions of § 8.01-384.1:1 ... in the 17th, 18th, 19th, and 20th Judicial Districts and Circuits.")


5Tigner v. Texas, 310 U.S. 141, 147 (1940).


COMMISSIONS, BOARDS AND INSTITUTIONS: APPOINTMENT TO BOARDS AND COMMISSIONS.

Authority established by legislature, whose membership is appointed by Governor, is not board, commission, or council on which member of General Assembly is ineligible to serve.

THE HONORABLE ROBERT S. BLOXOM
MEMBER, HOUSE OF DELEGATES
JANUARY 12, 2000

You ask whether § 9-6.23 of the Code of Virginia, which prohibits members of the General Assembly from serving on boards, commissions and councils within the executive branch, extends to service on an authority that is established by the General Assembly whose members are appointed by the Governor.

Section 9-6.23 provides, in part:

Members of the General Assembly shall be ineligible to serve on boards, commissions, and councils within the executive branch which are responsible for administering programs established by the General Assembly. Such prohibition shall not extend to boards, commissions, and councils engaged solely in policy studies or commemorative activities. If any law directs the appointment of any member of the General Assembly to a board, commission, or council in the executive branch which is responsible for administering programs established by the General Assembly, such portion of such law shall be void, and the Governor shall appoint another person from the Commonwealth at large to fill such a position.
Subsequent sessions of the General Assembly have added exceptions to the general prohibition set forth in § 9-6.23. None of the exceptions, however, appear to apply to your question.\(^2\)

There are several rules of statutory construction that must be applied to this matter. Obviously, the primary goal of statutory construction is to ascertain and give effect to legislative intent.\(^3\) """[T]ake the words as written" ... and give them their plain meaning."""" \(^4\) """"[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction."""" \(^5\) The use of the word "shall" in a statute generally implies that its terms are intended to be mandatory, rather than permissive or directive.\(^6\)

Finally, when the language of an enactment is plain and unambiguous, its plain meaning must be applied.\(^7\)

The plain and unambiguous language in § 9-6.23 prohibits members of the General Assembly from serving on "boards, commissions, and councils within the executive branch." The clear language does not prohibit service on an authority. I am of the opinion that an authority is not a "board, commission, or council" within the scope of the prohibition in § 9-6.23. Consequently, I must conclude that the language of § 9-6.23 does not prohibit a member of the General Assembly from serving on an authority established by the legislature whose membership is appointed by the Governor.

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\(^2\) See generally § 9-6.23.


CONSTITUTION OF THE UNITED STATES: FOURTH AMENDMENT.

School board policy requiring drug testing of public school students and school board employees must be reasonable under Fourth Amendment standards and relatively unobtrusive. Interest of school board in conducting such compulsory, suspicionless searches must be balanced against individual privacy interests. Balancing test focuses on (1) whether pronounced drug problem exists within targeted group, and if not, whether existence of pronounced drug problem is unnecessary to justify suspicionless testing; and (2) magnitude of harm that could result from use of illicit drugs. Reasonableness of any search depends on facts of each particular case.

THE HONORABLE CHARLES R. HAWKINS
MEMBER, SENATE OF VIRGINIA
JANUARY 31, 2000

You inquire whether local school boards may require drug testing of students and employees.

The Fourth Amendment to the Constitution of the United States requires that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." The Amendment guarantees the privacy and security of persons against certain arbitrary and invasive acts by officers of the government or those acting at their direction. Compulsory drug testing implicates privacy interests and constitutes a search for Fourth Amendment purposes. "Searches and seizures carried out by school officials are governed by the same Fourth Amendment principles that apply in other contexts." "To be reasonable under the Fourth Amendment, a search ordinarily must be based on individualized suspicion of wrongdoing." 

A search conducted in the absence of individualized suspicion would be reasonable only in a narrow class of cases, "where the privacy interests implicated by a search are minimal and where 'other safeguards' are available 'to assure that the individual's reasonable expectation of privacy is not subject to the discretion of the official in the field.'" The supervision and operation of schools "presents 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements." Search warrants or a showing of "probable cause" is not required of school administrators seeking to maintain order in the public schools. On the other hand, "[a]lthough [the Supreme] Court may take notice of the difficulty of maintaining discipline in the public schools today, the situation is not so dire that students in the schools may claim no
legitimate expectations of privacy." Consistent with the Fourth Amendment, therefore, individual privacy interests may be overcome, in the interest of school discipline, when there is a reasonable basis for suspecting that school rules are being violated.

In the case of *New Jersey v. T. L. O.*, the Supreme Court of the United States held that

the accommodation of the privacy interests of schoolchildren with the substantial need of teachers and administrators for freedom to maintain order in the schools does not require strict adherence to the requirement that searches be based on probable cause to believe that the subject of the search has violated or is violating the law. Rather, the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search. Determining the reasonableness of any search involves a twofold inquiry: first, one must consider "whether the ... action was justified at its inception"; second, one must determine whether the search as actually conducted "was reasonably related in scope to the circumstances which justified the interference in the first place." Under ordinary circumstances, a search of a student by a teacher or other school official will be "justified at its inception" when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school. Such a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

This standard will, we trust, neither unduly burden the efforts of school authorities to maintain order in their schools nor authorize unrestrained intrusions upon the privacy of schoolchildren. By focusing attention on the question of reasonableness, the standard will spare teachers and school administrators the necessity of schooling themselves in the niceties of probable cause and permit them to regulate their conduct according to the dictates of reason and common sense. At the same time, the reasonableness standard should ensure that the interests of students will be invaded no more than is necessary to achieve the legitimate end of preserving order in the schools.

[10]
The reasonableness of any search is dependent upon the facts of each particular case. As the Supreme Court also acknowledged in the case of New Jersey v. T. L. O., "the legality of a search of a student should depend simply on the reasonableness, under all the circumstances, of the search." You first ask whether a school board may require drug testing for any of its enrolled students prior to their participation in extracurricular activities or interscholastic athletics.

In 1995, the United States Supreme Court assessed the validity of a suspicionless school search. The case arose from a school district's decision to implement a random urinalysis drug-testing program for student athletes in an effort to curb a documented increase in the use of drugs among students. The Court analyzed the reasonableness of the program by balancing the students' legitimate privacy interests against the government's interests in conducting the search. The Court upheld the drug testing as a reasonable search, finding that the student athletes enjoyed a lessened expectation of privacy when compared to students in general. The Court noted that "public school children in general ... have a diminished expectation of privacy" and held:

Taking into account all the factors we have considered ...— the decreased expectation of privacy, the relative unobtrusiveness of the search, and the severity of the need met by the search—we conclude [the policy of random urinalysis drug testing of student athletes] is reasonable and hence constitutional.

Ultimately, however, the determination of whether such testing passes constitutional muster depends on a complete and detailed set of facts. The reasonableness of any search necessarily depends on the facts of each particular case. Accordingly, I am unable to render any definitive opinion in response to your question due to a lack of pertinent and particular facts. It is, however, my general opinion that all such searches need to be viewed through the lens of the decision of the United States Supreme Court in Vernonia School District 47J v. Acton and an assessment of the particular facts relative to whether a strong need for such a search exists and whether such search would be considered relatively unobtrusive.

You next ask whether a school board may require students who have been expelled for a drug-related offense to submit to a drug test before returning to school.
A 1989 opinion of the Attorney General concludes that "a local school board may adopt a drug testing policy for students who are seeking readmission after suspension or expulsion for a violation of school policies or state laws concerning controlled substances." The opinion cautions, however, that any such policy must, of course, be drafted and implemented to satisfy the constitutional principles discussed above. In accord with those principles, it is further my opinion that a general policy of compulsory drug testing of all students seeking re-enrollment solely because of a prior drug offense in the school would be vulnerable to constitutional attack. In order to avoid such an attack, therefore, any policy decision to require the drug testing of a student as a condition of re-enrollment should be made on a case-by-case basis and be based upon a review of the individual student's disciplinary problems and a reasonable belief that the compulsory testing will reveal the continuing use of drugs by that student in violation of the law or school regulations.

I concur with this opinion and the authority expressed in the opinion for school officials to require such drug testing.

Your final questions concern drug testing of school board employees. You ask whether a school board may require drug testing for all individuals accepting an offer of employment, and whether the school board may conduct random drug testing of its employees.

It is important to emphasize, again, that legal issues involving drug testing are entirely fact-oriented. Your inquiry has not detailed specific facts upon which a precise conclusion may be drawn. When such case-by-case determinations are required, this Office has refrained from rendering an opinion on general, hypothetical questions without specific facts being set forth. Whether testing is appropriate, the extent of testing and the nature of the test will depend on the particular circumstances of each case. It would be inappropriate, therefore, to give an answer to such questions and represent that the answer has universal application. A drug testing program should be considered in light of the school board's own peculiar fact situation and the nature of its interest in establishing such a program. My response, therefore, is general and may not be wholly applicable to every school board employer situation or testing program.

In responding to the specific inquiry of whether the Commonwealth may impose mandatory drug testing for new employees as a precondition to
employment, a 1987 opinion concludes that the Commonwealth may not legally impose, as a precondition to employment, mandatory drug testing for new employees. The opinion also notes that “the balance of interests in most work situations requires that drug testing be conducted only on the basis of at least ‘reasonable suspicion,’” and concludes that “random drug testing is not permissible in most work settings .... Moreover, any employer instituting random drug testing in appropriate circumstances should do so based on objective policy standards and preferably have the random selection computer-generated.”

In the case of *Skinner v. Railway Labor Executives’ Association*, the Supreme Court of the United States considered the government’s interest in testing railroad employees for drugs and alcohol after a number of serious train accidents without a showing of individualized suspicion that drugs were involved. The Court began its analysis by noting that “[t]he problem of alcohol use on American railroads is as old as the industry itself,” and that alcohol was the probable cause or a contributing factor in at least 21 significant train accidents occurring between 1972 and 1983, resulting in 25 fatalities, 61 nonfatal injuries, and property damages estimated at over $19 million. It was against this backdrop that the Court evaluated the Federal Railroad Administration’s regulations which mandated “Post-Accident Toxicological Testing” for all employees involved in any train accident, which led the Court to determine that the government had a compelling interest in such testing because “[e]mployees subject to the tests discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences.” The Court also noted that,

> [b]y ensuring that employees in safety-sensitive positions know they will be tested upon the occurrence of a triggering event, the timing of which no employee can predict with certainty, the regulations significantly increase the deterrent effect of the administrative penalties associated with the prohibited conduct, concomitantly increasing the likelihood that employees will forgo using drugs or alcohol while subject to being called for duty.

The avoidance of such calamities outweighed the employees’ privacy interests, which were “diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of covered employees.” Testing without a showing of a particularized suspicion was essential to the realization of a deterrent effect, i.e., the employee’s inability to avoid detection simply by
staying drug free at a prescribed test significantly enhanced the deterrent effect.\textsuperscript{36}

In the case of \textit{National Treasury Employees Union v. Von Raab},\textsuperscript{37} which was decided the same day as the \textit{Skinner} case, the Supreme Court upheld drug testing by the United States Customs Service (the “Service”) of employees seeking promotion or transfer to positions involved in the interdiction of illegal drugs, which required them to carry firearms. The Service’s drug-testing regime was not prompted by a pronounced drug problem, but by its stature as the “Nation’s first line of defense against one of the greatest problems affecting the health and welfare of our population.”\textsuperscript{38} The Court found that it was “readily apparent” that the government has a compelling interest in ensuring that the Service maintain unimpeachable integrity and judgment, and cautioned against the possibility of grievous consequences associated with having drug-using agents:

This national interest in self-protection could be irreparably damaged if those charged with safeguarding it were, because of their own drug use, unsympathetic to their mission of interdicting narcotics. A drug user’s indifference to the Service’s basic mission or, even worse, his active complicity with the malefactors, can facilitate importation of sizable drug shipments or block apprehension of dangerous criminals. The public interest demands effective measures to bar drug users from positions directly involving the interdiction of illegal drugs.\textsuperscript{39}

The Court further noted that “the public should not bear the risk that employees who may suffer from impaired perception and judgment will be promoted to positions where they may need to employ deadly force.”\textsuperscript{40}

The Supreme Court addressed the issue of drug testing in 1997 in the case of \textit{Chandler v. Miller}.\textsuperscript{41} Candidates for high office in the State of Georgia brought suit challenging the constitutionality of a statute which required candidates to submit to and pass a drug test within 30 days prior to qualifying for nomination or election to certain state offices. Balancing the candidates’ privacy expectations against the state’s interest in drug testing them, the Court held the statute unconstitutional. Specifically, the Court held that the suspicionless testing did not meet the Fourth Amendment’s “special needs” exception to overcome the need for an individualized suspicion of wrongdoing. The Court’s decision rested in large part upon the lack of a demonstrated drug problem among state officeholders which, “while not in all cases necessary to the validity
of a testing regime, would shore up an assertion of special need for a suspicionless general search program. Ultimately, this led the Court to conclude that the Fourth Amendment shields society against drug tests such as Georgia's candidate drug test, which "diminishes personal privacy for a symbol's sake."

As a general rule, in order to be reasonable, a search must be undertaken pursuant to a warrant issued upon a showing of probable cause. In the Chandler case, however, the Supreme Court clarified how suspicionless testing—presumably inherently suspect because, by definition, it is not accompanied by individualized suspicion—can comport with the Fourth Amendment:

[P]articularized exceptions to the main rule are sometimes warranted based on "special needs, beyond the normal need for law enforcement." When such "special needs"—concerns other than crime detection—are alleged in justification of a Fourth Amendment intrusion, courts must undertake a context-specific inquiry, examining closely the competing private and public interests advanced by the parties. As Skinner stated: "In limited circumstances, where the privacy interests implicated by the search are minimal, and where an important governmental interest furthered by the intrusion would be placed in jeopardy by a requirement of individualized suspicion, a search may be reasonable despite the absence of such suspicion."

Thus, where a Fourth Amendment intrusion serves special needs, "it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context." Quite simply, then, in evaluating the constitutionality of a proposed drug-testing policy, the government's (or public's) interest in testing must be balanced against the individual's privacy interest.

With regard to the government's interest in testing, the Supreme Court traditionally has focused its analysis on two central factors: (1) whether the group of people targeted for testing exhibits a pronounced drug problem; and, if not, whether the group occupies a unique position such that the existence of a pronounced drug problem is unnecessary to justify suspicionless testing; and (2) the magnitude of the harm that could result from the use of illicit drugs on the job.

The existence of a pronounced drug problem within the group of employees targeted for testing usually tips the equities in favor of upholding suspicionless
testing. For example, in the *Skinner* case, the Court traced the history of drug and alcohol abuse among train operators and, in the *Vernonia* case, it emphasized the rampant increase in drug use among students participating in school athletic programs. In both cases the existence of a pronounced drug problem contributed to the Court's upholding of the drug testing regimes. Likewise, in the *Chandler* case, the Court stated that the lack of a demonstrated drug problem among state officeholders in Georgia mitigated against allowing an unintrusive drug testing requirement. Thus, as would be expected when using a balancing test, in cases in which a pronounced drug problem exists within the target group, a drug-testing regime has a higher likelihood of being deemed constitutional because the more pernicious the drug problem is, the greater the public's interest is in abridging it.

The second factor that must be considered in the balancing test analysis focuses on the magnitude of harm that could result from the use of illicit drugs in any given set of circumstances. The possible basis for such a policy could be premised on a public interest argument that teachers, principals, and other such school personnel hold safety-sensitive positions and, further, that school boards have a legitimate and strong interest in safeguarding the health and welfare of the students by ensuring that people in safety-sensitive positions are not under the influence of drugs or alcohol at school. The validity of this argument, however, hinges in large part upon whether or not teachers, principals, and the other school officials covered by the testing actually occupy “safety-sensitive” positions.

As previously noted, the reasonableness of any drug-testing policy for employees of school boards depends entirely on the facts of each particular case. Accordingly, I am unable to render any definitive opinion on your final questions due to a lack of knowledge of all pertinent and particular facts that you may envision.

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3 DesRoches by DesRoches v. Caprio, 156 F.3d 571, 574 (4th Cir. 1998).
5 DesRoches, 156 F.3d at 575 (quoting New Jersey v. T. L. O., 469 U.S. 325, 342 n.8 (1985) (quoting Delaware v. Prouse, 440 U.S. at 655 (quoting Camara, 387 U.S. at 532))).
6 Griffin v. Wisconsin, 483 U.S. 868, 873-74 (1987) (upholding warrantless search of probationer's home by probation officer where there are "reasonable grounds" to believe that contraband was present).
New Jersey v. T. L. O., 469 U.S. at 337-43.

*Id. at 338.

*Id. at 340-42.

*Id. at 341-43 (footnotes omitted) (quoting Terry v. Ohio, 392 U. S. 1, 20 (1968)).


515 U.S. at 648-51.

*Id. at 652-53.

*Id. at 657.

*Id. at 659 n.2.

*Id. at 664-65.


See supra notes 13-18 and accompanying text.


*Id. (footnote and citation omitted).


*Id.

*Id. at 189-90.

*Id. at 191.

*Id. at 190.

*Id. at 190-91.

489 U.S. at 602.

*Id. at 606.

*Id. at 607.

*Id. at 628.

*Id. at 630 (citation omitted).

*Id. at 627.

*Id. at 629-30.


*Id. at 668.

*Id. at 670.

*Id. at 671.

520 U.S. at 305.

*Id. at 319 (citation omitted).
"Except in certain well-defined circumstances, a search or seizure in such a case is not reasonable unless it is accomplished pursuant to a judicial warrant issued upon probable cause." Skinner, 489 U.S. at 619. That is, a valid search "ordinarily must be based on individualized suspicion of wrongdoing." Chandler, 520 U.S. at 313.

"Von Raab, 489 U.S. at 665-66.

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT.
COUNTIES, CITIES AND TOWNS: FRANCHISES, PUBLIC PROPERTY, UTILITIES — BUILDINGS, MONUMENTS AND LANDS GENERALLY.

City's grant of conservation easement to tax exempt nonprofit conservation organization, which effectively results in permanent dedication of public property to its current public use, is tantamount to sale of municipal property, requiring three-fourths affirmative vote of council and public hearing prior to sale.

You ask whether a municipal corporation may grant a conservation easement, to be held in perpetuity, to a conservation organization exempt from income taxation under § 501(c)(3) of the Internal Revenue Code.

You relate that the City of Richmond is considering the possibility of granting conservation easements to several § 501(c)(3) nonprofit conservation groups to protect four of the city's parks and natural areas and to retain the natural character of these properties from future development. For the purposes of your inquiry, I shall assume that the terms of the grant provide for the continuation of the current public purpose of the property. You note that conservation easements may be held by these organizations in perpetuity pursuant to the Virginia Conservation Easement Act.¹ You inquire whether the franchise process contained in Article VII, § 9 of the Constitution of Virginia (1971), and implemented pursuant to §§ 15.2-2100 through 15.2-2107 of the Code of Virginia, must be engaged prior to such grant.

Article VII, § 9 requires an affirmative vote of three fourths of the members elected to a city governing body before a city may sell any rights "in and to its waterfront, wharf property, public landings, wharves, docks, streets, avenues, parks, bridges, or other public places, or its gas, water, or electric works." Furthermore, § 9 places restrictions on the rights of a city to create franchises,
leases, or other rights to use public property, including a limit on the term of such franchise and a procedural requirement of advertising and public bidding prior to the granting thereof.2

Article VII, § 9 and § 15.2-2100 impose two distinct restrictions on cities. First, property of certain enumerated classes, such as parks and other public property, that has been dedicated to public use “may not be sold without a three-fourths vote of all members elected to the municipal council.”3 Second, “the grant of any franchise, lease or right to use any of the enumerated classes of public property ‘or any other public property or easement of any description in any manner not permitted to the general public’ is limited to forty years in duration.”4

Prior opinions of the Attorney General repeatedly have noted that Article VII, § 9 seeks “to prevent the permanent dedication of publicly owned property to private use.”5 Section 9 of Article VII is virtually unchanged from § 125 of the 1902 Constitution of Virginia.6 According to Professor A.E. Dick Howard’s Commentaries on the Constitution of Virginia, the evil which gave rise to this section was the “fear of legislative willingness to knuckle under to special interests, [and] a belief that municipal councils could not be counted on faithfully to safeguard the public interest when dealing with corporations and utilities.”7 Professor Howard notes that, because of the concern that unscrupulous city councils might dispose of valuable public property at a fraction of its worth to such parties, the section attempts to ensure that private business interests are not favored over the public interests in a city or town’s public property.8 Thus, this section requires “the recorded vote of an extraordinary majority”9 of council members when selling public property. In the case of franchising public property, § 9 places a limit on the time a franchise may tie down city or town property and provides for an advertising and bidding process so that notice is clearly provided to the public prior to the award of the franchise.10

The clear intent of the constitutional provision is to safeguard public property and ensure that it not be appropriated by private self-interests for an extended term to the detriment of the public without due consideration by council members. Accordingly, a 1990 opinion concludes that a city cannot grant an easement in perpetuity to a gas company so that the company could install a natural gas pipeline across city property.11 The grant of such an easement permits the use of city property “in a manner not permitted to the general public.”12 Thus, the easement may not be granted in perpetuity but must be limited to the forty-year term prescribed in Article VII, § 9, and be subject
to the advertising and bid provisions therein. Unlike the circumstances presented in the 1990 opinion, the grant in question furthers the existing public purpose of the property. Additionally, the proposed grant does not benefit private business interests. Importantly, the use of the public property in issue remains the same and indeed benefits the public. Consequently, the provisions of Article VII, § 9, relating to the franchising process, along with the parallel provisions of § 15.2-2100(B), are not applicable to the conservation easement grant in this situation.

The Article VII, § 9 requirement of an affirmative vote of three fourths of the members elected to a city governing body before a city or town may sell any rights "in and to its ... parks ... or other public places" and the parallel provisions of § 15.2-2100(A) are, however, applicable. A grant of an easement "in perpetuity" is a grant of a prescribed use of certain real property for an endless duration. As applied to the instant case, the grant in issue effectively results in a permanent dedication of the public property involved to the current public use of such property. It is my opinion that such a grant is tantamount to a sale of municipal property. Accordingly, the provisions of Article VII, § 9, relating to the recorded three-fourths affirmative vote requirement for the sale of municipal property, as well as those of § 15.2-2100(A), which implement the constitutional provisions, apply to the grant in issue.

In addition, § 15.2-1800(B) requires that a public hearing be held prior to the sale of public property or a subordinate interest in such property.

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1See Va. Code Ann. tit. 10.1, ch. 10.1, §§ 10.1-1009 to 10.1-1016. The Virginia Conservation Easement Act enables certain nonprofit § 501(c)(3) organizations to hold conservation easements in perpetuity. Nothing in this Act, however, addresses the authority of a city to grant an easement, conservation or otherwise.


31990 Va. Att'y Gen. 43, 44.

4Id. (emphasis in italics added) (citing Art. VII, § 9 and § 15.1-307, predecessor statute to § 15.2-2100); see also Stendiag Development Corp. v. Danville, 214 Va. 548, 202 S.E.2d 871 (1974) (holding that Article VII, § 9 vote requirement is not limited to property dedicated to public use and does not proscribe city ordinance requiring three-fourths vote to sell any city property).


8Id.

9Id. at 853.

10Id. at 854.
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12 Id. (quoting Art. VII, § 9).
13 Compare 1994 Op. Va. Att'y Gen. 74 (concluding that Article XI, § 3, which affords special protection to certain natural oyster beds of the Commonwealth, does not allow private nonprofit organization to acquire ownership interest in beds, but does allow such organization to construct artificial reefs as long as purpose of reefs is to serve public interest).
14 See 2 REPORT OF THE PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION, STATE OF VIRGINIA, HELD IN THE CITY OF RICHMOND, JUNE 12, 1901, TO JUNE 26, 1902, at 2033-34 (1906) (discussing constitutional amendment excepting trunk railways from advertising and bid provisions).

**CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT (COUNTY AND CITY OFFICERS) – (MULTIPLE OFFICES).**

**COUNTIES, CITIES AND TOWNS: CERTAIN LOCAL GOVERNMENT OFFICERS – PROHIBITION ON DUAL OFFICE HOLDING.**

Office of commissioner of revenue is not incompatible with commissioner's service as trustee for nonprofit hospital or as member of local transportation commission. Commissioner's first duty is to his office and proper performance of his duties. Such officeholding, without compensation, is not prohibited.

THE HONORABLE JOHN P. GRZEJKA
COMMISSIONER OF THE REVENUE FOR THE CITY OF MANASSAS
APRIL 12, 2000

You ask whether a commissioner of the revenue may serve on the board of trustees of a nonprofit hospital corporation and as a member of a local transportation commission. You relate that no compensation is received for serving in either of these positions. You also relate that the city council appoints the members of the transportation commission.

Article VII, § 4 of the Constitution of Virginia (1971) establishes the office of "commissioner of revenue." Article VII, § 6 contains the Constitution's restriction on the holding of multiple constitutional offices but is not applicable to the positions in issue. Specifically, "Article VII, § 6 ... prohibits the holding of more than one office mentioned in that article at the same time." Thus, a
constitutional officer is prohibited from simultaneously serving as a member of the governing body of the locality\(^2\) or in another constitutional office of such locality.\(^3\)

Section 15.2-1534(A) of the *Code of Virginia* contains the parallel statutory provision to Article VII, § 6, and prohibits the holding of dual offices by certain elected officials, including the office of the commissioner of the revenue. Section 15.2-1534(B) details exceptions to the prohibition, none of which addresses your inquiry. Additionally, other statutes may contain prohibitions of certain dual officeholdings; however, I am unaware of any such statutes relevant to the positions raised here.\(^4\)

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.\(^5\) In my opinion, however, the office of commissioner of the revenue is not incompatible with serving as a trustee for a nonprofit hospital or as a member of a local transportation commission.\(^6\) Of course, it is fundamental that the commissioner's first duty is to his office and the proper performance of his duties.\(^7\) Accordingly, based on the limited facts presented, a commissioner of the revenue may also serve, without compensation, on the board of trustees of a nonprofit hospital corporation or as a member of a local transportation commission.\(^8\)

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\(^{2}\)Id.

\(^{3}\)Note, however, that a county commissioner of the revenue may serve "as appointed commissioner of the revenue of a town located in the county." Va. Code Ann. § 15.2-1534(B)(1).

\(^{4}\)E.g., § 22.1-63(B) (prohibiting "state officer" from holding office of division superintendent of schools); 1976-1977 Op. Va. Att'y Gen. 213 (concluding that, pursuant to § 22-35, predecessor statute to § 22.1-63, commissioner of revenue may not also be school superintendent).


\(^{6}\)Indeed, Article VII, § 6 prohibits a member of a governing body from holding "any office filled by the governing body by election or appointment," except that such member may nevertheless be named to certain boards and commissions, and § 15.2-1535(B)(3) specifically permits a governing body member to be named to a transportation district commission.


\(^{8}\)Note that the State and Local Government Conflict of Interests Act, §§ 2.1-639.1 to 2.1-639.24, is inapplicable because no personal interest in a contract or transaction is at issue. Compare § 2.1-639.2, which specifically provides that a "personal interest in a transaction shall not be deemed to exist where an elected member of a local governing body serves without remuneration as a member of the board of trustees of a not-for-profit entity," provided such member has no personal interest (i.e., a financial benefit or liability) related to the entity.
CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT (DEBT).

COUNTIES, CITIES AND TOWNS: PUBLIC FINANCE ACT - BONDS ISSUED BY COUNTIES – PROVISIONS APPLICABLE TO ALL BONDS.

Local governments are subordinates of Commonwealth, possessing only those powers conferred upon them by General Assembly. General Assembly has not conferred upon counties ability to create corporation. County has no statutory authority to create corporation whose sole authorized purpose is to contract debt on its behalf.

THE HONORABLE HARRY J. PARRISH
MEMBER, HOUSE OF DELEGATES
JANUARY 4, 2000

You ask whether a county may create a corporation with the sole authorized purpose to contract debt on behalf of the county.

Article VII, § 10(b) of the Constitution of Virginia (1971) provides:

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

Article VII, § 10(a) imposes a debt limitation on cities and towns[2] that is not imposed by § 10(b) on counties. Other than the exceptions authorized by Article VII, § 10(b), the issuance of bonds or other obligations by the county must be approved by a majority of the county’s qualified voters. If voter approval of a bond issue is required, a certified copy of the resolution or ordinance adopted by the governing body requesting the referendum on the issuance of the bond must be filed with the circuit court for the jurisdiction.³
The circuit court then will enter an order calling for election on the issuance of bonds. Notice of the election must be published "at least once but not less than ten days before the election in a newspaper published or having general circulation in the [county]." All bond elections are held and conducted in the manner prescribed by law for other elections. The amount of the bond issue on which the vote is to be taken must be stated on the ballot, but there is no requirement that the ballot specify the maximum interest rate which the bonds are to bear.

Section 15.2-2638(B) of the Code of Virginia states that voter approval is not required when a county (1) contracts debt or issues bonds described in Article VII, § 10(a)(1) and (3); (2) issues refunding bonds; and (3) issues bonds, with the consent of the county's school board and governing body, for capital projects for school purposes and sold to the Literary Fund, the Virginia Retirement System, or other state agency prescribed by law, such as the Virginia Public School Authority.

The Commonwealth follows the Dillon Rule of strict construction in that "municipal corporations have only those powers expressly granted, those necessarily or fairly implied therefrom, and those that are essential and indispensable." The powers of county boards of supervisors in the Commonwealth are also limited to those "conferred expressly or by necessary implication." Any doubt as to the existence of a power must be resolved against the locality. Accordingly, because local governments are subordinate creatures of the Commonwealth, they possess only those powers conferred upon them by the General Assembly.

I can find no statute wherein the General Assembly has conferred upon counties the ability to create a corporation. Consequently, I must conclude that a county is not statutorily authorized by the General Assembly to create a corporation whose sole authorized purpose is to contract debt on behalf of the county.

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1Article VII, § 10(a) provides:
"No city or town shall issue any bonds or other interest-bearing obligations which, including existing indebtedness, shall at any time exceed ten per centum of the assessed valuation of the real estate in the city or town subject to taxation, as shown by the last preceding assessment for taxes. In determining the limitation for a city or town there shall not be included the following classes of indebtedness:
"(1) Certificates of indebtedness, revenue bonds, or other obligations issued in anticipation of the collection of the revenues of such city or town for the then current year; provided that such certificates, bonds, or other obligations mature within one year from the date of their issue, be not past due, and do not exceed the revenue for such year."
"(3) Bonds of a city or town the principal and interest on which are payable exclusively from the revenues and receipts of a water system or other specific undertaking or undertakings from which the city or town may derive a revenue or secured, solely or together with such revenues, by contributions of other units of government."

3See supra note 1.
4VA. CODE ANN. § 15.2-2610.
5Id.
6Id.
7See Williamson v. Graham, 113 Va. 449, 74 S.E. 393 (1912).
9See supra note 1.
10See art. VII, § 10(b).
12Id. at 572, 232 S.E.2d at 39.
14See Gordon v. Fairfax County, 207 Va. 827, 153 S.E.2d 270 (1967) (county board of supervisors did not abuse its discretion in voting to lend money to airport authority; power was expressly implied from act of legislature allowing local governing body to lend money to any authority created by such governing body).

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT (MULTIPLE OFFICES).

ADMINISTRATION OF GOVERNMENT GENERALLY: STATE AND LOCAL GOVERNMENT CONFLICT.

COUNTIES, CITIES AND TOWNS: CERTAIN LOCAL GOVERNMENT OFFICERS.

Eligibility of individual to serve on town council depends on whether his position in town water department constitutes public office or whether he is employee of town. If individual's position constitutes office of town, individual is disqualified from serving on town council. If position is not office of town and individual is elected to town council, Act would not prohibit individual's continued employment in town water department, provided employment began before he became member of town council.

MR. JEFFREY W. PARKER
TOWN ATTORNEY FOR THE TOWN OF REMINGTON
MAY 9, 2000

You ask whether an individual who is employed by the water department in the Town of Remington may serve on the town council.
You advise that the subject individual in the town water department has filed a petition for election to the town council for the Town of Remington. You report that the town council makes all decisions regarding employment of town personnel, and directly employs all such individuals. The individual's position in the water department is full time and consists mainly of manual labor. Finally, you advise that there is no written contract or set term of employment.

It is your opinion that Article VII, § 6 of the Constitution of Virginia (1971) disqualifies the individual from continuing his employment with the water department of the Town of Remington if he is elected to town council. You believe that Article VII, § 6 must be literally construed, and that such literal construction results in the employee's disqualification.

Article VII, § 6 provides, in part:

No member of a governing body shall be eligible, during the term of office for which he was elected or appointed, to hold any office filled by the governing body by election or appointment, except that a member of a governing body may be named a member of such other boards, commissions, and bodies as may be permitted by general law and except that a member of a governing body may be elected or appointed to fill a vacancy in the office of mayor or board chairman if permitted by general law or special act.

Under the restriction in § 6, a member of an elected town council may not be appointed, during his tenure as councilman, to any office filled by a town council, unless such appointment is expressly authorized by law. The question for consideration, then, is whether the individual's position in the town water department constitutes an "office" of the Town of Remington.

A 1978 opinion of the Attorney General lists the criteria to be considered in determining whether a position constitutes an "office":

[T]o constitute a public office, the position must be created by the Constitution or statutes. It is a position filled by election or appointment, with a designation or title, and duties concerning the public, which are assigned by law. A frequent characteristic of such an office is a fixed term of office.
Your request does not indicate whether the individual’s position in the town water department is a public office. The charter for the Town of Remington provides little additional information in this regard. Section 6-1 of the charter permits the town council to appoint such officers of the town as it deems necessary:

Such officers may include, but shall not be limited to Town Attorney, Town Treasurer, Town Assessor, Town Sheriff, Building Inspector and Zoning Administrator. The enumeration of officers in this section shall not be construed to require the appointment of any such officer herein named. Officers appointed by the Town Council shall perform such duties as may be specified in this Charter or by the Town Council.

Section 6-3 of the charter provides that officers appointed by the town council “shall be appointed for a term of two years, unless provided by this Charter or by ordinance of the Town Council.”

“[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction.” Statutes should not be construed to frustrate their purpose. In addition, the use of the word “shall” in a statute generally implies that its terms are intended to be mandatory, rather than permissive or directive. When a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute.

I am unable to conclude that the subject individual’s position in the water department constitutes an “office,” because your request provides no information from which to make such a determination. Should it be determined that the individual’s position in the water department is an “office” of the town, it is my opinion that Article VII, § 6 would disqualify the individual from serving on the town council.

I note from your opinion request, however, that the individual is “employed” by the town. Consequently, it is necessary to determine whether an employer/employee relationship exists between the town and the subject individual. Whether a particular individual is an “employee” of a governmental agency depends on several factors, including whether the individual has a contract of employment, express or implied; whether the individual receives a salary for services rendered; whether the services performed by the individual arise in the usual course of the trade, business or occupation of the governmental entity; and whether the entity exercises control over the manner in which the individual performs the services.
Title 15.2 of the Code of Virginia addresses aspects of the employer/employee relationship in local government. Specifically § 15.2-1500(A) provides that “[e]very locality shall provide for all the governmental functions of the locality, including, without limitation, ... the employment of ... employees needed to carry out the functions of government.” Because the statute does not define the terms “employment” and “employee,” these terms must be given their common, ordinary meanings. “Employment” generally is defined as “activity in which one engages or is employed”; “an instance of such activity”; “the act of employing: the state of being employed.” “Employee” is “one employed by another usu[ally] for wages or salary and in a position below the executive level.” Furthermore, the verb “employ” generally means “to use or engage the services of”; “to provide with a job that pays wages or a salary.”

It is necessary to consider the State and Local Government Conflict of Interests Act (the “Act”) in determining whether an individual is an employee or an officer of a local governmental agency. Section 2.1-639.7(A) of the Act provides that “[n]o person elected or appointed as a member of the governing body of a ... town shall have a personal interest in (i) any contract with his governing body.” Section 2.1-639.2 of the Act defines “personal interest” as “a financial benefit or liability accruing to an officer or employee or to a member of his immediate family.” A “personal interest in a contract” is defined as “a personal interest which an officer or employee has in a contract with a governmental agency, whether due to his being a party to the contract or due to a personal interest in a business which is a party to the contract.” Finally, § 2.1-639.2 defines “contract” as

any agreement to which a governmental agency is a party, or any agreement on behalf of a governmental agency which involves the payment of money appropriated by the General Assembly or political subdivision, whether or not such agreement is executed in the name of the Commonwealth, or some political subdivision thereof. “Contract” includes a subcon-tract only when the contract of which it is a part is with the officer’s or employee’s own governmental agency.

Should the individual be elected as an officer of a local governing body subject to the Act’s prohibitions and restrictions, the individual would have a “personal interest” in his contract of employment with the Town of Remington. For purposes of the Act, a “personal interest in a contract” with a governmental agency results from an officer being a party to the contract. Clearly, the individual is a party to his contract of employment and, therefore, would have a
prohibited personal interest in the contract with the town unless one of the Act's exceptions applies.

Section 2.1-639.7(B)(1) exempts from the contract prohibition in § 2.1-639.7(A), "[a] member's personal interest in a contract of employment provided ... (ii) the employment first began prior to the member becoming a member of the governing body." You advise that the individual is employed by the water department in the Town of Remington, and that he has filed a petition to seek election to town council. Therefore, this exception clearly applies to the subject individual's current employment.

In summary, therefore, if it is determined that the individual's position in the water department constitutes an office of the town, it is my opinion that Article VII, § 6 of the Constitution disqualifies the member from serving on the town council. If the individual's position in the water department is determined not to constitute an office of the town and he is elected to the town council, it is my opinion that § 2.1-639.7(B)(1)(ii) would allow the individual to continue his employment in the water department of the Town of Remington.

1Any request by a town attorney for an opinion from the Attorney General "shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions." VA. CODE ANN. § 2.1-118.


While your inquiry is general in nature, I shall assume for the purposes of this opinion that your inquiry arises from the recent settlement of tobacco litigation. A plan is proposed to "securitize" the stream of payments due under a settlement agreement filed by the Commonwealth in the Circuit Court of the City of Richmond against major cigarette manufacturers. "Securitizations" are commercial transactions that routinely occur in private business dealings. Securitization typically is used by financial institutions and involves the sale of illiquid financial assets, such as mortgages, automobile loan receivables, or credit card receivables, to a special purpose, independent corporation ("SPC"). SPCs sell securities in public financial markets in order to obtain
the funds to pay the purchase price of the financial assets. The SPC securities are payable solely from the pool of financial assets purchased for that purpose. In addition, SPC securities are nonrecourse to the seller. It is my understanding that, under general accounting principles, such transactions are characterized as "sales."

Under the Innovative Progress plan, the Governor may sell up to forty percent of the tobacco settlement payments to a public body corporate organized and operated independently from the Commonwealth (the "nonstock corporation"). The nonstock corporation would issue bonds to raise the monies necessary to buy the Commonwealth's right and title to the authorized portion of the stream of revenue contemplated by the settlement. Bondholders would be paid from the revenue stream the nonstock corporation purchases from the Commonwealth. All bonds issued by the nonstock corporation would be nonrecourse to the Commonwealth and would expressly indicate that they were not backed by the Commonwealth's full faith and credit. The purchase price received by the Commonwealth from such sale would be deposited into the general fund to be spent only pursuant to the ordinary appropriations process. As discussed below, it is my opinion that the Innovative Progress plan is distinguishable from the type of fact situation contemplated by your opinion request.

To avoid potential constitutional issues raised by your question, I believe that any proposal to securitize the tobacco settlement revenues must meet three concerns: (1) the rights to the revenue stream must constitute an asset of the Commonwealth, (2) the transfer must be a true sale, and (3) the purchasing entity must be independent of the Commonwealth. I believe those requirements can be met in a plan such as that proposed by the Governor.

First, the payments the tobacco companies owe the Commonwealth under the settlement must qualify as assets of the Commonwealth. Indeed, while Article X, § 7 of the Constitution of Virginia (1971) requires that "[a]ll ... revenues of the Commonwealth shall be ... paid into the State treasury," the Commonwealth has broad authority to sell its assets. The term "asset" generally is defined to mean "entries on a balance sheet showing the items of property owned, including ... accounts receivable." The payments the tobacco companies owe the Commonwealth are analogous to accounts receivable and clearly are intangible rights of the type that qualify as assets.

Second, the nonstock corporation's acquisition of the Commonwealth's right to receive payments from the tobacco companies can be structured as a true sale. A "sale" is the transfer of property, the title to property or the rights to
property for a valuable consideration. Under common securitization principles, the Commonwealth will transfer to the nonstock corporation its rights to the settlement revenue stream for its present cash value. Moreover, under such a plan neither the nonstock corporation nor the bondholders will have recourse against the Commonwealth should the tobacco companies fail to make the required payments. Under general accounting principles, a nonrecourse feature of the transfer supports its characterization as a true sale.

Finally, the plan contemplates that the nonstock corporation will be an independent entity distinct from the Commonwealth. A determination of whether an organization is truly an entity separate and independent of the Commonwealth rests upon the peculiar features and characteristics of the body being considered and, ultimately, depends upon the statutory provisions creating the entity in question. In the context of civil rights lawsuits, whether a private corporation's actions are fairly attributable to a state depends on four factors:

1) the extent and nature of public funding to the institution,
2) the extent and nature of regulation on the institution,
3) whether the institution's activity constitutes a public function in the "exclusive prerogative" of the state, and
4) whether there is a "symbiotic relationship" between the institution and the state.

These criteria can easily be addressed under a plan such as the Innovative Progress plan. Presumably, there will be no public funding or regulation of the nonstock corporation. Moreover, the corporate activities—selling private bonds and purchasing financial assets as investments—are not exclusively governmental undertakings. Indeed, as mentioned above, private businesses regularly securitize assets. Nor does the Innovative Progress plan appear to contemplate a symbiotic relationship. Indeed, the sale will be arm's length, independent, and without recourse. Thus, I find no reason to believe that the nonstock corporation cannot be organized and operated independent of the Commonwealth.

The General Assembly's powers are broad and plenary. It may enact any law not prohibited by the United States or Virginia Constitution. Moreover, an act of the General Assembly is presumed to be constitutional, and every reasonable doubt must be resolved in favor of the act's constitutionality. Accordingly, I see no reason why legislation could not be fashioned to implement the Innovative Progress plan without violating Article X, § 7 of the Virginia Constitution.
REPORT OF THE ATTORNEY GENERAL

1See “Innovative Progress: Improving Transportation in Virginia” (Aug. 31, 1999) [hereinafter Innovative Progress plan].

2“Securitize” means “[t]o convert (assets) into negotiable securities for resale in the financial market, allowing the issuing financial institution to remove assets from its books, to improve its capital ratio and liquidity while making new loans with the security proceeds.” BLACK’S LAW DICTIONARY 1358 (7th ed. 1999).


4See 1 JASON H.P. KRAVITZ, SECURITIZATION OF FINANCIAL ASSETS §§ 1.01-1.02 (Aspen Law & Business 2d ed. Supp. 2000). The statements in this opinion concerning the process of securitization are derived from this treatise.

5The term “nonrecourse” relates to “an obligation that can be satisfied only out of the collateral securing the obligation and not out of the debtor’s other assets.” BLACK’S LAW DICTIONARY, supra, at 1080.

6See Innovative Progress plan, supra note 1, at 3, 5, 12, 13; see also 1999 Va. Acts: chs. 963, 880, cl. 2, at 2507, 2514, 1665, 1673, respectively (requiring that 40% of funds received by Commonwealth from Master Settlement Agreement be deposited in general fund).

7Because your request does not refer to any specific proposed legislation and because all proposed legislation is subject to modification, I offer no comments on any bills proposed during the 2000 Session of the General Assembly.

8See, e.g., VA. CODE ANN. §§ 2.1-457.2, 2.1-457.3 (disposition of surplus materials and proceeds from sale or recycling of such materials); § 2.1-504.3 (conveyance and transfers of real property by state agencies); § 2.1-512 (sale or lease of surplus property).

9BLACK’S LAW DICTIONARY, supra, at 112.

10See Faulkner v. Town of So. Boston, 141 Va. 517, 520, 127 S.E. 380, 381 (1925); see also BLACK’S LAW DICTIONARY, supra, at 1337.


COUNTIES, CITIES AND TOWNS: CERTAIN LOCAL GOVERNMENT OFFICERS.

City of Hopewell may not hire employees on temporary basis, pursuant to written contracts, rather than hire such employees for indefinite period of time.
You ask whether the City of Hopewell may hire employees on a temporary basis, pursuant to written contracts, rather than hire such employees for an indefinite period of time.

It is your opinion that § 15.2-1503 of the Code of Virginia permits the City of Hopewell to hire an employee on a temporary basis for a term not to exceed one year. You note that the charter for the City of Hopewell vests authority in the city to exercise all powers conferred upon cities. You, therefore, conclude that the language in § 15.2-1503(A), which permits localities to hire employees "for temporary service not to exceed one year or except as otherwise provided by general law or special act," is applicable to your request.

Title 15.2 contains several provisions addressing aspects of the employer/employee relationship in local government. Section 15.2-1500(A) specifically provides that "[e]very locality shall provide for all the governmental functions of the locality, including, without limitation... the employment of... employees needed to carry out the functions of government." Section 15.2-1503(A) provides that employees hired by a locality "shall be without definite term, unless for temporary services not to exceed one year or except as otherwise provided by general law or special act."

Chapter V of the Hopewell City Charter pertains to the position of city manager. Section 2 provides, in part:

The city manager shall appoint for an indefinite term and remove, subject to the provisions of this charter and except as herein provided, the heads of all departments and all other officers, (except executive officers), and employees of the city.

"[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction." Statutes should not be construed to frustrate their purpose. In addition, the use of the word "shall" in a statute generally implies that its terms are intended to be mandatory, rather than permissive or directive. A fundamental rule of statutory construction is that statutes which relate to the same subject matter should, to the extent possible, be read together, the object being to give effect to the legislative intent of each statute. An equally fundamental rule of construction is that a specific or special statute supersedes a general statute insofar as there
is a conflict. Finally, when a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute.

Chapter V, § 2 of the Hopewell charter pertains specifically to the hiring of employees by the City of Hopewell. Section 2 requires the city manager to appoint employees "for an indefinite term." A charter provision that establishes the powers of a local government is special legislation authorized by Article VII, § 2 of the Constitution of Virginia (1971), and will prevail over general law, absent an indication of legislative intent to the contrary, in the event of a conflict between the two. Words used in a statute are to be given their common meanings unless a contrary legislative intent is manifest. The term "indefinite" generally means "having no exact limits: indeterminate in extent or amount: not clearly fixed ...: not narrowly confined or restricted ...: continuing with no immediate end being fixed: UNLIMITED."

Applying the required rules of statutory construction and the above definition to this inquiry, I must conclude that the City of Hopewell may not hire employees on a temporary basis, pursuant to written contracts, rather than hire such employees for an indefinite period of time. Section 15.2-1503(A) is the general statute pertaining to the hiring of temporary employees by all local governments within the Commonwealth. The specific provisions of the Hopewell charter supersede the general provisions of § 15.2-1503(A).

Accordingly, I must conclude that the City of Hopewell is not authorized to fill a city position with a temporary employee.

1Section 2.1-118 requires that any request by a city attorney for an opinion from the Attorney General "shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions."

2"The city shall have and may exercise all powers which are now or may here-after be conferred upon or delegated to cities under the constitution and law of the Commonwealth and all other powers pertinent to the conduct of the city government ...." 1950 Va. Acts ch. 431, at 828, 830 (quoting ch. II, § 1).

3Id. at 837.


8See City of South Norfolk v. Dail, 187 Va. 495, 499, 47 S.E.2d 405, 406 (1948); Commonwealth v. Sanderson, 170 Va. at 40, 195 S.E. at 519; Commonwealth v. R. & P. R. R. Co.,
81 Va. (6 Hansbrough) 355 (1886); see also City of Roanoke v. Land, 137 Va. 89, 119 S.E. 59 (1923) (local ordinance adopted under general charter powers that conflicts with specific statute empowering court to grant or refuse pawnbroker license to applicant is void); Op. Va. Att'y Gen.: 1987-1988 at 276, 277; 1985-1986 at 65, 68.


101950 Va. Acts ch. 431, supra note 2, at 837 (emphasis added).

11"The General Assembly may also provide by special act for the ... powers of any county, city, town, or regional government ...." Art. VII, § 2.


15You ask a second question regarding whether such hiring of temporary employees must be made open for application from all interested applicants. Since I conclude that the city may not hire employees on a temporary basis, pursuant to a written contract, it is unnecessary to respond to your second inquiry.

COUNTIES, CITIES AND TOWNS: FRANCHISES, PUBLIC PROPERTY, UTILITIES.

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT — EDUCATION.

Buildings owned and used as schools by City of Hopewell are "public places" that may not be sold without recorded three-fourths affirmative vote of all members elected to city council.

MR. EDWIN N. WILMOT
CITY ATTORNEY FOR THE CITY OF HOPEWELL
DECEMBER 19, 2000

You ask whether Article VII, § 9 of the Constitution of Virginia (1971) and § 15.2-2100(A) of the Code of Virginia, which require a three-fourths vote of all members elected to the governing body to sell the rights to public property, apply to the sale of two buildings owned by the City of Hopewell.

You advise that the City of Hopewell is contemplating selling two buildings that previously have been used as school buildings. You relate that one of the buildings is vacant and has not been used for ten years. The other building is being used as an elementary school, but will become vacant upon completion of construction of a new elementary school. The current school building is also used as a polling place, as a meeting place for religious services, and as a place for other public functions. You state that, when both buildings no longer are used as schools and are vacant, the school board will relinquish
both buildings to the city. Therefore, you ask how many of the seven-member city council are required to approve the sale of the buildings to a private party.

You advise that your research reveals no cases of the Supreme Court of Virginia or opinions of the Attorney General indicating whether a building used as a school constitutes a “public place” within the meaning of Article VII, § 9 and § 15.2-2100(A). Consequently, you conclude that it is not clear whether a three-fourths vote of the city council is required to approve the sale of these particular buildings.¹

Article VII, § 9 and § 15.2-2100 impose two distinct restrictions on cities and towns. First, property of certain enumerated classes that has been dedicated to public use may not be sold without “a recorded affirmative vote of three fourths of all members elected”⁵ to the municipal council. A 1983 opinion of the Attorney General concludes that this requirement applies only to public places devoted to use by the public at large or by the municipality itself in carrying out its governmental functions.³ Second, the grant of any franchise, lease or right to use any of the enumerated classes of public property “or any other public property or easement of any description in any manner not permitted to the general public” is limited to forty years in duration.⁴

Prior opinions of the Attorney General repeatedly have noted that Article VII, § 9 seeks “to prevent ‘the permanent dedication of publicly owned property to private use.’”⁵ Section 9 of Article VII is virtually unchanged from § 125 of the 1902 Constitution of Virginia.⁶ According to Professor A.E. Dick Howard’s Commentaries on the Constitution of Virginia, the concern which gave rise to this section was the “fear of legislative willingness to knuckle under to special interests, [and] a belief that municipal councils could not be counted on faithfully to safeguard the public interest when dealing with corporations and utilities.”⁷ Professor Howard notes that, because of the concern that unscrupulous city councils might dispose of valuable public property at a fraction of its worth to such parties, the section attempts to ensure that private business interests are not favored over the public interests in a city or town’s public property.⁸ Thus, this section requires “the recorded vote of an extraordinary majority”⁹ of council members when selling public property. In the case of franchising public property, § 9 places a limit on the time a franchise may tie down city or town property and provides for an advertising and bidding process so that notice is clearly provided to the public prior to the award of the franchise.¹⁰
The 1983 opinion considers whether the predecessor statute to § 15.2-2100(A) applies to properties purchased and sold by a city in administering its housing program. The opinion notes that the term "public places" is not defined by the General Assembly in considering the applicability of the three-fourths vote requirement. Therefore, the following definition of "public place" has been adopted:

"A place to which the general public has a right to resort; not necessarily a place devoted solely to the uses of the public, but a place which is in point of fact public rather than private, a place visited by many persons and usually accessible to the neighboring public (e.g., a park or public beach). Also, a place in which the public has an interest as affecting the safety, health, morals, and welfare of the community. A place exposed to the public, and where the public gather together or pass to and fro."

A 1988 opinion responds to an inquiry whether, after two of four members present at a council meeting have disqualified themselves, the remaining two members constitute a legal quorum to conduct the business of transferring town real property to the fire department. The opinion notes that the "super-majority requirement" of § 15.2-2100 "does not apply to all property owned by a city or town. Rather, the requirements of [§ 15.2-2100] apply only to the sale of property dedicated to public use." Finally, a 1989 opinion notes that "municipal property that has been dedicated to public use may not be sold without a three-fourths vote of all members elected to a municipal council." The opinion relies on the 1983 opinion in noting that the requirement "applies only to public places devoted to use by the public at large or by the municipality itself in carrying out its governmental functions."

The General Assembly has not amended § 15.2-2100(A) in any manner to indicate that it disagrees with the definition of the term "public place" adopted by the Attorney General. The General Assembly is presumed to have had knowledge of the Attorney General's published interpretations of a statute, and its failure to make corrective amendments evinces legislative acquiescence in the interpretation. I must conclude that the prior opinions correctly state the definition to be used in responding to your inquiry.

The school buildings you describe clearly are public, rather than private, places. Further, the buildings clearly are devoted to use by the city in carrying out its governmental function of providing a free public education. In addition, the public has a clear interest in such buildings that affects the safety,
health, morals, and welfare of the community. Consequently, it is my opinion that the specific buildings in the City of Hopewell that you describe as being used as school buildings clearly are "public places" as that term is used in Article VII, § 9 and § 15.2-2100(A).

Consequently, it is also my opinion that Article VII, § 9 and § 15.2-2100(A), which require a three-fourths vote of all members elected to the governing body to sell the rights to public property, apply to the sale of the two described buildings owned by the City of Hopewell.

1Section 2.1-118 requires that any request by a city attorney for an opinion from the Attorney General "shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions."

2Art. VII, § 9; § 15.2-2100(A).


4The quoted portion implements the first paragraph of Article VII, § 9, which provides: "No rights of a city or town in and to its ... public places ... shall be sold except by an ordinance or resolution passed by a recorded affirmative vote of three fourths of all members elected to the governing body." See § 15.2-2100 (enacting parallel statutory provisions); see also Stendig Development Corp. v. Danville, 214 Va. 548, 202 S.E.2d 871 (1974); 1989 Op. Va. Att'y Gen. 125 (concluding that constitutional limits are applicable to city's lease of property to state agency).


8Id.

9Id. at 853.

10Id. at 854.


12Id.

13Id. at 32 n.6 (quoting BLACK'S LAW DICTIONARY 1107 (5th ed. 1979)).


15Id. at 231 n.3 (citing former § 15.1-307); see Art. VII, § 9; see also Stendig Development Corp. v. Danville, 214 Va. at 550, 202 S.E.2d at 873; 1983-1984 Op. Va. Att'y Gen., supra note 3, at 31.


17Id.


19Article VIII, § 1 of the Virginia Constitution mandates that all children of the Commonwealth be provided a "free" public education.
COUNTIES, CITIES AND TOWNS: GOVERNING BODIES OF LOCALITIES.

Louisa County Board of Supervisors may set maximum annual compensation after January 1 and before July 1 in years 2001 and 2003 for staggered-term board members elected or reelected on November 8, 2001, and November 4, 2003; to become effective after January 1 in years 2002 and 2004, respectively.

MR. PATRICK J. MORGAN
COUNTY ATTORNEY FOR LOUISA COUNTY
OCTOBER 13, 2000

You ask when the Louisa County Board of Supervisors may increase the annual compensation for board members, considering the recent amendment to § 15.2-1414.2 of the Code of Virginia.¹

You relate that the Louisa County Board of Supervisors consists of seven board members, three of whom will be elected or reelected on November 8, 2001, and four to be elected or reelected on November 4, 2003. You believe that any consideration for an increase in compensation for the board must occur between January 1 and June 30 in a year in which at least forty percent of the members are to be elected. You conclude that, based on the number of board members, at least forty percent will be elected in any year that an election of the board is held. Consequently, it is your opinion² that the earliest the board of supervisors may consider an increase in compensation is January 2001. The date such increase would become effective is January 2002.

The first paragraph of § 15.2-1414.2 provides:

The annual compensation to be allowed each member of the board of supervisors of a county shall be determined by the board of supervisors of such county but such compensation shall not be more than a maximum determined in the following manner. Prior to July 1 of the year in which members of the board of supervisors are to be elected or, if the board is elected for staggered terms, of any year in which at least forty percent of the members of the board are to be elected, the current board, by a recorded vote of a majority present, shall set a maximum annual compensation which will become effective as of January 1 of the next year. [Emphasis added.]

The use of the word “shall” in a statute generally implies that the General Assembly intends its terms to be mandatory, rather than permissive or directive.³
You advise that the county board is elected for staggered terms. Consequently, § 15.2-1414.2 permits the supervisors to set a maximum annual compensation "[p]rior to July 1 of the year in which ... at least forty percent of the members of the board are to be elected." Furthermore, such increase in annual compensation for board members will not "become effective [until] January 1 of the next year." 

Several rules of statutory construction apply to your request. 

1. The plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction.

2. In addition, statutes should not be construed to frustrate their purpose.

3. "Take the words as written and give them their plain meaning." Finally, when a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute.

You advise that three board members, which is more than forty percent of the board, will be elected or reelected on November 8, 2001, and four members will be elected or reelected on November 4, 2003. Therefore, it is my opinion that § 15.2-1414.2 permits the Louisa County Board of Supervisors to set a maximum annual compensation after January 1, 2001, and before July 1, 2001. In addition, the board may also set a maximum annual compensation after January 1, 2003, and before July 1, 2003. Furthermore, I am of the opinion that such annual compensation increases would become effective after January 1, 2002, and 2004, respectively.

2Any request by a county attorney for an opinion from the Attorney General "shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions." Section 2.1-118.
4Section 15.2-1414.2.
COUNTIES, CITIES AND TOWNS: JOINT ACTIONS BY LOCALITIES – JOINT EXERCISE OF POWERS.

TAXATION: REAL PROPERTY TAX – WHO PERFORMS REASSESSMENT/ASSESSMENT.

Two or more counties may establish joint department of real estate assessment, unless express statutory procedure provides otherwise, so long as each county possesses independent authority to establish such department.

THE HONORABLE HARVEY B. MORGAN
MEMBER, HOUSE OF DELEGATES
AUGUST 31, 2000

You ask whether, pursuant to § 15.2-1300 of the Code of Virginia, two or more counties may establish a joint department of real estate assessment.

A 1984 opinion of the Attorney General concludes that a county board of supervisors may, by ordinance, establish a department of real estate assessment.¹ Similarly, another 1984 opinion concludes that certain functions related to real estate assessment may be assigned to a locality's department of real estate assessment by an appropriate ordinance.²

Section 15.2-1300(A) authorizes the joint exercise of "[a]ny power, privilege or authority exercised or capable of exercise by any political subdivision" with that of any other political subdivision, "except where an express statutory procedure is otherwise provided for the joint exercise." Section 15.2-1300(B) provides that "[a]ny two or more political subdivisions may enter into agreements with one another for joint action pursuant to the provisions of this section."

The purpose of § 15.2-1300 is to allow a more efficient and economical exercise of existing powers rather than grant additional substantive authority or modify existing duties.³ Thus, the power sought to be exercised in each instance must exist in each of the political subdivisions before the power may be exercised jointly.⁴ Therefore, so long as each political subdivision has the authority to exercise certain powers independently, they may jointly conduct such activities.⁵

Accordingly, it is my opinion that, unless express statutory procedure provides otherwise, § 15.2-1300 allows two or more counties to establish a joint department of real estate assessment, so long as each county possesses independent authority to establish such a department.⁶

COUNTIES, CITIES AND TOWNS: LOCAL CONSTITUTIONAL OFFICERS, ETC.

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

Augusta County sheriff may not serve persons who reside in Staunton or Waynesboro with warrants for crimes committed in county. County deputy sheriffs may question individuals in Staunton or Waynesboro regarding criminal offenses committed in county; may not arrest for Class 1 misdemeanors committed in their presence within city limits.

THE HONORABLE R. STEVEN LANDES
MEMBER, HOUSE OF DELEGATES
MARCH 16, 2000

You inquire regarding the authority of the Augusta County sheriff to investigate and arrest for criminal offenses committed in the county by individuals residing within the city limits of Staunton or Waynesboro. You relate that the sheriff is concerned that the process of forwarding criminal warrants to authorities in Staunton or Waynesboro would delay the county's criminal justice system, by allowing additional time for the individuals to commit other offenses or evade arrest.

A sheriff is an independent constitutional officer whose duties "shall be prescribed by general law or special act." A sheriff may appoint one or more deputy sheriffs to discharge the duties of his office. A 1980 opinion of the Attorney General notes that, in the absence of a statute providing otherwise, the authority of a sheriff is coextensive with his county. The Supreme Court of Virginia has commented that, as a general rule, the duties of a sheriff and his deputies are regulated and defined by statute. The Court has also stated:

The sheriff is an officer of the court subject to its orders and directions. He is also a conservator of the peace and charged with the enforcement of all criminal laws within his jurisdiction. It is his duty, as well as the duty of the other police officers of the county and city, to investigate all violations of law and to serve criminal warrants.
You first ask whether Augusta County deputy sheriffs may serve residents of Staunton or Waynesboro with warrants for crimes committed in the county.

In prior opinions interpreting former § 15.1-79 of the Code of Virginia, the Attorney General concludes that the sheriff and his deputies possess the required statutory authority to execute criminal process in a city included within the boundaries of the sheriff's county. In 1997, however, the General Assembly repealed Title 15.1 and recodified the laws pertaining to counties, cities and towns within Title 15.2. Prior to its repeal, § 15.1-79 specified that "[e]very officer to whom any ... warrant ... may be lawfully directed, ... may execute the same in any" city that is contiguous to such officer's jurisdiction. The 1997 Session of the General Assembly, thus, has repealed the express authorization for county sheriffs to execute warrants in any city that is contiguous to the county and has not enacted within Title 15.2 any comparable provision authorizing such service. A rule of statutory construction requires the presumption that, in amending or enacting statutes, the General Assembly has full knowledge of existing law and interpretations thereof. It is presumed further that the legislature acted purposefully with the intent to change existing law.

Consequently, I must conclude that, under current law, the Augusta County sheriff may not serve persons who reside in Staunton or Waynesboro with warrants for crimes committed in the county.

You next ask whether Augusta County deputy sheriffs may conduct investigations in Staunton or Waynesboro pertaining to criminal offenses committed in Augusta County. Your inquiry does not detail specific facts upon which a precise conclusion may be drawn. For the purposes of this opinion, therefore, I shall assume that your inquiry relates exclusively to the questioning by Augusta County deputy sheriffs of private citizens residing in Staunton or Waynesboro regarding criminal offenses committed in the county.

The principal responsibility for investigating and prosecuting violations of criminal law is vested in the local Commonwealth's attorney and local law enforcement officials. Law enforcement officials, therefore, typically perform all of the activities that comprise an investigation of criminal violations, for the specific purpose of bringing criminal prosecutions. The courts of the Commonwealth recognize that the role of an investigating officer acting as an "arm of the prosecution" is to impute knowledge of all facts regarding a criminal case to the prosecutor for purposes of the discovery requirements in criminal prosecutions. "[C]onstructive knowledge is attributed to the prosecutor where information is in the possession of the [local law enforcement officer],
so long as the officer is not a law enforcement official of a different jurisdiction." Therefore, "information known to the police is information within the Commonwealth's knowledge." Additionally, "[t]he Commonwealth is charged with the responsibility to interview all government personnel involved in a case in order to comply with its discovery obligations."

Generally, in the absence of a statute providing otherwise, the authority of a sheriff is coextensive with his county. In a 1978 opinion, the Attorney General concludes that, "as a general rule a county law enforcement officer has no authority to make an arrest outside his jurisdiction, except in his status as a private citizen to arrest for a felony, affray or breach of the peace." I can find no statute that directly addresses your inquiry. It is, however, the duty of the sheriff "to investigate all violations of law." Such an investigation necessarily includes the systematic inquiry of individuals to determine the identity of potential witnesses. Private citizens may also similarly question individuals regarding potential violations of the law.

Consequently, I must conclude that Augusta County deputy sheriffs may question individuals in Staunton or Waynesboro regarding criminal offenses committed in the county.

Your final question is whether Augusta County deputy sheriffs may arrest for Class I misdemeanors committed in their presence within the city limits of Staunton or Waynesboro.

Prior opinions of the Attorney General conclude that a county deputy sheriff has no statutory authority to arrest for a misdemeanor committed in his presence within the boundaries of a city. Further, a county law enforcement officer has no authority to make an arrest outside his jurisdiction. The General Assembly has enacted no statute that alters the conclusions of these opinions. Since the authority of a sheriff is coextensive with his county, and the General Assembly has enacted no statute providing otherwise, an Augusta County deputy sheriff has no law enforcement authority in Staunton or Waynesboro. With the exception of certain specific situations, which are not provided in your request, the status of the county deputy sheriffs in these cities is that of a private citizen. A 1978 opinion concludes that, as a general proposition, a private citizen may only effect an arrest for felonies, affrays or breaches of the peace committed in his presence.

Consequently, under the facts presented in your request, I conclude that Augusta County deputy sheriffs may not arrest for Class I misdemeanors committed in their presence within the city limits of Staunton or Waynesboro.
Staunton and Waynesboro are independent cities located within Augusta County.

VA. CONST. art. VII, § 4 (1971); see also Va. Code Ann. § 15.2-1600 (requiring counties and cities to elect sheriffs).

See § 15.2-1603.


Commonwealth v. Malbon, 195 Va. 368, 371, 78 S.E.2d 683, 686 (1953). A county sheriff, generally speaking, also has the following duties within his county: (a) enforcement of county ordinances and state laws (see id. at 368, 78 S.E.2d at 683); (b) service of process for the courts within his county (see, e.g., §§ 16.1-79, 16.1-99); (c) maintenance of order in the courtroom and assistance of the court generally (see, e.g., § 53.1-120; Near v Commonwealth, 202 Va. 20, 30, 116 S.E.2d 85, 92 (1960)); and (d) operation of the jail (see, e.g., Watts's Case, 99 Va. 872, 877, 39 S.E. 706, 707 (1901)).


Section 8.01-295 authorizes the sheriff to "execute such process throughout the political subdivision in which he serves and in any contiguous county or city." (Emphasis added.) The process to which § 8.01-295 refers, however, is process received by the sheriff from the clerk's office, along with "other papers to be served by him." Section 8.01-294; see 1983-1984 Op. Va. Att'y Gen. 116, 117 (term "process" contemplates procedures by which legal action or suit in equity commences, and through which courts acquire lawful jurisdiction over parties); see also 1996 Op. Va. Att'y Gen. 113, 113 ($ 19.2-76 clearly places geographical limitation on officer's authority to execute warrant by providing that officer may execute warrant only "within his jurisdiction").

See Richmond v. Sutherland, 114 Va. 688, 77 S.E. 470 (1913); 1995 Op. Va. Att'y Gen. 130, 131 (General Assembly, in amending statute, had full knowledge of existing law and construction placed upon it by courts, and intended to change existing law); see also 1996 Op. Va. Att'y Gen. 51, 52 (General Assembly, in repealing one statute and enacting another, had full knowledge of existing law and construction placed upon it by Attorney General, and intended to change existing law).


See § 15.2-1627(B) (Commonwealth's attorney and assistants are empowered to prosecute felonies and certain misdemeanors); § 15.2-1704 (local police force is empowered to enforce criminal laws of Commonwealth).

See, e.g., United States v. Jackson, 780 F.2d 1305, 1308 n.2 (7th Cir. 1986); Wedra v. Thomas, 671 F.2d 713, 717 n.1 (2d Cir. 1982) (prosecutor had constructive knowledge of information in hands of police).


"The term "investigate" means "to inquire into (a matter) systematically." BLACK'S LAW DICTIONARY 830 (7th ed. 1999).


I note, however, that when questioning individuals in Staunton and Waynesboro, Augusta County deputy sheriffs do not possess statutory law enforcement authority.


See, e.g., Op. Va. Att'y Gen.: 1996 at 113 (when court issues capias on indictment, county deputy sheriff may enter city to execute capias, without requiring assistance of law enforcement officer from city); 1978-1979 at 15 (§ 8.01-295 implies that sheriff remains clothed with powers of his office incidental to perfecting service of process outside his usual jurisdiction).


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

Property owner whose property is subdivided in one county for conveyance to family member is not prohibited from subdividing property he owns in another county for conveyance to such family member.

THE HONORABLE JO ANN DAVIS
MEMBER, HOUSE OF DELEGATES
MARCH 6, 2000

You ask whether, pursuant to § 15.2-2244 of the Code of Virginia, an individual who has conveyed property in one county to a qualifying family member is prohibited from conveying property in another county to such family member.

Virginia's subdivision enabling statutes are detailed in Article 6, Chapter 22 of Title 15.2, §§ 15.2-2240 through 15.2-2279. Section 15.2-2240 requires that every locality adopt a subdivision ordinance. The purposes of a subdivision ordinance are "to assure the orderly subdivision of land and its development" and to promote "the public health, safety, convenience and welfare of citizens." Section 15.2-2241(10) specifically requires subdivision ordinances to include "reasonable provisions permitting a single division of a lot or parcel for the purpose of sale or gift to a member of the immediate family of the property owner." In accordance with this statutory provision, § 15.2-2244(A) provides:
In any county ... a subdivision ordinance shall provide for reasonable provisions permitting a single division of a lot or parcel for the purpose of sale or gift to a member of the immediate family of the property owner .... Only one such division shall be allowed per family member, and shall not be for the purpose of circumventing this section.

Subdivision ordinances are enacted pursuant to the delegation of the police power of the Commonwealth to a locality. With respect to § 15.2-2244(A), a 1989 opinion of the Attorney General notes:

The manifest intent of the General Assembly in enacting [§ 15.2-2244(A)] was to permit property owners in counties ... to divide existing parcels by a single transfer by a property owner to a family member without being subject to the formalities and expenses attendant to compliance with otherwise applicable provisions of the subdivision ordinance.1

A 1986 opinion also notes that the principal focus of the exception in § 15.2-2244(A) is to promote the values society places on the disposition of family estates during the lifetime of the owner with a minimum of government regulation and to promote the cohesiveness of the family.3

Thus, whereas this Office has concluded that § 15.2-2244(A) is not intended to apply to profit-motivated divisions for short-term investment purposes because such a division would have the purpose of circumventing otherwise applicable requirements of a subdivision ordinance,4 it also has concluded that a family division of a parcel to keep the family estate within the immediate family and passing real property interests from one generation to another is consistent with the purpose of § 15.2-2244(A).5 Based on the facts presented, it would appear that the conveyances of property in the respective localities fall within the purview of this statute and you do not indicate that there is any issue regarding circumvention of the statute.

The General Assembly, in enacting Virginia's subdivision enabling statutes, "delegated to each locality a portion of the police power of the state, to be exercised by it in determining what subdivisions would be controlled, and how they should be regulated." Accordingly, each county "is granted broad discretion in determining the types of subdivisions of land which are to be subject to the requirements of its subdivision ordinance." Section 15.2-2244(A) mandates that a county's subdivision ordinance provide for a family subdivision exception. Each county's subdivision ordinance (including
exceptions) is necessarily applicable to the subdivision of such county's land. I am aware of no statute which articulates that the family subdivision exception may be exercised in only one county.

Accordingly, it is my opinion that a property owner whose property is subdivided pursuant to § 15.2-2244(A) in one county is not prohibited from subdividing property pursuant to this section which he owns in another county.

Section 15.2-2240.

Section 15.2-2200.


See § 15.2-2240.

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

Provision in subdivision ordinance prescribing minimum time period lot must be in existence prior to its subdivision is more expansive than is permitted by subdivision enabling statutes and is void and unenforceable.

THE HONORABLE R. CREIGH DEEDS
MEMBER, HOUSE OF DELEGATES
OCTOBER 13, 2000

You ask whether a locality may include in its subdivision ordinance a provision allowing the subdivision of a lot only if the lot was in existence on September 30, 1995, or has been in existence a minimum of five calendar years.

Section 15.2-2240 of the Code of Virginia authorizes "[t]he governing body of every locality [to] adopt an ordinance" regulating the subdivision and development of land "to assure the orderly subdivision of land and its development." Section 15.2-2241 contains mandatory provisions to be included in such subdivision ordinance, and § 15.2-2242 sets forth optional provisions which may be included in such subdivision ordinance.
The powers of local governing bodies in the Commonwealth are limited to those "conferred expressly or by necessary implication." 1 "This [principle] is a corollary to Dillon's Rule that municipal corporations have only those powers expressly granted, those necessarily or fairly implied therefrom, and those that are essential and indispensable." 2 Any doubt as to the existence of a power must be resolved against the locality. 3 Accordingly, because local governments are creatures of the Commonwealth and thus subordinate, they possess only those powers that the General Assembly has conferred upon them. 4

Subdivision ordinances are enacted pursuant to the delegation of the police power of the Commonwealth to the locality. 5 As noted in § 15.2-2240, the purpose of a subdivision ordinance is to assure the orderly subdivision and development of land. "Provisions in a local subdivision ordinance, however, must derive power from an authorization from the General Assembly." 6 Thus, a local governing body "does not have unfettered discretion when deciding what matters it may include in its subdivision ordinance. Rather, [it] must include those requisites which are mandated in Code § 15.2-2241 and may, at [its] discretion, include the optional provisions of a subdivision ordinance contained in Code § 15.2-2242." 7

It is my opinion that the General Assembly does not authorize the enactment of the requirement in issue. "Authority for requirements imposed on land subdividers and developers must be found in the subdivision enabling statutes and may not be implied from other more general grants of local powers." 8 Neither § 15.2-2241 nor § 15.2-2242 authorizes a governing body to enact provisions in a subdivision ordinance prescribing a minimum time period for a lot to be in existence prior to being subdivided. 9 Thus, such an ordinance is more expansive than is permitted pursuant to these statutes. 10 Accordingly, a provision in a subdivision ordinance allowing the subdivision of a lot only if the lot has been in existence for a minimum period of time is, in my opinion, void and unenforceable. 11

2 Id. at 574, 232 S.E.2d at 40 (quoting Bd. of Supervisors v. Horne, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975)).
4 See Gordon v. Fairfax County, 207 Va. 827, 153 S.E.2d 270 (1967) (power exercised by county board of supervisors in voting to lend money to airport authority was expressly implied from act of legislature allowing local governing body to lend money to any authority created by such governing body).
5 See Nat. Realty Corp. v. Virginia Beach, 209 Va. 172, 175, 163 S.E.2d 154, 156 (1968).
You inquire regarding the enforcement of the traffic laws of the Commonwealth on streets intended for motor vehicular use by the public in a subdivision in the Town of Berryville.

You advise that a developer has recorded a subdivision plat, approved by the Town of Berryville, showing streets intended for motor vehicular use by the public. You state that the developer is required to construct the streets in the subdivision in accordance with standards established by the Virginia Department of Transportation. You note that, after construction of the streets according to the Department’s standards, the Department will maintain the streets.
and authorize the placement of appropriate traffic control devices, and school buses will transport children to and from school.

You advise that the streets are not yet compliant with Transportation Department standards, and that the public is using the streets for vehicular travel without the aid of traffic control devices. You relate that the town is concerned that it may be liable for accidents occurring on streets lacking traffic control devices and on unpaved or unfinished streets and curbs. In addition, you advise that law enforcement personnel has refused to enforce traffic laws until the streets have been completed according to Department standards and have been accepted into the secondary system of state highways. They do not consider such streets to be public streets until they have been accepted by the Department into the state secondary highway system.

You first ask whether, as a prerequisite to the enforcement of the Commonwealth's traffic laws, the subdivision streets must be constructed in accordance with standards established by the Virginia Department of Transportation and accepted into the secondary system of state highways.

Section 15.2-2265 of the Code of Virginia provides:

The recordation of an approved plat shall operate to transfer, in fee simple, to the respective localities in which the land lies the portion of the premises platted as is on the plat set apart for streets, alleys or other public use and to transfer to the locality any easement indicated on the plat to create a public right of passage over the land.... Nothing in this section shall obligate the locality, association or authority to install or maintain such facilities unless otherwise agreed to by the locality, association or authority.

When the authorized officials of a locality within which land is located, approve in accordance with the subdivision ordinances of the locality a plat or replat of land therein, then upon the recording of the plat or replat in the circuit court clerk's office, all rights-of-way, easements or other interest of the locality in the land included on the plat or replat, except as shown thereon, shall be terminated and extinguished, except that an interest acquired by the locality by condemnation, by purchase for valuable consideration and evidenced by a separate instrument of record, or streets, alleys or easements for public passage subject to the provisions of § 15.2-2271 or § 15.2-2272 shall not be affected thereby.
A 1973 opinion of the Attorney General responds to the question whether the recordation of a plat before adoption of a subdivision ordinance operates to transfer streets shown on the plat, in fee simple, to the locality pursuant to § 15.2-2265. The opinion concludes that

the recordation of a plat in a [locality], in the absence of a subdivision ordinance, does not of itself operate to transfer the streets in fee simple to the [locality]. Such a recordation, in the absence of any reservation, merely creates a public easement in the streets. When the [locality] accepts the dedication of the plat the streets are transferred in fee simple to the [locality].[2]

The opinion also concludes that "the adoption of a subdivision ordinance would constitute an acceptance of the dedication of the streets indicated on the plat." In addition, the 1973 opinion responds to the question of when streets shown on a recorded plat become "highways" as defined in § 46.2-100. The opinion concludes that "streets on a recorded subdivision plat become public easements at the time of recordation and as such are 'highways' within the meaning of this section." Finally, a 1978 opinion responds to the question whether certain traffic laws apply to the roads in a subdivision in a county owned either by the developer or a property owners' association. The opinion concludes that "[a]ny reference in Title [46.2] to traffic infractions committed on highways has no applicability to roads not falling within the definition of highways."[7]

Section 46.2-100 defines the term "highway" to include "the entire width between the boundary lines of every way or place open to the use of the public for purposes of vehicular travel in the Commonwealth." In 1980, the Supreme Court of Virginia held that "evidence of accessibility to the public for free and unrestricted use gave rise to a prima facie presumption that the streets of [an apartment complex] were highways within the definition of [§ 46.2-100]." When there is such free and unrestricted use of an area by vehicular traffic, the traffic laws of the Commonwealth apply to such area.[9]

In addition, § 46.2-1307 permits the governing body of a locality to "adopt ordinances designating the private roads, within any residential development containing 100 or more lots, as highways for law-enforcement purposes." A 1988 opinion of the Attorney General concludes that, when such an ordinance is adopted by the local governing body, private roads and streets may be considered to be "highways" for the purposes of enforcement of the implied consent provisions of § 18.2-268(b).
Finally, there are several rules of statutory construction applicable to your request. The primary goal of statutory construction is to ascertain and give effect to the intent of the legislature. In addition, "the plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction." When a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute. The General Assembly is presumed to be aware of the law existing at the time it adopts a statute.

The interpretation of the laws of the Commonwealth in the prior opinions of the Attorney General remain valid. In addition, the General Assembly has made no substantial change to the applicable statutes since the opinions were issued. "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." Accordingly, I concur with these prior opinions that, as a prerequisite to the enforcement of Virginia's traffic laws, it is not necessary that a street be constructed in accordance with standards established by the Department of Transportation and actually accepted into the secondary system of state highways.

You next ask whether the Town of Berryville is subject to liability for failure to erect or maintain traffic control devices on subdivision streets that are not compliant with Transportation Department standards and have not been accepted into the state secondary highway system.

The test for determining a municipality's immunity under the facts you provide is well-established:

In Virginia a municipal corporation is clothed with a twofold function—one governmental and the other proprietary. A municipality is immune from liability for failure to exercise or for negligence in the exercise of its governmental functions. It may be liable, just as a private individual or corporation, for the failure to exercise or for negligence in the exercise of its proprietary functions.

A "governmental function" is "expressly or impliedly authorized by constitution, statute, or other law and ... is carried out for the benefit of the general public," whereas a "proprietary function" is performed for the benefit of the municipality rather than the general public. The doctrine of sovereign immunity extends to municipalities in their exercise of governmental, rather than proprietary, functions.
2000 REPORT OF THE ATTORNEY GENERAL

“The rule that Virginia follows is that the regulation by municipalities of traffic on their streets constitutes the exercise of a discretionary governmental function.” The Supreme Court has held that a city, in maintaining its traffic signals, was engaged in a governmental function of regulating traffic, and it was immune from liability for its negligence in failing to repair a malfunctioning signal that allegedly caused a plaintiff’s injury. The Court has also held:

Traffic lights, blinking lights, warning signals, roadway markings, railings, barriers, guardrails, curbings, and like devices are all designed to control and regulate traffic and to insure its orderly and safe flow on the streets. A determination of the need for such devices and the decision to install or not to install them calls for the exercise of discretion on the part of the city. In the exercise of that discretion and in making a judgment, the city is performing a governmental function and is not liable for its negligent performance of the function.

The regulation of the flow of traffic by means of such traffic control devices constitutes “the exercise of a discretionary governmental function.” A municipality is immune from liability for failure to exercise a governmental function. Consequently, I must conclude that the Town of Berryville would be immune from liability for failure to erect or maintain traffic control devices on subdivision streets that are not compliant with Transportation Department standards and have not been accepted into the state secondary highway system. Your final question is whether the Town of Berryville would be liable for injuries resulting from a fall on an unpaved or unfinished street or curb. A dedication is the setting aside of land, or of an interest therein, to public use—“a form of transfer by an owner to the public of the fee or a lesser interest in land.” Recordation of a subdivision plat and the sale of lots in the subdivision evidence an intent to make the platted streets available for public use and constitute the common law offer of dedication. When streets are accepted by the Department of Transportation into the state secondary highway system, the Department not only exercises control and jurisdiction over the streets, but also is responsible for their maintenance, since individual members of the public have no property rights in the roadway. A completed dedication imposes upon the Department not only the burden of maintenance, but also the burden of potential tort liability. Section 33.1-79 permits the Department of Transportation to take into the secondary highway system those streets in towns with 3,500 or less inhabitants.
You state that the developer has recorded a subdivision plat approved by the Town of Berryville showing streets intended for motor vehicular use by the public. Furthermore, you advise that the public is using the streets for vehicular travel. When streets in the Town of Berryville are accepted into the secondary system of state highways by dedication, I am of the opinion that the town would not be liable for any injury sustained by a pedestrian from a fall on an unpaved or unfinished street or curb.

Id. at 342.
Id.
Id. (citing repealed § 46.1-1(10), revised as § 46.2-100).
Id. at 179 (citing repealed Title 46.1, revised as Title 46.2); see also Prillaman v. Commonwealth, 199 Va. 401, 100 S.E. 2d 4 (1957) (holding that service station lot is not “highway” used by public for vehicular travel in state).
See Kay Management v. Creason, 220 Va. at 823-32, 263 S.E.2d at 400-02.
You provide no information indicating whether the town has a subdivision ordinance or the number of lots within the subdivision.
See Richmond v. Sutherland, 114 Va. 688, 693, 77 S.E. 470, 472 (1913); 1995 Op. Va. Att’y Gen. 130, 131 (General Assembly, in amending statute, had full knowledge of existing law and construction placed upon it by courts, and intended to change then-existing law); see also 1996 Op. Va. Att’y Gen. 51, 52 (General Assembly, in repealing one statute and enacting another, had full knowledge of existing law and construction placed upon it by Attorney General, and intended to change then-existing law).
Section 15.2-102 provides that the term “[m]unicipality[ ]... and words or terms of similar import shall be construed to relate only to cities and towns.”
BLACK’S LAW DICTIONARY 704, 1235 (7th ed. 1999).

Freeman v. City of Norfolk, 221 Va. at 59, 266 S.E.2d at 886.


Freeman v. City of Norfolk, 221 Va. at 60, 266 S.E.2d at 886.


Fenon v. City of Norfolk, 203 Va. at 555, 125 S.E.2d at 811.

In responding to your final inquiry, I must assume that the dedication to which you refer is complete. Furthermore, I note that the population of the town is under 3,500. Finally, I must also assume that the curb to which you refer is an integral part of the street.


See, e.g., Highway Commissioner v. Howard, 213 Va. 731, 195 S.E.2d 880 (1973) (abutting landowner has no property right in continuance or maintenance of highway traffic flow past his property); Highway Commissioner v. Netleton, 213 Va. 26, 189 S.E.2d 377 (1972) (plaintiffs were entitled only to reasonable and adequate access to road dedicated for use as public highway).

Section 15.2-2268 provides that localities are not obligated to pay for street "grading or paving" or curb "improvements or construction."

Ocean Island Inn v. Virginia Beach, 216 Va. at 477, 220 S.E.2d at 250.

COUNTIES, CITIES AND TOWNS: VIRGINIA COALFIELD ECONOMIC DEVELOPMENT AUTHORITY — INDUSTRIAL DEVELOPMENT AND REVENUE BOND ACT.

CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE.

Board of Virginia Coalfield Economic Development Authority is appropriate body to consider whether Authority may make grant to Industrial Development Authority of Wise County which will pass money to prospective company willing to locate in county. Coalfield Authority may loan or grant funds to Wise County Authority, provided Board makes independent legislative determination that contemplated use of funds furthers one or more eligible public purposes. If Wise County Authority finds that prospective project meets public purposes of Act, financing of project is within its discretionary power. Contributing to capital of company does not violate Constitution, provided attending facts and circumstances support determination that use of funds furthers requisite public purpose.

THE HONORABLE TERRY G. KILGORE
MEMBER, HOUSE OF DELEGATES
MAY 17, 2000

You ask for guidance regarding the ability of the Virginia Coalfield Economic Development Authority to "pass monies on" to the Industrial Development
Authority of Wise County ("Wise County Authority"), which will, in turn, "pass these monies on" to a prospective industry willing to locate in Wise County. Materials accompanying your request indicate that the development agreement between the prospective company and the Wise County Authority outlines the construction of a facility in Wise County which will be an information technology support center. The materials also provide that such company occupies such centers in other states and worldwide. Additionally, the materials provide that the project ultimately may create over 400 jobs in such center. These materials note that that the development agreement states that the monies are a "contribution to the capital" of the company.

Chapter 60 of Title 15.2, §§ 15.2-6000 through 15.2-6015 of the Code of Virginia, creates the Virginia Coalfield Economic Development Authority ("Coalfield Authority" or "Authority") and details its powers. The Coalfield Authority is created as a body politic to assist the Southwest Virginia coalfield region in achieving some degree of economic stability. All powers, rights and duties conferred ... upon the Authority are exercised by its sixteen-member Board. Wise County is one of the localities participating in the Coalfield Authority, as specified in § 15.2-6002.

Chapter [60] is remedial in nature and is intended to address long-standing and intractable problems related to economic development and the absence of a diverse economic base in the coalfield region of Virginia. As a remedial statute, Chapter [60] should be liberally construed to accomplish this underlying legislative intent.\(^3\)

Section 15.2-6011 authorizes the Authority to make loans and grants for the benefit of qualified private, for-profit enterprises; nonprofit industrial development corporations; or industrial development authorities.\(^4\) Section 15.2-6011 also specifies the eligible uses and projects for which such Authority loans and grants may be made.\(^5\) Specifically, § 15.2-6011 provides that the Authority is "empowered to pledge its funds, and make loans and grants to ... industrial development authorities for financing"\(^6\) certain enumerated purposes. Among such purposes are the "[p]urchase of real estate," "[c]onstruction ... of buildings," and "[s]uch other improvements as the Authority deems necessary to accomplish its purpose."\(^7\)

Quite clearly, the overriding purpose of the Coalfield Authority is to support the economic development of the coalfield region. To further such purpose, the legislation establishing and granting powers to the Coalfield Authority places few prohibitions on the Authority.\(^8\) "The Board of the Authority is
the appropriate body to consider all of the relevant facts" [and] "the decision whether to make the grant is within the discretion of the Board of the Authority." Assuming the money will be used for one of the eligible purposes specified in § 15.2-6011, the Authority may make a loan or grant of funds. Thus, the Authority may loan or grant the funds, provided it makes an "independent legislative determination that the contemplated use of the funds furthers the public purposes" enunciated in § 15.2-6011. It is my opinion, therefore, that the Coalfield Authority has the discretion to make a loan or grant to the Wise County Authority so long as it is satisfied, based on all the relevant facts, that such loan or grant is for the financing of one or more of the purposes set forth in § 15.2-6011.

The Industrial Development and Revenue Bond Act, §§ 15.2-4900 through 15.2-4920, authorizes localities to create industrial development authorities. The overall purpose for creating industrial development authorities is to promote trade and industry by inducing certain types of enterprises and institutions to locate and remain in the Commonwealth. "Any activity by an industrial development authority must have a demonstrable public purpose. Whether a transaction is performed for a proper public purpose is a factual matter determined by the circumstances of each case. Generally, a transaction must benefit primarily the public and only incidentally private interests."

Specifically, an industrial development authority "may make loans or grants from the authority's revenues to individuals or business entities for the purpose of promoting economic development." Additionally, § 15.2-4901 provides that the Industrial Development and Revenue Bond Act is to be liberally construed in conformity with the stated intentions of the legislature. Whether a transaction in which an industrial development authority is engaged comes within any of the express or implied powers of § 15.2-4905 will depend on the facts of the particular transaction.

In making this determination, the industrial development authority acts in its legislative capacity. Section 15.2-4901 confines the discretionary power of an industrial development authority to that 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." If the authority finds that a proposed project meets the public purposes of the Industrial Development and Revenue Bond Act, then the financing of the project is within its discretionary power. Accordingly, it is my opinion that it is within the discretion of the Wise County Authority to engage in the transaction in issue upon its determination, based on all the
relevant facts, that its proposed agreement with the company supports its public purposes.\(^{21}\)

Finally, you also raise the issue of whether a grant in the nature of a contribution to the capital of the corporation violates Article X, § 10 of the Constitution of Virginia (1971).

Article X, § 10 provides:

Neither the credit of the Commonwealth nor of any county, city, town, or regional government shall be directly or indirectly, under any device or pretense whatsoever, granted to or in aid of any person, association, or corporation; nor shall the Commonwealth or any such unit of government subscribe to or become interested in the stock or obligations of any company, association, or corporation for the purpose of aiding in the construction or maintenance of its work; nor shall the Commonwealth become a party to or become interested in any work of internal improvement, except public roads and public parks, or engage in carrying on any such work; nor shall the Commonwealth assume any indebtedness of any county, city, town, or regional government, nor lend its credit to the same. This section shall not be construed to prohibit the General Assembly from establishing an authority with power to insure and guarantee loans to finance industrial development and industrial expansion and from making appropriations to such authority.

The Supreme Court of Virginia has held that the three prohibitions contained in Article X, § 10, commonly referred to as the “credit clause,” “stock or obligations clause,” and the “internal improvement clause,” are intended “to remedy the same evil”—“the use of the State’s funds and credit to foster and encourage construction and operation of private enterprises.”\(^{22}\) In interpreting and applying these three clauses, the Court consistently has held that “the moving consideration and motivating cause of a transaction are the chief factors by which to determine if it is prohibited.”\(^{23}\) Thus, the Court repeatedly has found that transactions which involve extensions of public credit or expenditures of public funds that benefit private enterprises do not violate Article X, § 10, provided such transactions are motivated by a clearly defined public purpose.\(^{24}\) “It is the animating purpose of the transaction, and not its form or the extent to which it may benefit the private business involved, that determines its constitutionality.”\(^{25}\)
Based on these principles, this Office has concluded, for example, that the animating purpose of the Commonwealth's acquisition of a private corporation's stock was to benefit the state retirement system rather than to aid the corporation and thus did not violate Article X, § 10. Additionally, this Office has concluded that an industrial development authority may acquire an industrial park through the purchase of stock of the private development corporation to accomplish the transfer of the ownership of the park from the corporation to the authority with the ultimate goal of attracting industrial clients to the area. Also, this Office has concluded that a county may advance funds to an industrial development authority so that such authority may make a loan to a private corporation, provided that the authority makes its independent legislative determination that the contemplated use of the funds furthers the public purposes of the Industrial Development and Revenue Bond Act. Similarly, it is my opinion that contributing to the capital of a corporation does not violate Article X, § 10, so long as the attending facts and circumstances support a determination that the use of the funds furthers a requisite public purpose.

31989 Op. Va. Att'y Gen. 132, 134 (citing Chapter 40, predecessor to Chapter 60) (citations omitted); see also § 15.2-6013 ("chapter ... shall be liberally construed to effect the purposes thereof").

5Id.

6"The term "finance" means, among other things, "to provide capital for."" Needles v. Kansas City, 371 S.W.2d 300, 305 (Mo. 1963) (quoting 36A C.J.S. 410, 411 (1961)); see also MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 436 (10th ed. 1996) (defining "finance" as "obtaining of funds or capital").

7Section 15.2-6011(1), (5), (10).
9Id. at 100.
10Id. at 99 (citing § 15.1-1646, predecessor to § 15.2-6011).
12Section 15.2-4901.
15See 1999 Op. Va. Att'y Gen. 67, 68 (citing § 15.2-4905(13)).


See id. at 199.

Compare Gordon v. Fairfax County, 207 Va. 827, 834, 153 S.E.2d 270, 276 (1967) (county loan to airport authority promotes essential governmental functions, violates no public trust, and is not abuse of discretion); 1998 Op. Va. Att’y Gen. 96, 98 (concluding that (1) housing authority generally has broad discretion in control of its assets, provided discretion is exercised in accordance with underlying purpose of housing authority legislation and does not violate public trust impressed upon authority’s assets; and (2) whether transaction is consistent with purpose of housing authority legislation is question of fact).


See, e.g., City of Charlottesville v. DeHaan, 228 Va. at 578, 323 S.E.2d at 131 (under animating purpose test, city’s appropriation of funds to redevelopment authority, which, in turn, lent funds to private hotel developer, served purposes of Housing Authorities Law and did not violate credit clause); Fairfax County v. County Executive, 210 Va. 253, 169 S.E.2d 556 (1969) (localities’ guarantee of debts of metropolitan transit authority serves valid public purpose, notwithstanding benefit to bondholders and private contractors operating transit service); Development Authority v. Coyner, 207 Va. 351, 150 S.E.2d 87 (1966) (upholding authority’s issuance of revenue bonds to finance facility for lease to private industry based on legislative finding that promotion of industrial development is for public purpose); United States Fidelity Co. v. Carter, 161 Va. 381, 406, 170 S.E. 764, 773 (1933) (“credit clause” does not prohibit deposit of state or county funds in bank in usual course of business, unless deposit is made for specific purpose of aiding bank); Holston Corp. v. Wise County, 131 Va. 142, 157-58, 109 S.E. 180, 184 (1921) (county’s guarantee of payment to quarry for crushed stone furnished to county road contractors does not violate “credit clause,” because guarantee is motivated by need to ensure supply of stone at favorable price and not to aid credit of private business).


Note 1992 Op. Va. Att’y Gen., supra note 22, at 141-42 (expenditures must benefit governmental entity’s public purpose; other possible public benefits are not to be considered).
Amendment in 2000 House Bill 950 is not necessary to authorize law-enforcement officers of Commonwealth to detain nonresident runaway child. Current law authorizes law-enforcement officers to take into custody out-of-state runaway child who is within Commonwealth.

The Honorable William C. Mims
Member, Senate of Virginia
December 29, 2000

You inquire whether it is necessary for the 2001 Session of the General Assembly to consider House Bill 950, which was carried over from the 2000 Session by the Senate Committee on Courts of Justice. House Bill 950 amends § 16.1-246(G) of the Code of Virginia to allow a child who has run away from home, “including a child who is not a resident of the Commonwealth,” to be taken into immediate custody. Section 16.1-246 is a portion of Article 4, Chapter 11 of Title 16.1, relating to the immediate custody, arrest, detention and shelter care of children.

You advise that House Bill 950 was introduced at the request of certain law-enforcement officials because they believe that § 16.1-246(G) does not provide authority to detain out-of-state runaways. You also advise that members of the Senate Courts of Justice Committee believe that law-enforcement officials already have the requisite authority without the proposed amendment. Furthermore, you state that some committee members believe that inserting the phase “including a child who is not a resident of the Commonwealth” in § 16.1-246(G) would call into question the authority of law-enforcement officials over nonresident children in other subsections of § 16.1-246 and in other statutes in Article 4 that are nonspecific regarding authority over such children.

Therefore, you ask whether § 16.1-246(G) is applicable to a child who is within the Commonwealth and has run away from a home located outside the Commonwealth.

Section 16.1-246 provides:

No child may be taken into immediate custody except:

* * *

(G) When a law-enforcement officer has probable cause to believe that a child (i) has run away from home ….

"The jurisdiction, practice, and procedure of the juvenile and domestic relations district courts [of the Commonwealth] are entirely statutory." Section
16.1-228 defines the terms used in Chapter 11 of Title 16.1. "Child" is defined as "a person less than eighteen years of age." 5 Section 16.1-228 clearly does not confine the definition of "child" to include only a person under the age of eighteen who is a resident of the Commonwealth. In addition, pursuant to Article IV(a), § 16.1-323 of the Interstate Compact Relating to Juveniles, a juvenile6 who has run away from another state party to the compact "may be taken into custody without a requisition." The Interstate Compact permits the return of the juvenile "to another state party to this compact."7

The Supreme Court of Virginia has stated, "[i]f the language used [in a statute] is plain and unambiguous, and its meaning clear and definite, effect must be given to it regardless of what courts think of its wisdom or policy."8 In such cases courts must find the meaning within the statute itself.9 It is my opinion that the proposed amendment to § 16.1-246(G) in House Bill 950 is not necessary to authorize law-enforcement officers of the Commonwealth to detain a runaway child who is not a resident of the Commonwealth. I am, therefore, of the opinion that § 16.1-246(G) is already applicable to a child within the Commonwealth who is an out-of-state runaway.

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1House Bill 950 was introduced in the 2000 Session of the General Assembly on January 24 and continued to the 2001 Session on March 1.

2House Bill 950, supra (amending § 16.1-246(G)).

3Sections 16.1-246 to 16.1-258.


5Section 16.1-228.

6A "juvenile," as that term is used in Article IV, "means any person who is a minor under the law of the state of residence of the parent, guardian, person or agency entitled to the legal custody of such minor." Section 16.1-323 art. IV(c).

7Section 16.1-323 art. IV(a).

8Fairbanks, etc., Co. v. Cape Charles, 144 Va. 56, 63, 131 S.E. 437, 439 (1926); see also Town of South Hill v. Allen, 177 Va. 154, 165, 12 S.E.2d 770, 774 (1941); Hammer v. Commonwealth, 169 Va. 355, 364-65, 193 S.E. 496, 499-500 (1937); Woodward v. Staunton, 161 Va. 671, 674, 171 S.E. 590, 591 (1933).


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

COURTS OF RECORD: GENERAL PROVISIONS.
Signature of judge is not required for attested copy of court order. Judge's use of his initials when entering order is valid method of signing order.

THE HONORABLE J. CURTIS FRUIT
CLERK, CIRCUIT COURT OF VIRGINIA BEACH
MARCH 31, 2000

You ask whether a judge's signature must be shown on the copy of an order in order for the copy to be properly certified, or whether a certification stamp by the clerk, with the date entered, is sufficient. You also ask whether a judge may enter a court order by using the judge's initials, or whether the judge is required to sign the order using a full signature.

The answer to your first inquiry is found in a prior opinion of the Attorney General addressing the meaning of "a copy teste" of an order and whether the judge's signature is required on the copy. A "copy teste" is a copy of an order bearing an attestation or certification of the clerk of court or his duly authorized deputy verifying that the instrument is a genuine copy. The opinion concludes that "a copy teste' is legally sufficient even though the signature of the judge does not appear on the copy." The opinion notes that "[t]he practice of including or excluding the judge's signature on a photocopy may vary from jurisdiction to jurisdiction" and arises from the early practice wherein "clerks of court would hand-copy orders [but] could not also copy a judge's signature." I concur in the conclusion of the opinion that the signature of the judge is not required for an attested copy.

With respect to your second inquiry, another prior opinion notes that there is no Virginia statute defining the term "signature." The opinion also notes that nothing

"restricts the meaning of 'signature' to a written name ... what constitutes a signature must largely depend upon the circumstances of each particular case, though in all cases the intent is the vital factor. Whatever symbol is employed, it must appear that it 'is intended as a signature.'"

The opinion concludes that a facsimile signature by a judge is a valid method of signing judgments, orders and decrees. Similarly, it is my opinion that a judge's use of his initials when entering a court order is a valid method of signing such order.

2See id. at 46.

*"Id." (quoting Pilcher v. Pilcher, 117 Va. 356, 365, 84 S.E. 667, 670 (1915), in which Supreme Court considered validity of will signed by testator with his initials).


*Compare Stephens v. Commonwealth, 225 Va. 224, 232, 301 S.E.2d 22, 27 (1983) (holding that entry of unsigned order is notice of judicial determination, and stating that "the fact that the trial judge did not sign or initial the draft of the order prepared by the deputy clerk is of no consequence" (emphasis added)). See also § 17.1-123 (providing that orders shall be deemed authenticated when judge's signature is shown in order or order book, or order is recorded in order book on last day of each term showing signature of each judge presiding during term).

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

Circuit court clerk may provide Internet access to nonconfidential case management data maintained by clerk's office; may not provide Internet access to court records not maintained by his office, such as data provided by Supreme Court to clerk's office through LOPAS.

THE HONORABLE J. JACK KENNEDY JR.
CLERK, CIRCUIT COURT FOR WISE COUNTY AND THE CITY OF NORTON
JULY 27, 2000

You ask whether, pursuant to § 17.1-225 of the Code of Virginia, a circuit court clerk may provide Internet access to case management data and/or the data provided by the Office of the Executive Secretary of the Supreme Court of Virginia through a direct dial-up service known as the Law Office and Public Access System ("LOPAS").

You explain that the case management information you wish to provide is available through LOPAS. You note that some users have difficulty accessing information through LOPAS. The Wise County Circuit Court, therefore, wishes to pilot a program that would provide on-line access through the Internet to the court's case management data. You state that you intend to redact from the case management data the social security numbers, race, address, and date of birth for individuals before the information is made available on the Internet.

Section 17.1-225 authorizes the clerk of a county or city circuit court to "provide remote access, including Internet access, to all nonconfidential court records maintained by his office." Before its amendment in 1997, § 17-59.2,
the predecessor statute to § 17.1-225, contained no language authorizing a
circuit court clerk to provide Internet access to court records.\(^1\) In 1996, you
requested the Attorney General’s opinion on whether § 17-59.2 permitted a
clerk to place public records, such as judgment liens, deeds, marriage licenses,
wills, and court documents, on-line electronically, thus making them available
on the Internet. The Attorney General concluded that, absent language indi-
cating a legislative intent to expand access to public records to include access
through the Internet system, a circuit court clerk had no such statutory
authority.\(^2\) At its 1997 Session, the General Assembly amended the statute
to expressly authorize a circuit court clerk to provide Internet access to court
records.\(^3\)

Clear and unambiguous words of a statute must be accorded their plain
meaning.\(^4\) Section 17.1-225 provides:

The clerk of the circuit court of any county or city may pro-
vide remote access, including Internet access, to all nonconfi-
dential court records maintained by his office. The clerk shall
be responsible for insuring that proper security measures are
implemented and maintained to prevent remote access users
from obtaining any data which is confidential under this
Code and to prevent the modification or destruction of any
records by remote access users.

The language of § 17.1-225 is clear and unambiguous. The statute expressly
authorizes a circuit court clerk to provide Internet access to all “nonconfidential
court records maintained by his office.” Although none of the statutes in
Title 17.1 define the phrase “court records,” this phrase is defined by
§ 16.1-69.53 to include “case records” and “administrative records” of the
court. Accordingly, a clerk may provide Internet access to nonconfidential
case management data maintained by the clerk’s office. Note, however, that
§ 17.1-225 refers solely to court records “maintained by [the clerk’s] office.”
Thus, a clerk may not provide Internet access to court records that, although
available to the clerk’s office through a system such as LOPAS, are not records
maintained by his office.\(^5\)

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\(^1\)See 1997 Va. Acts ch. 413, at 622. At its 1998 Session, the General Assembly recodified Title 17


\(^3\)See 1997 Va. Acts ch. 413, supra.

5See 1996 Op. Va. Att'y Gen., supra note 2, at 84 (clerks have powers granted by general or special laws; "scope of their powers must be determined by reference to applicable statutes").

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

HEALTH: VITAL RECORDS.

DOMESTIC RELATIONS: MARRIAGE GENERALLY.

ADMINISTRATION OF GOVERNMENT GENERALLY: VIRGINIA FREEDOM OF INFORMATION ACT

Original marriage license and certificate maintained by circuit court clerk constitute vital records required to be open to inspection by public. Public may have access to microfilmed copies of such records.

THE HONORABLE MICHAEL M. FOREMAN
CLERK, CIRCUIT COURT OF THE CITY OF WINCHESTER
SEPTEMBER 27, 2000

You ask whether the original marriage license and certificate maintained by the clerk of the circuit court pursuant to § 20-20 of the Code of Virginia constitute vital records required to be kept confidential. In addition, you ask whether the public may have access to microfilmed copies of these records, which are also maintained by the clerk.

Section 20-20 provides:

The clerk to whom the license and certificate are returned, shall file and preserve the original in his office, and make an index of the names of both of the parties married.

When the certificates of such person celebrating such marriage are returned to the clerk, and recorded as provided in this section and § 32.1-267, copies of the same properly certified by the clerk lawfully having the custody thereof or properly certified by the State Registrar of Vital Statistics shall be prima facie evidence of the facts therein set forth in all courts of this Commonwealth.

A marriage license and certificate are considered to be a vital record.¹ The confidentiality of vital records is protected by § 32.1-271(A), which reads:

To protect the integrity of vital records and to ensure the efficient and proper administration of the system of vital records, it shall be unlawful, notwithstanding the provisions of §§ 2.1-340.1 through 2.1-346.1, for any person to permit inspection of or to disclose information contained in vital records.
or to copy or issue a copy of all or part of any such vital records except as authorized by regulation of the [State] Board [of Health] or when so ordered by a circuit court of this Commonwealth. [Emphasis added.]

Sections 2.1-340.1 through 2.1-346.5 comprise The Virginia Freedom of Information Act, which permits public access to official records, unless otherwise provided by law. Section 17.1-208 also requires that "[t]he records and papers of every circuit court shall be open to inspection by any person." (Emphasis added.) The use of the word "shall" in a statute generally implies that its terms are intended to be mandatory, rather than permissive or directive.

To determine legislative intent in this instance, statutes dealing with the same subject matter should be construed together to achieve a harmonious result, resolving conflicts to give effect to each statute, to the maximum extent possible. Another accepted principle of statutory construction is that, when it is not clear which of two statutes applies, the more specific statute prevails over the more general. Also, when statutes provide different procedures on the same subject matter, the more general gives way to the more specific.

In this instance, it is clear that both §§ 32.1-271(A) and 17.1-208 apply. It is also apparent that § 17.1-208 is the more specific statute pertaining to all records and papers maintained by the clerk of the circuit court, and that § 32.1-271(A) is the more general statute. Consequently, the provisions of § 32.1-271(A) must give way to the more specific provisions of § 17.1-208.

Therefore, I conclude that the original marriage license and certificate maintained by the clerk of the circuit court pursuant to § 20-20 constitute vital records, and that § 17.1-208 requires such records to be open to inspection by the public. Furthermore, pursuant to § 17.1-208, the public may have access to microfilmed copies of such records.

1See § 32.1-249(12) (defining "vital records" as "certificates or reports of ... marriages").
4VEPCO v. Prince William Co., 226 Va. 382, 387-88, 309 S.E.2d 308, 311 (1983); 1991 Op. Va. Att'y Gen. 7, 8; id. at 159, 160; see also Prillaman v. Commonwealth, 199 Va. 401, 405-06, 100 S.E.2d 4, 7-8 (1957) (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).
CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING FRAUD.

Every person who participates in "gifting program" by giving valuable consideration for opportunity to receive further compensation for inducing others to become participants is guilty of Class 1 misdemeanor for operating pyramid promotional scheme.

THE HONORABLE WILLIAM H. FULLER III
COMMONWEALTH'S ATTORNEY FOR THE CITY OF DANVILLE
AUGUST 29, 2000

You ask for guidance regarding the meaning of the term "operates" as it is used in § 18.2-239 of the Code of Virginia, pertaining to pyramid promotional schemes.

You enclose documents describing a "gifting program." An individual participates in the program by "giving" $2,000 to a "senior" on the "board" of a private group, which entitles the individual to become a "freshman" on the "board." As new persons join, the "freshman" advances and, after eight "freshmen" have joined the "board," the "senior" rotates off the "board" with a total gift of $16,000. Assuming that the described "gifting program" is a pyramid promotional scheme, you inquire whether a person giving $2,000, with the expectation of advancing on the "board" and receiving $16,000, is guilty of a Class 1 misdemeanor for operating a pyramid promotional scheme, in violation of § 18.2-239.

Section 18.2-239 states that "[e]very person who ... operates ... any pyramid promotional scheme shall be guilty of a Class 1 misdemeanor." A "pyramid promotional scheme" is defined as "any program utilizing a pyramid or chain process by which a participant gives a valuable consideration for the opportunity to receive compensation or things of value in return for inducing other persons to become participants in the program." The Supreme Court of Virginia decided Bell v. Commonwealth and Love v. Durastill of Richmond, Inc. under § 18.2-239 without considering the meaning of the term "operates" as used in the statute. Neither of the pyramid promotional scheme statutes—§ 18.2-239 or § 18.2-240—defines the term "operates." In the absence of a statutory definition, a statutory term should
be given its common, ordinary and accepted meaning, given the context in which it is used. Generally, "operate" means "[to] produce an effect ... to cause to occur ... to cause to function." In applying this definition to § 18.2-239, I am mindful that, although penal statutes must be construed strictly, such "rule of construction "does not abrogate the well recognized canon that a statute ... should be read and applied so as to accord with the purpose intended and attain the objects desired if that may be accomplished without doing harm to its language." 

Participants in the described "gifting program" give valuable consideration for the opportunity to receive compensation in return for inducing others to become participants in the scheme. The action of a participant in making the payment or "gift" sustains the program and induces others to make that contribution. It is my opinion that the act of giving $2,000 constitutes the operation and promotion of a pyramid promotional scheme. An individual moves through the "gifting program" to obtain future compensation, i.e., he pays $2,000 in anticipation of receiving a total gift of $16,000. Therefore, everyone who pays into the "gifting program" is operating and promoting the program, because absent the payment of this "gift," the program would fail.

Accordingly, it is my opinion that every person who participates in the "gifting program" by paying $2,000, with the expectation of advancing and ultimately receiving $16,000, is guilty of a Class 1 misdemeanor for operating a pyramid promotional scheme, in violation of § 18.2-239.

1Punishment for conviction of a Class 1 misdemeanor is "confinement in jail for not more than twelve months and a fine of not more than $2,500, either or both." Section 18.2-11.

2Section 18.2-239.


5In Bell, the Virginia Supreme Court had to determine whether a "self-development" plan was operating as a pyramid promotional scheme under § 18.2-239. In determining such plan was a pyramid promotional scheme, the Court focused on the meaning of the words "compensation" and "consideration" as such words are used in § 18.2-239. The Court held that the term "compensation," defined in § 18.2-239(b) as not meaning "payment based on sales of goods or services to persons who are not participants in the [pyramid] scheme and who are not purchasing in order to participate in the scheme," included certain commissions received under the scheme. 236 Va. at 302, 304, 374 S.E.2d at 15, 16. The Court also held that the term "consideration" includes more than a payment of money and noted that it is the price bargained for and paid for a promise, which may be in the form of a benefit to the promisor or a detriment to the promisee. Id. at 302, 374 S.E.2d at 16 (citing Brewer v. Bank of Danville, 202 Va. 807, 815, 120 S.E.2d 273, 279 (1961)). In Durastill, the Court held that, even when intermediate parties do not receive compensa-
tion, the enterprise still can be classified as a pyramid promotional scheme because the enterprise uses the pyramid or chain process. 242 Va. at 190, 408 S.E.2d at 895.


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

MOTOR VEHICLES: LICENSURE OF DRIVERS – UNLICENSED DRIVING PROHIBITED.

Arrest warrant issued for driving after license has been forfeited for driving under influence of alcohol or drugs is not sufficient to impound driver’s vehicle.

THE HONORABLE ARCHER L. YEATTS III
CHIEF JUDGE, HENRICO COUNTY GENERAL DISTRICT COURT
MARCH 10, 2000

You ask whether an arrest warrant issued to a driver for violation of § 18.2-272 of the Code of Virginia is sufficient under § 46.2-301.1 to impound the driver’s vehicle. You relate that § 18.2-271.1(C) provides that, upon conviction of a violation of § 18.2-266, the court shall impose the license revocation authorized under § 18.2-271. You further relate that § 18.2-271.1(E) allows the court to issue a restricted license for certain purposes. You also relate that § 18.2-271.1(E) provides that a person violating any restrictions imposed under § 18.2-271.1 is guilty of a violation of § 18.2-272. Additionally, you relate that § 46.2-301.1 authorizes the impoundment of a motor vehicle being driven by a person whose driver’s license has been suspended or revoked for driving under the influence of drugs or intoxicants in violation of § 18.2-266. You, therefore, ask whether the § 46.2-301.1 impoundment process may be used for a violation of § 18.2-272.

Section 18.2-266 pertaining to driving under the influence of drugs or alcohol, and § 18.2-271.1(C) provides that such driver’s license be revoked. Section 18.2-271.1(C) also authorizes a court to issue an order in accordance with § 18.2-271.1(E) by which an eligible person may receive a restricted permit to operate a motor vehicle. Pursuant to § 18.2-271.1(E), this restricted permit allows the person to drive in limited circumstances, such as to and from his place of employment, to and from school, etc. A violation of § 18.2-271.1(E)
gives rise to a violation of § 18.2-272. A person convicted under § 18.2-272 for driving while his license has been forfeited for a conviction under § 18.2-266 is guilty of a Class 1 misdemeanor.

Section 46.2-301.1(A) provides for the administrative impoundment of a motor vehicle for thirty days if such motor vehicle is being driven by any person (i) whose driver's license ... has been suspended or revoked for a violation of § 18.2-51.4 or driving while under the influence in violation of §§ 18.2-266, 46.2-341.24 or ... (ii) driving after adjudication as an habitual offender, ... or where such person's license has been administratively suspended under the provisions of § 46.2-391.2, or (iii) driving after such person's driver's license ... has been suspended or revoked for unreasonable refusal of tests in violation §§ 18.2-268.3, 46.2-341.26:3 ....

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.1 Additionally, the mention of one thing in a statute implies the exclusion of another.2 Section 46.2-301.1(A) specifically notes certain statutes that give rise to the administrative impoundment process expressed in the statute. These statutes are derived from Title 18.2, regarding criminal violations, and from Title 46.2, regarding motor vehicle violations. Had the General Assembly intended that a violation of § 18.2-272 be included among them, it would have so stated.3

Furthermore, with respect to a drunk driving offense, the rationale for license revocation is that public safety is enhanced by removing unsafe drivers from the highways.4 The rationale is furthered by the impoundment procedure outlined in § 46.2-301.1. Section 18.2-271.1(E), however, articulates the punishment for violating a restriction contained in a restricted permit authorized by a court to be that prescribed in § 18.2-272 (providing that a person driving after forfeiture of his license is guilty of a Class 1 misdemeanor).

Finally, I must take note of the fact that §§ 18.2-266, 18.2-271.1(E) and 18.2-272 are statutes that impose criminal sanctions. Statutes that impose criminal sanctions must be narrowly construed to encompass only the conduct clearly proscribed.5 Therefore, construing these statutes narrowly with § 46.2-301.1, I am of the opinion that § 46.2-301.1 is not applicable to a conviction under § 18.2-272.6
Accordingly, it is my opinion that an arrest warrant issued to a driver for a violation of § 18.2-272 is not sufficient under § 46.2-301.1 to impound the driver's vehicle.


See Turner v. Wexler, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992); Tate v. Ogg, 170 Va. 95, 103, 195 S.E. 496, 499 (1938); 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.23 (5th ed. 1992 & Supp. 1999) ("Expressio unius est exclusio alterius.").


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

Person with valid concealed weapons permit who carries gun to school and leaves it unattended, and not on his or her person, is in violation of statute prohibiting weapons possession on school property except when engaged in any of activities specifically exempted. Such person is not entitled to carry gun onto school property or school bus.

THE HONORABLE ROBERT G. MARSHALL
MEMBER, HOUSE OF DELEGATES
NOVEMBER 9, 2000

You first ask whether any Virginia laws are violated if a person with a valid concealed weapons permit carries a gun to a school and leaves it unattended, and not on his or her person.

With respect to your first inquiry, § 18.2-308.1 of the Code of Virginia sets forth a general prohibition against possessing weapons on school property. Section 18.2-308.1(B) excepts from this prohibition

(i) persons who possess such weapon or weapons as a part of the school's curriculum or activities, ... [or] (iii) persons who possess such weapon or weapons as a part of any program sponsored or facilitated by either the school or any organization authorized by the school to conduct its programs either on or off the school premises ....
It is clear that a person engaged in any of the activities specifically exempted in § 18.2-308.1(B) is not in violation of the section. The result is different, however, if a person possessing a weapon is not engaged in any of the specifically exempted activities.

Your inquiry arises from the fact that the gun is unattended, and not on his or her person. This fact is not automatically tantamount to the conclusion that the person is not in possession of the weapon. This is due to the Commonwealth's well-settled doctrine of constructive possession, providing that where evidence of acts, statements, or conduct or other facts or circumstances tends to show that the person has dominion and control over the weapon, then such person is in possession of the weapon. Thus, the act of leaving the gun unattended does not terminate dominion and control over the weapon. Accordingly, unless the person is engaged in any of the activities specifically exempted in § 18.2-308.1(B), he or she would be in violation of the section, even though the gun is not on his or her person.

You next ask whether a person who has been issued a valid concealed weapons permit may carry a gun onto school property or a school bus and keep the weapon on or about his or her person at all times.

Section 18.2-308(O) provides:

The 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.

Section 18.2-308(O) clearly states that the granting of a concealed weapons permit does not authorize the possession of such weapon(s) on property or in places where such possession is otherwise prohibited by law. The clear intent of the General Assembly is to allow concealed handgun permit holders to carry handguns only in areas where it has not specifically prohibited the carrying of handguns. Section 18.2-308.1 specifically prohibits persons from possessing firearms on school property or school buses, except the persons specifically exempted from the activities described in § 18.2-308.1(B)(i)-(vi). Accordingly, unless the person falls within any such exceptions, he or she would be in violation of § 18.2-308.1. Thus, the relevant statutes are clear that a person who has been issued a valid concealed weapons permit is not entitled to carry a gun onto school property or a school bus.
CRIMINAL PROCEDURE: MAGISTRATES.

Magistrate may not issue warrant to sheriff who is first cousin of magistrate; may issue warrant to sheriff's deputy.

THE HONORABLE CLAUDE MEINHARD
SHERIFF FOR CUMBERLAND COUNTY
JUNE 7, 2000

You ask whether § 19.2-37 of the Code of Virginia prohibits a magistrate from issuing a warrant requested by a deputy sheriff, when such deputy sheriff is employed by a sheriff who is a first cousin of the magistrate. You interpret § 19.2-37 to prohibit the magistrate's issuance of a warrant requested by the sheriff because of the familial relationship between the two officers.

Section 19.2-45 enumerates the powers of a magistrates to include the power to issue warrants.1 Section 19.2-37 provides that "[n]o magistrate shall issue any warrant or process in complaint of his spouse, child, grandchild, parent, grandparent, parent-in-law, child-in-law, brother, sister, brother-in-law or sister-in-law, nephew, niece, uncle, aunt, [or] first cousin." Although it is arguable that the General Assembly may not have intended that this language preclude a sheriff from obtaining a warrant from a magistrate who is a first cousin of the sheriff, I concur in your interpretation that the sheriff may not do so.2

With respect to whether a deputy sheriff may request the issuance of a warrant from a magistrate who is a first cousin of the sheriff, it is my opinion that the
prohibition expressed in § 19.2-37 does not extend to deputies of such sheriffs. A rule of statutory construction provides that where the language of a statute is clear and unambiguous, effect must be given to its plain and ordinary meaning. The plain language of § 19.2-37 clearly expresses the prohibition in issue as between the magistrate and certain individuals enumerated in the statute. Nothing in the statutory language extends its proscription beyond such individuals. Thus, such language is not applicable to individuals other than those enumerated. A deputy sheriff, therefore, unless otherwise related to the magistrate in one of the capacities articulated in the statute, is not included within the scope of the prohibition.

Accordingly, it is my opinion that § 19.2-37 does not preclude a sheriff's deputy from obtaining a warrant from a magistrate who is the first cousin of the sheriff.

1See § 19.2-45 (1), (2), (5); see also 1997 Op. Va. Att’y Gen. 105, 106 (noting that § 19.2-45(1), (5) authorizes magistrate to issue process for arrest of person charged with criminal offense and also to issue civil warrants).

2For example, the language "in complaint of" in § 19.2-37 may be interpreted to refer only to warrants issued to one of the relatives enumerated in the section as opposed to warrants issued upon the request of one of the relatives. In my opinion, however, in light of similar statutes, as well as the presumed intent of such statutes that the issuing officer be prohibited from being involved in matters concerning his family, the better reasoned interpretation is that the language of the statute encompasses both situations. Compare § 16.1-69.40 ("No clerk or deputy clerk shall issue any warrant or process based on complaint of his spouse, child, grandchild, parent, grandparent, parent-in-law, child-in-law, brother, sister, brother-in-law, niece, uncle, aunt, first cousin, ...." (Emphasis added)). Additionally, it is arguable that the presumed intent of the language, that the magistrate be prohibited from being involved in matters concerning his family, poses no bar to a sheriff seeking a warrant in the ordinary course of his duties with respect to a nonfamily member. It is my opinion such a result is inconsistent with the broad language in issue. Should this conclusion be inconsistent with the intent of the General Assembly, it may amend the statute to clarify its intent.


4Compare the express language in the first part of § 19.2-37, making ineligible for the office of magistrate a person or the spouse of such person who is a "law-enforcement officer" or "a clerk, deputy or assistant clerk, or employee charged with the duty of enforcing any of the laws of this Commonwealth or any ordinance of any political subdivision thereof."

5Compare Bray v. Brown, 258 Va. 618, 521 S.E.2d 526 (1999) (holding that because language in Article VII, § 6 of Constitution of Virginia (1971), prohibiting certain multiple officeholdings, does not include deputy sheriffs within its scope, deputy, unlike sheriff, is not encompassed in prohibition and is thus not subject to its provisions).
CRIMINAL PROCEDURE: PRELIMINARY HEARING.

Statutory requirement that copy of certificate of analysis be "mailed or delivered" to counsel for accused at least seven days before hearing or trial does not impose condition that accused, or his counsel, be in possession of such copy within seven days of hearing or trial.

THE HONORABLE GEORGE W. GRAYSON
MEMBER, HOUSE OF DELEGATES
DECEMBER 20, 2000

You ask whether the requirement in § 19.2-187(ii) of the Code of Virginia that a copy of a certificate of analysis be "mailed or delivered" to counsel of record for the accused at least seven days prior to the accused's hearing or trial means that such certificate must be in the possession of the accused at least seven days prior to hearing or that the letter containing the certificate must be postmarked seven days prior to the hearing.

Section 19.2-187 provides that certain certificates of analysis shall be admissible in evidence as evidence of the facts therein stated and the results of the analysis or examination referred to therein, provided (i) the certificate of analysis is filed with the clerk of the court hearing the case at least seven days prior to the hearing or trial and (ii) a copy of such certificate is mailed or delivered by the clerk or attorney for the Commonwealth to counsel of record for the accused at least seven days prior to the hearing or trial upon request made by such counsel to the clerk with notice of the request to the attorney for the Commonwealth. The request to the clerk shall be in writing at least ten days prior to trial and shall clearly state in its heading "Request for Copy of Certificate of Analysis."

The prerequisites set forth in § 19.2-187(i) and (ii) must be satisfied in order for an applicable certificate of analysis to be admitted into evidence. Specifically, § 19.2-187(ii) requires that, upon proper request by counsel for the accused to the clerk, and notice of such request to the Commonwealth's attorney, a copy of such certificate is to be "mailed or delivered" by the clerk or Commonwealth's attorney to such counsel at least seven days prior to hearing or trial.

A principle of statutory construction provides that language of a statute that is plain should be given its clear and unambiguous meaning. "A related principle is that the plain, obvious, and rational meaning of a statute is always
to be preferred to any curious, narrow, or strained construction." The plain language of § 19.2-187(ii) mandates that the copy be “mailed or delivered” to counsel for the accused at least seven days prior to the hearing or trial. Thus, the statute permits either mailing or delivering the copy of the certificate to counsel at least seven days prior to the hearing or trial. Although it may be inferred that delivering a copy of the certificate to counsel would give him physical possession of the copy, no such inference can be derived from the word “mailed.”

Accordingly, it is my opinion that § 19.2-187(ii) does not impose the condition that the accused, or his counsel, be in possession of a copy of the certificate of analysis at least seven days prior to his hearing or trial.

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4See MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 701 (10th ed. 1996) (defining “mail” as “something sent or carried in the postal system”).

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DOMESTIC RELATIONS: UNIFORM CHILD CUSTODY JURISDICTION ACT.

Document purporting to transfer legal custody of infant from minor’s biological mother to unrelated couple is not decree of another state’s court and is not legally valid in Virginia.

THE HONORABLE SHARON B. WILL
JUDGE, JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT
AUGUST 29, 2000

You ask whether a document purporting to transfer legal custody of an infant from the minor’s biological mother to an unrelated couple has any legal effect under Virginia law.

You relate that the purported document was executed before a notary in Orange County, California. You also relate that the document does not indicate that a guardian was acting on behalf of the mother nor was a guardian ad litem appointed for her. You further relate that the name used by the female who received custody under the purported document was false. Finally, you state that no biological father is identified and there is no information indicating that a guardian ad litem was appointed for him.
Chapter 7 of Title 20, §§ 20-125 through 20-146 of the Code of Virginia, contains the Uniform Child Custody Jurisdiction Act, which provides for the treatment of foreign custody decrees by juvenile and domestic relations district courts in the Commonwealth. Specifically, § 20-136 states that “[t]he courts of this Commonwealth shall recognize and enforce an initial or modification decree of a court of another state.” Thus, a custody decree from another state that is filed in accordance with this Act has the same effect and shall be enforced in like manner as a custody decree rendered by a court of this Commonwealth.¹

Notably, the Uniform Child Custody Jurisdiction Act refers to a “decree of a court of another state.”² A rule of statutory construction provides that where the language of a statute is clear and unambiguous, effect must be given to its plain and ordinary meaning.³ The statutes governing the instant issue specifically require a court-ordered decree. Nothing in the limited facts you present suggests that the document in issue is a decree of a court or in any way authorized by a court.

Accordingly, I am required to conclude that the document described is not legally valid in the Commonwealth.⁴

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²Section 20-136.
⁴Even if such document falls within the purview of a “court decree,” there is no requirement that a state automatically accept a sister state's decision if factors indicate the sister state was not aware of the full circumstances when rendering its decree. See Bennett v. Commonwealth, 236 Va. 448, 458, 374 S.E.2d 303, 310 (1988) (noting that § 8.01-389 makes it appropriate to determine what credit originating state would give its own judgment when advised of full circumstances surrounding its entry).

EDUCATION: BOARD OF EDUCATION — STANDARDS OF QUALITY.

Board of Education, and not Attorney General, has been delegated authority to determine whether Virginia law permits enrolled, full-time public school student to transfer credit for courses completed outside public school system that offers similar courses.

THE HONORABLE EMILY COURIC
MEMBER, SENATE OF VIRGINIA
OCTOBER 30, 2000
You ask whether Virginia law permits an enrolled, full-time public school student to transfer credits from courses completed outside the school system when the school system offers similar courses. Because the General Assembly clearly has delegated the decision-making authority on this matter to the Board of Education, I have followed the practice of other Virginia Attorneys General of declining to render an official opinion pursuant to § 2.1-118 of the Code of Virginia, when the request requires an interpretation of a matter reserved to another entity, such as the Board of Education.

You advise that a constituent has contacted you regarding concerns about state policy governing the transfer of credits to a student's public school record. Correspondence enclosed with your letter notes that the constituent requested the public school system to accept the transfer credits of her child for foreign language courses taken at an accredited university that awards "Carnegie" units. The school principal approved the child's request to complete a correspondence course in a foreign language that was not offered at the child's school. Similar requests made by other parents were not approved because the courses their children sought to take were offered in the regular school schedule. The Department of Education advises that Virginia's standards for accreditation allow the principal to approve correspondence courses that are not available through the school's course schedule. You relate that your constituent, acting on behalf of other parents, challenges the Department's interpretation of the accrediting standards relating to the transfer of credit for courses offered at the school. The Department maintains that children enrolled in Virginia's public schools may not transfer credits for courses taken outside the school. The Department also maintains that the accrediting standards provide opportunities for students to take courses outside their schools, with the permission of the school principal.

You relate that the Department advises that regulations governing the transfer of credits apply only to students who transfer to a public school in the Commonwealth, either from another school division or from a school outside the Commonwealth. The Department also advises that a student enrolled in a public school in Virginia, who is taking courses and earning credit in that school, clearly is not a transfer student. The Department states that no Virginia law governs this matter. Finally, the Department advises that the issue of students' taking correspondence courses clearly is governed by the regulations authorizing credit for certain off-site instruction, and is subject to the approval of the principal under certain conditions, and not by the regulations governing transfer of credit.
Section 22.1-8 of the Code of Virginia vests the general supervision of the public school system in the Board of Education. Furthermore, § 22.1-16 permits the Board to "promulgate such regulations as may be necessary to carry out its powers and duties and the provisions of [Title 22.1]." Section 22.1-253.13:4(C) requires local school boards to award diplomas to students who earn the units of credit prescribed by the Board of Education, pass the prescribed tests, and meet such other requirements as may be prescribed by the local school board and approved by the Board of Education. Provisions shall be made for students who transfer between secondary schools and from nonpublic schools or from home instruction as outlined in the standards for accreditation.

Pursuant to its authority, the Board of Education has established regulations governing the standards for accreditation in Virginia's public schools. The Board regulations authorizing the transfer of credits and credit for off-site instruction provide, respectively:

A secondary school shall accept credits received from other accredited secondary schools, including summer schools, special sessions, schools accredited through the Virginia Council for Private Education, and educational programs operated by the state. Credit also shall be accepted for courses satisfactorily completed in accredited colleges and universities when prior written approval of the principal has been granted. Students may enroll in and receive a standard or verified unit of credit for supervised correspondence courses in subjects not available to them through the school's schedule with prior approval of the principal. Credit shall be awarded for the successful completion of such courses when the course is equivalent to that offered in the regular school program and the work is done under the supervision of a licensed teacher, or a person eligible to hold a Virginia license, approved by local school authorities. Verified credit may be earned when the student has passed the Standards of Learning test associated with the correspondence course completed.

Having noted the above, I also note that a 1987 opinion of the Attorney General concludes that, in rendering official opinions pursuant to § 2.1-118, the Attorney General has declined to render such opinions when the request
(1) does not involve a question of law, (2) requires the interpretation of a matter reserved to another entity, (3) involves a matter currently in litigation, and (4) involves a matter of purely local concern or procedure. Prior opinions also conclude that a request for an official opinion made pursuant to § 2.1-118 concerning the propriety of the actions of another entity interpreting matters reserved solely to it is not subject to review by the Attorney General and must be treated as the binding determination with regard to the matter.

Consequently, I must respectfully decline to render an official opinion regarding whether Virginia law permits an enrolled, full-time public school student to transfer credit for courses completed outside the school system when the school system offers similar courses. The General Assembly clearly has delegated such decision-making authority to the Board of Education.

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28 VAC 20-131-60(A).
48 VAC 20-131-180(B) (emphasis added).
7The Supreme Court of Virginia has held that “the practical construction given to a statute by public officials charged with its enforcement is entitled to great weight ... and in doubtful cases will be regarded as decisive.” Bed Company v. Corporation Commission, 205 Va. 272, 275, 136 S.E.2d 900, 902 (1964).

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EDUCATION: POWERS AND DUTIES OF SCHOOL BOARDS.

As opposed to prayer conducted in public school context, opening sessions of legislative and other deliberative public bodies with prayer is deeply embedded in history and tradition of this country, does not present danger of establishing religion, and is therefore constitutional. Audience to which prayer is directed consists of adults who presumably are not susceptible to religious indoctrination or peer pressure. School board meeting is meeting of adults with official business and policymaking duties; does not warrant constitutional scrutiny that official public school function would warrant with regard to conducting prayer. Local school board may open meetings with prayer.

THE HONORABLE STEPHEN D. NEWMAN
MEMBER, SENATE OF VIRGINIA
MARCH 13, 2000
You ask whether it is constitutional for the members of a local school board to pray at the start of their meetings. You relate that the school board has opened its meetings with a prayer since 1971 and that board members alternate in giving such prayer. You also relate that two student representatives attend such meetings. You further relate that other students may voluntarily attend such meetings, but their attendance is not required for class work or for disciplinary hearings conducted by the board. Finally, you relate that the board meetings are televised on the local cable television station.

The Establishment Clause of the First Amendment to the Constitution of the United States, made applicable to the states through the Fourteenth Amendment, commands that a state “shall make no law respecting an establishment of religion.” In analyzing the constitutionality of an invocation, the Supreme Court of the United States has recognized “heightened concerns” in applying the Establishment Clause in the public school context. In certain contexts, however, the Court has applied less rigorous standards to the reciting of an invocation. Most notably, in Marsh v. Chambers, the Court held that the Nebraska legislature’s practice of opening each legislative session with an invocation does not violate the Establishment Clause. It stated that opening a legislative session with prayer was rooted in historical practice, and did not present a real danger of establishing religion. The Court also noted in Marsh that the audience to which the prayer was directed is adults who presumably are not susceptible to religious indoctrination or peer pressure.

The Supreme Court notes in Marsh that “[t]he opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country.” Lower courts, both before and after Marsh, have held accordingly that a prayer recited at the beginning of meetings of various public bodies is constitutional. Thus, the issue presented by your inquiry is whether the invocation practice of a school board falls within the purview of the Marsh rationale as opposed to prayer conducted in a public school context. It is my opinion, based on the limited facts presented, that the invocation practice to which you refer meets the Marsh analysis and is thus constitutional.

Like legislative prayer which is primarily directed to legislators themselves, the invocation in question is directed to the school board members. Additionally, the nature and function of the board meeting is a meeting of adults with official business and policymaking duties. The fact that two students voluntarily attend such meetings to provide input (along with any other students who may from time to time voluntarily attend such meetings) does not trans-
form the board’s meetings from a policy and rule-making function into an official school function akin to a graduation ceremony or classroom instruction. It is thus my view that, like city councils and boards of supervisors, a school board is a deliberative public body charged with deciding business and policy issues. Consequently, it is also my view that the board’s meetings do not warrant the level of constitutional scrutiny required by the United States Supreme Court that an official public school function would warrant with regard to conducting prayer.

The United States Supreme Court and the United States Court of Appeals for the Fourth Circuit have yet to rule on this particular issue, and any such ruling is necessarily dependent upon the particular facts and circumstances. I am aware that the Sixth Circuit in Coles v Cleveland Board of Education held that the Cleveland school board’s practice of opening its meetings with a prayer is constitutionally prohibited. In so holding, the court disputed that Marsh is controlling and found that a school board meeting is so integral to the public school system to be tantamount to a public school function.

For the reasons discussed above, I do not agree with the court’s holding, which, of course, is not controlling precedent in Virginia. It is my opinion that the prayer at issue is the prayer of a public deliberative body which occurs in a fundamentally adult atmosphere rather than in a student-oriented or school-oriented atmosphere. Accordingly, based on the facts presented, it is my opinion that if members of a local school board wish to do so, they may open their board meetings with a prayer.

1 I assume that the student representatives are not members of the school board appointed by city council and do not make any official decision. See VA. CODE ANN. § 22.1-86.1(C). I further assume that, unlike their attendance at school, their attendance at school board meetings is not compulsory.

2 U.S. CONST. amend. 1; see id. amend. XIV, § 1.

3 See Lee v. Weisman, 505 U.S. 577, 592 (1992) (pervasive public school supervision of personal prayer at high school graduation is constitutionally prohibited).


5 Id. at 791-92.

6 Id. at 792.

7 Id. at 786 (emphasis added).

"Compare North Carolina Civil Liberties v. Constangy, 947 F.2d 1145, 1147-49 (4th Cir. 1991) (holding that Marsh analysis does not apply to judge's courtroom prayer that is directed to litigants and their attorneys, rather than to fellow consenting judges, and is thus not analogous to legislative prayer that is primarily directed at legislators themselves).

"See § 22.1-79 (outlining powers and duties of school board).

"171 F.3d 369 (6th Cir. 1999).

"Id. at 381.

EDUCATION: PUPILS.

COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS - CONFIDENTIALITY AND EXPUNGEMENT.

Local law-enforcement authorities may report to principal of local public school or his designee any offense committed by student, which would be felony if committed by adult or adult misdemeanor involving incidents occurring on school bus, school property, or at school sponsored activity. Sharing of such reports is discretionary and not mandatory.

THE HONORABLE H. RUSSELL POTTS JR.
MEMBER, SENATE OF VIRGINIA
JULY 21, 2000

You ask whether § 22.1-280.1(B) of the Code of Virginia permits local law-enforcement authorities to share with public schools officials information concerning any offense that would be a felony if committed by an adult or would be an adult misdemeanor involving any of the incidents described in § 22.1-280.1(A).

Section 22.1-280.1 addresses the reporting of certain criminal incidents occurring on school buses, school property, or at school-sponsored activities. Section 22.1-280.1(B) provides:

Notwithstanding the provisions of Article 12 (§ 16.1-299 et seq.) of Chapter 11 of Title 16.1, local law-enforcement authorities may report, and the principal or his designee may receive such reports, on offenses, wherever committed, by students enrolled at the school if the offense would be a felony if committed by an adult or would be an adult misdemeanor involving any incidents described in clauses (i) through (v) of subsection A.11

The information that Article 12, Chapter 11 of Title 16.1² seeks to control is that which specifically identifies or describes a juvenile, or otherwise concerns a particular juvenile, who has become involved with a law-enforcement agency.
or court, if that information is derived either directly or indirectly from an agency or court file or acquired by anyone in the course of official duties. Indiscriminate release of such information would violate the purpose and interest of the confidentiality statutes—that the welfare of the child is a paramount concern of the state.

Section 22.1-280.1(B) is a relatively new provision added by the 1999 Session of the General Assembly. The use of the phrase “notwithstanding the provisions of” at the beginning of the statute indicates a legislative intent to override any potential conflicts with the confidentiality provisions in Article 12, Chapter 11 of Title 16.1. In addition, the use of the term “may” in § 22.1-280.1(B) indicates that the sharing of reports by local law-enforcement authorities with principals, on offenses, is permissive and discretionary, rather than mandatory. The discretionary language in § 22.1-280.1(B) is in stark contrast to the mandatory requirements of the remaining provisions of § 22.1-280.1, as is reflected by the use of the word “shall.”

The General Assembly does not define the term “report” as it is used in § 22.1-280.1(B). The term must be given its common, ordinary meaning. The term “report” generally means “something that gives information”; “to announce or relate as the result of a special search, examination, or investigation.”

Several additional rules of statutory construction apply to your request. “[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction.” In addition, statutes should not be construed to frustrate their purpose. “‘[T]ake the words as written’ ... and give them their plain meaning.” Finally, when a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute.

The clear purpose of § 22.1-280.1(B) is to permit the sharing of reports by local law-enforcement authorities with the principal of local public schools or his designee. The sharing of such reports of the described offenses by students, wherever they have occurred, by local law-enforcement authorities is clearly discretionary and not mandatory. Therefore, it is my opinion that § 22.1-280.1(B) clearly and unambiguously authorizes local law-enforcement authorities to report to the school principal or the designee of such principal any offense that would be a felony if committed by an adult or would be an adult misdemeanor involving any of the incidents described in § 22.1-280.1(A).
The incidents described in § 22.1-280.1(A) are "(i) the assault, assault and battery, sexual assault, death, shooting, stabbing, cutting, or wounding of any person on a school bus, on school property, or at a school-sponsored activity; (ii) any conduct involving alcohol, marijuana, a controlled substance, imitation controlled substance, or an anabolic steroid on a school bus, on school property, or at a school-sponsored activity; (iii) any threats against school personnel while on a school bus, on school property or at a school-sponsored activity; (iv) the illegal carrying of a firearm onto school property; [or] (v) any illegal conduct involving firebombs, explosive materials or devices, as defined in § 18.2-85, or explosive or incendiary devices, as defined in § 18.2-433.1, or chemical bombs, as described in § 18.2-87.1, on a school bus, on school property, or at a school-sponsored activity ...."

Chapter 11 of Title 16.1 comprises the Juvenile and Domestic Relations District Court Law. Article 12 consists of §§ 16.1-299 to 16.1-309.1 (governing confidentiality and expungement of records regarding juveniles).


The use of the word "shall" in a statute generally implies that its terms are intended to be mandatory, rather than permissive or directive. See Andrews v. Shepherd, 201 Va. 412, 414-15, 111 S.E.2d 279, 281-82 (1959); see also Schmidt v. City of Richmond, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965); 1998 Op. Va. Att'y Gen. 56, 58, and opinions cited at 60 n.13.


EDUCATION: SYSTEM OF PUBLIC SCHOOLS; GENERAL PROVISIONS — PROGRAMS, COURSES OF INSTRUCTION, ETC. — BOARD OF EDUCATION — PUPILS — DISCIPLINE.

CONSTITUTION OF VIRGINIA: EDUCATION.

Fairfax County School Board lacks authority to require parents to pay for testing and treatment program as condition to granting excused absences to pupils suspended for substance abuse. Board of Education may not authorize local school board to
establish program that conditions suspended student's participation in program on parents' payment of costs of participation.

THE HONORABLE JOSEPH V. GARTLAN JR.
MEMBER, SENATE OF VIRGINIA
JANUARY 11, 2000

You ask whether, as a condition to granting excused absences to a pupil suspended for substance abuse, a local school board may require the pupil to participate in a testing and treatment program and impose the costs of the program on the pupil's parents.

You explain that the Fairfax County School Board wishes to adopt a policy requiring students suspended for substance abuse on school property to undergo testing and assessment with parental participation and, if recommended after the testing and assessment, to undergo treatment. You state that the policy would permit the student to undergo the testing, assessment and treatment through either the local public mental health agency or a private practitioner. Whether provided by the local mental health agency or by a private practitioner, the parents are to pay the costs of the testing, assessment and treatment. If the treatment is provided by a local mental health agency, the fee may be based on a sliding scale. Only upon satisfying the testing and treatment requirements would a student be granted excused absences for the suspension and thus be allowed to make up work missed.

You ask whether the Fairfax County School Board has the authority to condition the granting of excused absences on the parents' obtaining, at their own expense, substance abuse testing, assessment and treatment for the student. Section 22.1-6 of the Code of Virginia restricts the authority of a school board to impose fees on pupils. The section provides that "[e]xcept as provided in [Title 22.1] or as permitted by regulation of the Board of Education, no fees or charges may be levied on any pupil by any school board." No regulation or statute permits a local school board to impose the type of charge you describe.1 It is accordingly my opinion that the Fairfax County School Board lacks authority to require parents to pay for substance abuse testing and treatment as a condition to a pupil's being granted excused absences for a suspension. This result is consistent with a 1982 opinion of the Attorney General which concludes that a local school board may not make participation in a substance abuse counseling program, for which the parents must pay, an alternative to expulsion.2

You also ask whether the Board of Education may grant the Fairfax County School Board the authority to impose a charge for the type of program you
describe. No statute or regulation expressly authorizes the Board of Education to approve such a program or charge by a local school board. In addition, § 22.1-209.1:9, which establishes the Community-Based Intervention Program for Suspended and Expelled Students (the "Program") and establishes a mechanism for funding the Program, indicates that the General Assembly intends programs of the nature you describe to be administered in accordance with the statute.

The 1999 Session of the General Assembly enacted § 22.1-209.1:9. The purpose of the Program is "to provide interim instructional programs, intervention, and supervision for students in the public schools who have been suspended, excluded or expelled from school attendance." The Program is to "consist of five regional projects located throughout the Commonwealth." Students are eligible to attend the Program if recommended by the local school board, ordered by a court in the Commonwealth, or enrolled in the Program by a parent. The Department of Education is to administer the Program and is authorized to establish a fee schedule based on a parent's ability to pay, with waivers to be granted if the parent cannot afford the costs.

Section 22.1-209.1:9 indicates a legislative intent that programs providing intervention and supervision for students who have been suspended or expelled are to be administered by the Department of Education, with any charge for a student's participation in the program imposed in accordance with the fee schedule established by the Department. It is thus my opinion that, under current law, the Board of Education may not authorize a local school board to establish a program that conditions a suspended student's participation in the program on the parents' payment of the costs of the participation.

1Section 22.1-206 requires the public schools to provide instruction concerning drugs and drug abuse but does not authorize a fee for this instruction.

21981-1982 Op. Va. Att'y Gen. 144; see also 1973-1974 Op. Va. Att'y Gen. 316 (in absence of statute, local school board may not require children to have dental examination as prerequisite to school attendance; school board has implicit power only to extent necessary to protect health of other children or to enable child to benefit from education).

3Under its general power to "promulgate such regulations as may be necessary to carry out its powers and duties and the provisions of [Title 22.1]," the Board of Education has by regulation authorized local school boards to impose certain fees on pupils. Section 22.1-16; see 8 VAC 20-370-10 (Law. Coop. 1996) ("Fee and charges" regulation). Whether the imposition of fees conflicts with the mandate of Article VIII, § 1 of the Constitution of Virginia (1971) that all children of the Commonwealth be provided a "free" public education depends on the nature of the particular fee. See Op. Va. Att'y Gen.: 1977-1978 at 364, 365 (Constitution does not require that all materials and supplies be provided free to every student); 1976-1977 at 248 (fee for activity that is not required part of curriculum does not conflict with Constitution).
EDUCATIONAL INSTITUTIONS: COMMUNITY COLLEGE BOARD.

Member of State Board for Community Colleges must be from Commonwealth when chosen to serve. No requirement that Board member remain citizen or resident of Commonwealth throughout term of service. Board member may continue to serve after relocating residence to another state; will be ineligible for reappointment to Board if residence remains outside Commonwealth at expiration of term.

MR. ARNOLD R. OLIVER
CHANCELLOR, VIRGINIA COMMUNITY COLLEGE SYSTEM
MAY 1, 2000

You ask whether a member of the State Board for Community Colleges ("State Board" or "Board") may continue his term on the Board once he relocates his residence outside the Commonwealth.

You advise that the appointment term of the chairman of the Board runs through the year 2001. You further advise that, during the spring, the chairman will relocate to another state as a result of his acceptance of a job promotion. The chairman wishes to continue serving his term on the State Board.

Chapter 16 of Title 23, §§ 23-214 through 23-231.1 of the Code of Virginia, contains the statutory provisions applicable to the State Board and Virginia Community College System. Section 23-115 establishes the Board and authorizes it to be responsible for establishing, controlling and administering "a statewide system of publicly supported comprehensive community colleges." Section 23-216(a) structures the Board to contain "fifteen members appointed by the Governor subject to confirmation by the General Assembly." Section 23-216(b) contains the following criteria for Board membership:

The State Board shall be composed of persons selected from the Commonwealth at large. No officer, employee, or member of the governing board of any public institution of higher education, or of any school subject to the control of the State
Board, or any member of the General Assembly, or any member of the State Board of Education, shall be eligible for appointment to the Board. All members of the Board shall be deemed members at large charged with the responsibility of serving the best interests of the whole Commonwealth. No member shall act as the representative of any particular region or of any particular institution of higher education.

There are several rules of statutory construction that should be applied to this matter. Obviously, the primary goal of statutory construction is to ascertain and give effect to the intent of the legislature.\(^1\) "[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction."\(^2\) Statutes should not be construed to frustrate their purpose.\(^3\) In addition, the use of the word "shall" in a statute generally implies that its terms are intended to be mandatory, rather than permissive or directive.\(^4\) Finally, when a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute.\(^5\)

Statutes are also to be read as a whole rather than in isolated parts.\(^6\) Section 23-216(b) requires the Board to be "composed of persons selected from the Commonwealth at large." The members of the Board are specifically "charged with the responsibility of serving the best interests of the whole Commonwealth."\(^7\) Accordingly, each member of the Board is prohibited from acting "as the representative of any particular region or of any particular institution of higher education."\(^8\) Words used in a statute are to be given their common meanings unless a contrary legislative intent is manifest.\(^9\) The General Assembly does not, however, define the term "selected" as used in § 23-216(b). Consequently, the term must be given its ordinary meaning within the statutory context.\(^10\) The term "select[ed]" means "[chosen] from a number or group."\(^11\) Therefore, a member of the Board must be "from the Commonwealth when chosen to serve. By its definition, however, the term "selected" does not impose a continuing requirement that a member of the Board remain a citizen or resident of the Commonwealth to continue to be eligible to serve.

My conclusion is dictated by the rule of statutory construction that "every part of a statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary."\(^12\) To read "selected" in § 23-216(b) to require a Board member to remain a citizen or resident of the Commonwealth throughout the term of his or her service would render the term meaningless. It is my opinion that under such an interpretation, the statutory provision would have the same meaning if the term were omitted.
I, therefore, conclude that a Board member may continue to serve after relocating his residence to another state. The Board member, however, will be ineligible for reappointment to the Board if his residence remains outside the Commonwealth when his term expires.

7Section 23-216(b).
8Id.

ELECTIONS: CAMPAIGN FINANCE DISCLOSURE ACT.

Act does not include limited liability corporation as entity that must comply with campaign finance reporting requirements; does not address expenditure of funds transferred from political action committee to limited liability corporation. Expenditure of such funds by corporation is not subject to reporting requirements of Act.

THE HONORABLE MADISON E. MARYE
MEMBER, SENATE OF VIRGINIA
THE HONORABLE ALBERT C. POLLARD JR.
MEMBER, HOUSE OF DELEGATES
DECEMBER 11, 2000

You inquire regarding the use of a limited liability corporation ("LLC") to receive and expend political funds which the Campaign Finance Disclosure Act normally requires to be made public.
Within the very limited facts that you provide, you advise that it has been reported that funds solicited by and contributed to certain members of the General Assembly were transferred to a lawfully established political action committee which, in turn, transferred substantial sums to a lawfully established LLC. It is your understanding that the LLC is not required to file financial reports of receipts and expenditures with the State Board of Elections. You specifically inquire whether an LLC, which is not required to report political contributions or expenditures, may expend funds originating from an entity which is subject to the reporting requirements of the Campaign Finance Disclosure Act. If so, you ask whether such expenditure constitutes campaign activity that must be reported by the LLC.

The Campaign Finance Disclosure Act, §§ 24.2-900 through 24.2-930 of the Code of Virginia, constitutes “the exclusive and entire campaign finance disclosure law of the Commonwealth.”1 Section 24.2-923(A) requires that “[p]ersons and political committees shall file the prescribed reports of contributions and expenditures with the State Board [of Elections] in accordance with the applicable schedule set out in § 24.2-916.” Furthermore, “[a] committee shall comply with the election year schedule for each year in which it seeks to influence the outcome of the election.”2

For the purposes of the Campaign Finance Disclosure Act, the term “person” is defined as “any individual or corporation, partnership, business, labor organization, membership organization, association, cooperative, or other like entity.”3 The term “political committee” is defined as

any state political party committee, congressional district political party committee, county or city political party committee for a county or city with a population of more than 100,000, organized political party group of elected officials, political action committee, other committee, person or group of persons which receives contributions or makes expenditures for the purpose of influencing the outcome of any election. The term shall not include: (i) a campaign committee; (ii) a political party committee exempted pursuant to § 24.2-911; or (iii) a person who receives no contributions from any source and whose only expenditures are made solely from his own funds and are either contributions made by him which are reportable by the recipient pursuant to Article 4 (§ 24.2-914 et seq.) of [the Act] or independent expenditures which are reportable by him to the extent required by subsec-
tion B of § 24.2-910, or a combination of such reportable contributions and independent expenditures.\textsuperscript{141}

"Expenditure" is defined to include "money ... paid, ... or in any other way disbursed by any candidate, campaign committee, political committee, inaugural committee, or person for the purpose of influencing the outcome of an election."\textsuperscript{5}

The Campaign Finance Disclosure Act requires that campaign finance reports be filed according to the schedule contained in § 24.2-916 "until a final report is filed."\textsuperscript{6} Section 24.2-920(A) requires that "[t]he final report shall include a termination statement, signed by the candidate, that all reporting for the nomination or election is complete and final." In addition, "[o]nce a candidate's final report has been filed, no further report relating to that election shall be required."\textsuperscript{7} Moreover, "each general election shall be treated separately."\textsuperscript{8} Finally, the Act requires campaign finance reports to be filed by each committee "until a final report is filed."\textsuperscript{9}

The Supreme Court of Virginia has held that, ""[w]hile in the construction of statutes the constant endeavor of the courts is to ascertain and give effect to the intention of the legislature, that intention must be gathered from the words used, unless a literal construction would involve a manifest absurdity.""\textsuperscript{10} "[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction."\textsuperscript{11} Statutes should not be construed to frustrate their purpose.\textsuperscript{12}

The Campaign Finance Disclosure Act requires contributions and expenditures of persons and political committees to be reported to the State Board of Elections in accordance with the schedule set forth in the Act.\textsuperscript{13} A political action committee clearly is required to report such activity to the Board. The applicable definitions of terms used in the Act, however, do not include the described LLC as an entity that must comply with the campaign finance reporting requirements of the Act. Furthermore, the plain language of the Act does not address an LLC that expends funds transferred from a political action committee.

Consequently, I must conclude that the General Assembly has chosen not to enact any laws addressing the question of whether an entity, which is not required to report political contributions or expenditures, may expend funds transferred from an entity which is required to report such funds. Because I am unable to find any Virginia law addressing such a factual situation, I also must conclude that such expenditures of funds by the LLC are not subject to the reporting requirements of the Campaign Finance Disclosure Act.
ELECTIONS: CAMPAIGN FINANCE DISCLOSURE ACT.

Act permits political action committee to purchase and make available to legislators redistricting-related services to assist in political process of redistricting.

THE HONORABLE H. MORGAN GRIFFITH
MEMBER, HOUSE OF DELEGATES
DECEMBER 11, 2000

You inquire regarding whether it is permissible under Virginia law for a political action committee established pursuant to § 24.2-909 of the Code of Virginia\(^1\) to purchase redistricting-related services from a private company and make such services available to Republican members of the General Assembly to assist in the legislative process of redistricting.

You advise that Republican members of the General Assembly intend to use donated private funds, rather than taxpayer-paid public funds, to assist with the redistricting process. You advise further that Metro Consulting LLC, a privately owned company, has been formed for the purpose of obtaining computer hardware and software, data, and technical support (“redistricting tools”) for use in the legislative and congressional redistricting process in the Commonwealth. You relate that Metro Consulting functions as a vendor and charges a fee for the purchase of the redistricting tools based on Metro's costs of obtaining the tools. Purchasers of these redistricting tools include political action committees that will make the tools available to Republican members of the General Assembly for use in the redistricting process.
The Campaign Finance Disclosure Act, §§ 24.2-900 through 24.2-930, constitutes “the exclusive and entire campaign finance disclosure law of the Commonwealth.” For the purposes of the Campaign Finance Disclosure Act, the term “political action committee” is defined as “any organization, other than a campaign committee or political party committee, established or maintained in whole or in part to receive and expend contributions for political purposes.” Section 24.2-909 of the Act provides that certain entities “may establish and administer for political purposes, and solicit and expend contributions for, a political action committee.”

The General Assembly does not define the term “political purpose” as used in the definition of “political action committee” in the Campaign Finance Disclosure Act and in § 24.2-909. The term must, therefore, be given its common, ordinary meaning. The term “political” generally means “of or relating to government, a government, or the conduct of governmental affairs”; “of or relating to matters of government as distinguished from matters of law”; “of, relating to, or concerned with the making as distinguished from the administration of governmental policy”; “of, relating to, or concerned with politics”; “of relating to, or involved in party politics.” The term “purpose” generally is defined to mean “something that one sets before himself as an object to be attained”; “an end or aim to be kept in view, in any plan, measure, exertion, or operation”; “an object, effect, or result aimed at, intended, or attained”; “a subject under discussion or an action in course of execution.”

The Supreme Court of Virginia has noted that, “[w]hile in the construction of statutes the constant endeavor of the courts is to ascertain and give effect to the intention of the legislature, that intention must be gathered from the words used, unless a literal construction would involve a manifest absurdity.” “[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction.” Statutes should not be interpreted in ways that produce absurd or irrational consequences.

Section 24.2-909 permits certain entities to establish and administer political action committees “for political purposes” and to solicit and expend contributions on behalf of such committees. The commonly accepted definition of “political purposes” includes an objective relating to the conduct of governmental affairs and the making of governmental policy. The Supreme Court of the United States recognizes that “legislative reapportionment is primarily a matter for legislative consideration and determination.” The Supreme Court has also noted on numerous occasions that the redistricting process is inherently a political process. The Court has said that “[l]egislators are, after all,
politicians," and, consequently, political considerations are inherent "in the essentially political process of redistricting."

Based on the above, I must conclude that the purchase of redistricting-related services designed to assist members of a particular political party in the redistricting process, an inherently political process, constitutes a "political purpose," and is, thus, permissible under the Campaign Finance Disclosure Act. I, therefore, also conclude that it is permissible for a political action committee established pursuant to § 24.2-909 to purchase redistricting-related services from a private company and make those services available to particular members of the General Assembly to assist in the redistricting process.

Section 24.2-909 provides: "Any stock or nonstock corporation, labor organization, membership organization, cooperative, or other group of persons may establish and administer for political purposes, and solicit and expend contributions for, a political action committee, provided that:

1. No political action committee shall make a contribution or expenditure by utilizing money or anything of value secured by physical force, job discrimination, financial reprisal, threat of force, or as a condition of employment.

2. Any person soliciting a contribution to a political action committee shall, at the time of solicitation, inform the person being solicited of (i) his right to refuse to contribute without any reprisal and (ii) the political purposes of the committee."

Section 24.2-900.

Section 24.2-901.

The use of the term "may" in § 24.2-909 indicates that the formation of a political action committee is permissive and discretionary. See 1997 Op. Va. Att’y Gen. 10, 12, and opinions cited at 13 n.11


Id. at 1847.


You ask whether Tazewell County has the authority to require reimbursement for costs related to the use of emergency equipment in response to emergency calls for fire and rescue services.

You relate that Tazewell County owns certain emergency service equipment that is used to provide fire and rescue services to the citizens of the county through the operation of fire and rescue organizations. You further relate that the county is responsible for replacing and maintaining such equipment. You inquire whether the county may devise a system of reimbursement for the actual costs of emergency equipment used by fire and rescue organizations in response to emergency service calls.

Section 27-6.1 of the Code of Virginia provides that "[t]he governing body of any [locality] may establish as a department of government a fire department." Prior opinions of the Attorney General consistently have concluded that Virginia localities have no affirmative obligation under state law to provide fire and rescue services. Consequently, there is no obligation on counties to establish and maintain fire and rescue services. Although localities are statutorily authorized to provide fire-fighting and rescue services, it is, nevertheless, within their discretion to do so. I am not aware of any statutory amendment or court decision that alters this conclusion, nor am I aware of any statute prohibiting the reimbursement mechanism you suggest. Inasmuch as the provision of emergency services by a county is discretionary, requiring reimbursement from a user of such services for the reasonable costs associated with the use of emergency equipment owned and maintained by the county is appropriate.
Accordingly, it is my opinion that it is within the discretion of a county to provide the emergency equipment in issue and similarly within its discretion to seek reimbursement for the actual cost of the use of such equipment.

1You note that the system proposed by the county will not involve collection of any costs for volunteer services associated with emergency responses.


4See 1984-1985 Op. Va. Att'y Gen., supra; accord Op. Va. Att'y Gen.: 1979-1980 at 171, 172 (stating that § 27-6.1 permits governing bodies to establish fire departments); 1978-1979 at 102, 103 (concluding that county is not authorized to enter into service agreement with fire company without creating fire zone or district); 1977-1978 at 452, 453 (noting that town charter grants council authority to establish and maintain fire department); 1976-1977 at 85, 86 (stating that § 27-6.1 authorizes any county to establish fire department); 1972-1973 at 328 (noting that city may recognize rescue squad as integral part of its safety program by passing resolution or ordinance).

5See § 27-23.6.


7Compare § 15.2-1716 (providing for reimbursement of expenses incurred in responding to DUI incident, and stating that "section shall not preempt or limit any remedy available to the Commonwealth, to the locality or to any volunteer rescue squad to recover the reasonable expenses of an emergency response to an accident or incident not involving impaired driving or operation of a vehicle as set forth herein").

FIRE PROTECTION: FIRE DEPARTMENTS AND FIRE COMPANIES — LOCAL FIRE MARSHALS.

MOTOR VEHICLES: MOTOR VEHICLE AND EQUIPMENT SAFETY — LIGHTS AND TURN SIGNALS.

Fire marshal granted law-enforcement powers by local governing body may equip vehicle with blue lights.

THE HONORABLE MARSHA L. GARST
COMMONWEALTH'S ATTORNEY FOR THE CITY OF HARRISONBURG
MAY 18, 2000

You ask whether a fire marshal may use blue lights on his vehicle in accordance with § 46.2-1022 of the Code of Virginia.

A 1982 opinion of the Attorney General concludes that permissible vehicular lighting devices for emergency vehicles are limited to those specified by statute.1 Section 46.2-1022 provides that "law-enforcement vehicles may be equipped with ... blue ... lights." Section 46.2-1023 provides that "[f]ire apparatus ... may be equipped with ... red ... lights." Section 46.2-1024 provides that "[a]ny member of a fire department ... may equip one vehicle owned by him with ... red ... lights." Section 46.2-1025(A)(8) permits the mounting of
"amber lights" on "[f]ire apparatus" when "used in addition to lights permitted under § 46.2-1023."

In accordance with these statutes, a 1976 opinion concludes that blue lights may not be used on fire department vehicles. Fire departments are established pursuant to Article 1, Chapter 2 of Title 27, §§ 27-6.1 through 27-23.10. "The head of such fire department shall be known as 'the chief.'" Chapter 3, §§ 27-30 through 27-37.1, however, authorizes the appointment of a "fire marshal." Section 27-34.2:1 provides that "the local fire marshal ... shall, if authorized by the [local] governing body ... , have the same police powers as a sheriff, police officer or law-enforcement officer."

A 1990 opinion concludes that § 27-34.2:1 grants to the fire marshal "the same police powers as are exercised by a sheriff, police officer or other law-enforcement officer, without limitation as to the types of offenses for which the fire marshal ... may exercise those police powers." Such authority stands in contrast to that of a fire "chief," for example, who is granted only limited police powers to be used in fire situations. Relying on the legislative history of § 27-34.2:1, the opinion emphasizes that the General Assembly intended that this provision allow local governing bodies to imbue a fire marshal with the same police powers possessed by a sheriff, police officer, or other law-enforcement officer. Inasmuch as § 46.2-1022 permits law-enforcement vehicles to be equipped with blue lights, it is my opinion that the vehicle of a fire marshal, who has been authorized by the local governing body to have such law-enforcement powers, may likewise be so equipped.

Section 27-6.1.
Section 27-30.
See § 27-15.1 (providing, generally, that chief shall have authority to maintain order at fire and "power to make arrests" of persons refusing to obey his orders in connection with emergency).

FIRE PROTECTION: STATEWIDE FIRE PREVENTION CODE ACT.
Locality that chooses to enforce Fire Prevention Code pursuant to Act may not selectively enforce open burning regulations prescribed by Code on geographic basis.
The Honorable Emily Couric  
Member, Senate of Virginia  
December 18, 2000

You ask whether a locality may selectively enforce the open burning regulations of the Fire Prevention Code only within certain areas of the locality.

Chapter 9 of Title 27, §§ 27-94 through 27-101 of the Code of Virginia enacts the “Virginia Statewide Fire Prevention Code Act.” Section 27-96 provides that the purposes of the Act “are to provide for statewide standards for optional local enforcement to safeguard life and property from the hazards of fire.” Section 27-97 empowers the Board of Housing and Community Development “to adopt and promulgate a Statewide Fire Prevention Code.” Section 27-97 also provides that such Code “shall prescribe regulations.” Additionally, “[l]ocal governments are hereby empowered to adopt fire prevention regulations that are more restrictive or more extensive in scope than the Fire Prevention Code,” provided they do not affect certain matters not in issue here.¹

The statutory scheme articulated in the Virginia Statewide Fire Prevention Code Act establishes concurrent authority of the state and a locality to enforce the Fire Prevention Code.² The locality is not obligated to enforce the Code, but rather is given the option to do so.³ When a locality does opt for such concurrent authority, § 27-97 authorizes such locality to adopt fire prevention regulations that are more restrictive than the Code, not less so.

Moreover, § 27-98 provides that “[a]ny local government may enforce the Fire Prevention Code in its entirety or with respect only to those provisions of the Fire Prevention Code relating to open burning, fire lanes, fireworks, and hazardous materials.” This statute gives a locality that has chosen to enforce the Code the option to enforce the Code in its entirety or to enforce only those provisions of the Code that relate to “open burning, fire lanes, fireworks, and hazardous materials.”⁴ I am unaware, however, of any Code provisions that regulate open burning on a geographic basis.⁵

The Virginia Supreme Court has stated, “the plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction.”⁶ Accordingly, it is my opinion that a locality that has opted to enforce the Fire Prevention Code pursuant to the Virginia Statewide Fire Prevention Code Act may not selectively enforce the open burning regulations promulgated pursuant to the Code on a geographic basis.

¹Section 27-94.
'Section 27-97 (emphasis added).


2Note § 27-96, which provides for "optional local enforcement" of the Fire Prevention Code.

Section 27-98.

4Compare BOCA National Fire Prevention Code § F-403.4.3 (prohibiting "open burning that will be offensive or objectionable due to smoke or odor emissions when atmospheric conditions or local circumstances make such fires hazardous" but does not prohibit open burning on purely geographic basis). 1996 BOCA NATIONAL BUILDING CODE (13th ed.).


HEALTH: REGULATION OF MEDICAL CARE FACILITIES – UTILIZATION REVIEW STANDARDS AND APPEALS.

Statutory scheme pertaining to review of health care service determinations is designed to benefit covered person. Appeals process is designed to be undertaken by provider on behalf of such person. No authority for health care provider to appeal, on own behalf, final adverse decision involving retrospective utilization review denials.

THE HONORABLE JOHN H. CHICHESTER
MEMBER, SENATE OF VIRGINIA
JUNE 9, 2000

You inquire regarding Article 1.2, Chapter 5 of Title 32.1, §§ 32.1-137.7 through 32.1-137.17 of the Code of Virginia ("Article 1.2"), pertaining to utilization review standards and appeals of health care service determinations made by an "insurer, health services plan, managed care health insurance plan licensee, or other entity or person." You specifically ask whether health care providers may appeal, on their own behalf, adverse decisions involving retrospective utilization review denials.

You advise that retrospective medical necessity determinations arise where a health care provider obtains approval to provide services to a health plan member and subsequently submits its treatment plan to the health plan. You also advise that the health plan allegedly reviews the provision of care previously authorized and subsequently denies coverage based on a determination of lack of medical necessity. In such instances, the provider generally may not bill the health plan member. Therefore, neither the individual health plan member nor the provider files an appeal on behalf of the member. Rather, the provider files the appeal on its own behalf since it is the entity suffering financial harm. You assert that the primary issue is whether the timelines and procedures specified in Article 1.2 for the handling of utilization review appeals apply to appeals filed by and on behalf of the provider.
Section 32.1-137.8(A) specifies that "[n]o utilization review entity shall perform utilization review with regard to hospital, medical or other health care resources rendered or proposed to be rendered to a covered person except in accordance with the requirements and standards set forth in this article." The use of the word "shall" in § 32.1-137.8(A) implies that its terms are intended to be mandatory, rather than permissive or directive. In addition, I also note that when a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute.

A "utilization review entity," as that term is used in § 32.1-137.8(A), is "a person or entity performing utilization review." "Utilization review" is defined as a system for reviewing the necessity, appropriateness and efficiency of hospital, medical or other health care services rendered or proposed to be rendered to a patient or group of patients for the purpose of determining whether such services should be covered or provided by an insurer, health services plan, managed care health insurance plan licensee, or other entity or person.

The initial utilization review conducted by a health plan of the provision of health care previously authorized for a covered person which results in a denial of coverage already rendered, based on a determination of lack of medical necessity, constitutes an "adverse decision." Sections 32.1-137.14 and 32.1-137.15 specify the procedures for reviewing an adverse decision. Section 32.1-137.14(A) requires that reconsideration of such a decision "shall be requested by the provider on behalf of the covered person." (Emphasis added.)

The term "covered person" means "a subscriber, policyholder, member, enrollee or dependent, as the case may be, under a policy or contract issued or issued for delivery in Virginia by a managed care health insurance plan licensee, insurer, health services plan, or preferred provider organization." "The treating provider on behalf of the covered person shall be notified" regarding a decision rendered on a request for reconsideration of an adverse decision. The decision constitutes a "final adverse decision," which is "a utilization review determination ... in a reconsideration of an adverse decision ... upon which a provider or patient may base an appeal."

Section 32.1-137.15 details the procedure for appealing a final adverse decision. Any person or entity performing utilization reviews is required to establish an appeals process for consideration of a final adverse decision appealed
“by a covered person, his representative, or his provider.” It is clear that any such appeal is for the benefit of the covered person, whether the appeal is filed by the covered person or on his behalf by his representative or provider. Furthermore, if the appeal is denied, the notification provided to the appellant must include “a clear and understandable description of the covered person’s right to appeal final adverse decisions to the Bureau of Insurance ..., the procedures for making such an appeal, and the binding nature and effect of such an appeal.”

There are several additional rules of statutory construction that must be applied to this matter. Obviously, the primary goal of statutory construction is to ascertain and give effect to legislative intent. "[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction." "The manifest intention of the legislature, clearly disclosed by its language, must be applied." "[T]ake the words as written" ... and give them their plain meaning." In addition, statutes should not be construed to frustrate their purpose. Finally, statutes are to be read as a whole rather than in isolated parts.

The entire statutory scheme in Article 1.2 pertaining to review of health care service determinations is, in my view, clearly designed for the benefit of the covered person. I am also of the view that the appeals process in Article 1.2 has clearly been designed to be undertaken “by the provider on behalf of the covered person.” Therefore, I must conclude that health care providers have no authority to appeal, on their own behalf, final adverse decisions involving cases of retrospective utilization review denials.

1Section 32.1-137.7 (defining “utilization review”).
2Senator Chichester reports that the information contained in paragraph two of this opinion was provided to him by representatives of Potomac Hospital.
5Section 32.1-137.7.
6Id.
7"Adverse decision" means a utilization review determination by the utilization review entity that a health service rendered or proposed to be rendered was or is not medically necessary, when such determination may result in noncoverage of the health service or health services.” Section 32.1-137.7.
You ask several questions regarding an apparent abandonment of State Route 655, a secondary road in Pulaski County.

You relate that Old Route 655, located in Pulaski County, enters the Powhatan Boy Scout reservation. In 1944, the board of supervisors of Pulaski County passed a resolution requesting that the Virginia Department of Transportation abandon a 1.30 mile section of Route 655 existing in the secondary system of Pulaski County, because the road served no purpose and was practically impassable.
You advise that between 1944 and 1998, Pulaski officials and residents believed the road had been abandoned. The road has not been maintained, and much of the original roadbed has become covered with vegetation and is impassable to vehicular traffic. You indicate that in 1998, people began expressing uncertainty whether the road, in fact, was abandoned by the Department of Transportation.

You first ask whether the Department of Transportation’s failure to maintain Route 655 since 1944 establishes that the secondary road has, in fact, been abandoned rather than discontinued by the Department.

In 1928, Virginia’s roads were divided into the state highway system and county roads. In 1932, the General Assembly established the secondary system of highways. In 1940, the General Assembly amended and reenacted § 8 of the 1932 Act, prescribing that “[t]he jurisdiction and procedure for abandonment of roads in the secondary system of State highways, shall remain in the local road authorities as now provided by law.” As early as 1926, statutory authority to abandon Route 655 rested with the board of supervisors of the locality rather than with the Department of Transportation:

In case of the abandonment of any section of road ... under the provisions of this act as a part of the State highway system, such section of road ... shall remain a public road ... as the case may be, unless abandoned or discontinued as such under the provisions of this act ..., and subject to the authority of the board of supervisors or other local road authorities, as provided by law.

Several rules of statutory construction apply to your request. “[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction.” Statutes should not be construed to frustrate their purpose. In addition, the use of the word “shall” in a statute generally implies that its terms are intended to be mandatory, rather than permissive or directive. Finally, when a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute.

Applying the above rules of statutory construction and the statutory provisions codify applicable in 1944, the Pulaski County board of supervisors had authority to abandon Route 655; however, the board actually only requested that the Department of Transportation abandon the road. The failure of the Department to maintain Route 655 does not impact upon abandonment of
the road; rather, such action indicates only that its use was discontinued. Therefore, I am of the opinion that Route 655 has not been abandoned.

You next ask whether, if the road was discontinued rather than abandoned, the Boy Scouts of America, Blue Ridge Council, which has maintained Route 655, is entitled to reimbursement from the Commonwealth for any maintenance performed on the road by the Council.

A 1986 opinion of the Attorney General concludes that discontinuance of a road under § 33.1-150 of the Code of Virginia simply removes the road from the state system of secondary roads "and constitutes a determination that the road no longer warrants maintenance at public expense." Furthermore, in 1967, the Supreme Court of Virginia decided that

the discontinuance of a secondary road means merely that it is removed from the state secondary road system. Discontinuance of a road is a determination only that it no longer serves public convenience warranting its maintenance at public expense. The effect of discontinuance upon a road is not to eliminate it as a public road or to render it unavailable for public use.

A determination by the Department of Transportation that a road is discontinued divests the Department with control of the road. In addition, discontinuance of the road constitutes a determination by the Department that the road does not merit any further maintenance at public expense. Therefore, any maintenance performed on the road by the Blue Ridge Council was voluntary. Consequently, I must conclude that the Blue Ridge Council is not entitled to reimbursement for any maintenance it performed voluntarily on the road for the benefit of those using the Powhatan Boy Scout reservation.

Your last inquiry is whether the Department of Transportation, should it reclaim ownership of Route 655, must use the original roadbed or may the Department condemn that portion of the road which no longer follows the original roadbed.

Section 33.1-69 vests "[t]he control, supervision, management and jurisdiction over the secondary system of state highways ... in the Department of Transportation." The Department has adopted regulations in accordance with the Administrative Process Act. The resident engineer is the Department official charged with the responsibility for making determinations and ultimately accepting streets into the secondary system of state highways.
The Attorney General has declined to render official opinions pursuant to § 2.1-118 when the request (1) does not involve a question of law, (2) requires the interpretation of a matter reserved to another entity, (3) involves a matter currently in litigation, and (4) involves a matter of purely local concern or procedure. Also a request for an official opinion made pursuant to § 2.1-118 concerning the propriety of the actions of another entity interpreting matters reserved solely to it is not subject to review by the Attorney General and must be treated as the binding determination with regard to the matter.

Based on the above, the Department of Transportation has exclusive jurisdiction over all roads in the secondary system of state highways. As a result, the Department has adopted regulations establishing requirements and setting forth the administrative procedures for reviewing and approving the addition of subdivision streets into the secondary system. Finally, the Department's resident engineer makes the final decision whether subdivision streets will be accepted into the secondary system. Consequently, I must respectfully decline to interpret the matter raised by your final question, as the Department of Transportation is the appropriate agency to make such determinations.

1See 1928 Va. Acts ch. 159, at 568.
41926 Va. Acts ch. 212, § 2, at 394, 396-97. This language was in place at the time of the adoption of the 1944 resolution. See VA. CODE ANN. § 1975t (1942); see also § 1975oo.
You ask whether the Commonwealth's attorney is responsible for prosecuting candidates for local office who post campaign materials on state highway-owned rights-of-way.

You advise that your office receives reports that candidates for local office post campaign materials along the highways on state-owned rights-of-way. You advise further that a publication of the State Board of Elections indicates that reports of such violations regarding the use of campaign materials be submitted to the Commonwealth's attorney in the county or city in which the violation occurs. You conclude that the Commonwealth's attorney is not responsible for the prosecution of such matters.¹

Section 33.1-12(3) of the Code of Virginia empowers the Commonwealth Transportation Board “[t]o make rules and regulations ... not in conflict with the laws of this Commonwealth, for the protection of and concerning traffic on and the use of systems of state highways and to add to, amend or repeal the same.” Section 33.1-19 stipulates that “[t]he rules and regulations ... prescribed by the Board ... shall have the force and effect of law and any person, firm or corporation violating any such rule or regulation ... shall be guilty of a misdemeanor.” Pursuant to its authority, the Board has adopted a regulation prohibiting the use or occupancy of rights-of-way within the system of state highways except for travel or as authorized by permit or as provided by law.²
Article 1, Chapter 7 of Title 33.1, §§ 33.1-351 through 33.1-378, governs outdoor advertising in sight of the public highways. Section 33.1-351 defines the terms used in Chapter 7:

"Advertisement" means any writing, printing, picture, painting, display, emblem, drawing, sign, or similar device which is posed or displayed outdoors on real property and is intended to invite or to draw the attention or to solicit the patronage or support of the public to any goods, merchandise, real or personal property, business, services, entertainment, or amusement .... [Emphasis added.]

***

"Sign" means any outdoor sign, display, device, figure, painting, drawing, message, placard, poster, billboard, or other thing which is designed, intended, or used to advertise or inform, any part of the advertising or informative contents of which is visible from any highway.

Section 33.1-373 provides for the assessment of a civil penalty of $100 against any person who "erects, paints, prints, places, puts, or affixes any advertisement within the limits of any highway." Furthermore, § 33.1-375 declares any sign, advertisement or advertising structure that is not removed from the right-of-way after thirty days' written notice "to be a public and private nuisance." After declaring such outdoor advertising to be a nuisance, the Commonwealth Transportation Commissioner may remove, obliterate or abate any violating sign, advertisement or advertising structure from the right-of-way and collect the cost of such removal. Section 33.1-375, however, does not impose a penalty for failure to remove any such violating signs, advertisements or advertising structures. Section 33.1-377 provides:

Any person, firm or corporation violating any provision of this article for which violation no other penalty is prescribed by this article shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than ten dollars nor more than fifty dollars. Each day during which such violation is continued after conviction may be treated for all purposes as a separate offense. [Emphasis added.]

There are several rules of statutory construction that apply to this matter. The use of the word "shall" in a statute ordinarily implies that its provisions are mandatory. Obviously, a primary goal of statutory interpretation is to ascertain the intent of the General Assembly. In addition, statutes relating
to the same subject should be considered in pari materia. When a statute creates a specific grant of authority, that power exists only to the extent plainly granted by the statute. Additionally, the mention of one thing in a statute implies the exclusion of another.

It is clear that the placing of political signs within the public highway rights-of-way violates §§ 33.1-19 and 33.1-375, and the Board rule governing the use of rights-of-way within the system of state highways. The violation of § 33.1-19 is a misdemeanor. It is also my opinion that a violation of § 33.1-375 is a misdemeanor. Section 15.2-1627 provides that a Commonwealth's attorney "may in his discretion, prosecute Class 1, 2 and 3 misdemeanors, or any other violation, the conviction of which carries a penalty of confinement in jail, or a fine of $500 or more, or both such confinement and fine." (Emphasis added.) I must, therefore, conclude that the Commonwealth's attorney may prosecute candidates for local office who post campaign materials on state highway-owned rights-of-way.

1Section 2.1-118 requires that any request by a Commonwealth's attorney for an opinion from the Attorney General "shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions."


3See Andrews v. Shepherd, 201 Va. 412, 414, 111 S.E.2d 279, 281 (1959) (noting that "shall" is word of command, used in connection with mandate); see also Schmidt v. City of Richmond, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965) (noting that "shall" generally indicates procedures are intended to be mandatory, imperative or limited); Op. Va. Att'y Gen.: 1997 at 16, 17; 1996 at 20, 21; 1991 at 126, 126, and opinions cited therein; id. at 127, 129, and opinions cited therein.


8Although no penalty is specified for violating § 33.1-375, § 33.1-377 provides that a person "shall be guilty of a misdemeanor" for violating any provision of Article 1 for which no other penalty is prescribed by the article.

9The use of the term "may" in § 15.2-1627 indicates that the prosecution of Class 1, 2 and 3 misdemeanors by the Commonwealth's attorney is permissive and discretionary, rather than mandatory. See 1997 Op. Va. Att'y Gen. 10, 12, and opinions cited at 13 n.11.
HOTEL ROANOKE CONFERENCE CENTER COMMISSION ACT.

Act specifically authorizes Virginia Polytechnic Institute and State University to enter into services contracts with Hotel Roanoke Conference Center Commission and to expend nongeneral funds from continuing education programs in support of operating costs of Hotel Roanoke Conference Center; does not authorize University to contribute to capital expenditures of Commission.

THE HONORABLE CLIFTON A. WOODRUM
MEMBER, HOUSE OF DELEGATES
DECEMBER 29, 2000

You inquire regarding whether the Hotel Roanoke Conference Center Commission Act (the "Act") prohibits Virginia Polytechnic Institute and State University (the "University") from contributing to capital expenditures of the Hotel Roanoke Conference Center Commission (the "Commission").

For the purposes of this opinion, I shall assume that the term "capital expenditure" is to be given its common, ordinary meaning. "Capital expenditure" generally is defined to mean "an expenditure for long-term additions or betterments properly chargeable to a capital assets account." Capital assets are "long-term assets either tangible or intangible (as land, buildings, patents, or franchises)."

The first paragraph of § 20 of the Act provides:

Any participating party, or other political subdivision of the Commonwealth, except the University, is authorized to provide services, to donate real or personal property and to make appropriations to the Commission, for the acquisition, construction, maintenance, and operation of the Commission's facilities... Nothing in this section shall prohibit the University from entering into a services contract with the Commission by which the University receives services from or provides services to the Commission.

Section 3 of the Act contains definitions of terms used in the Act. The term "facility" is defined as "a conference center constructed adjacent to a renovated Hotel Roanoke, including all fixtures, furniture and equipment."

Section 21 of the Act pertains to the fiscal year and the budget of the Commission. The Commission is required to prepare and submit to the participating parties a proposed operating budget and a proposed capital budget. The proposed operating budget must show "estimated revenues and expenses," as well as the responsibility of any participating party for any anticipated deficit when estimated expenses exceed estimated revenues. The proposed capital
budget must show “estimated expenditures for such fiscal year for assets costing more than $20,000 ... and having an estimated useful life of twenty years or more and the source of funds for such expenditures."9 The University has authority to participate in funding the budget of the Commission as follows:

No moneys appropriated to the University by the Commonwealth, except moneys generated by the continuing education programs offered by the University, shall be contributed to the Commission by the University. The University is authorized to expend nongeneral funds from continuing education programs in support of its share of the operating costs of the Hotel Roanoke Conference Center. The University shall report to the chairmen of the House Appropriations and Senate Finance Committees by August 15 of each fiscal year all planned and actual transfers to the Hotel Roanoke Conference Center."[10]

Under well-accepted principles of statutory construction, when a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute.11 In addition, the mention of one thing in a statute implies the exclusion of another.12 Finally, the use of the word “shall” in a statute ordinarily implies that its provisions are mandatory.13 The Act specifically authorizes the University to enter into services contracts with the Commission “by which the University receives services from or provides services to the Commission.”14 Furthermore, the University is allowed to contribute to the Commission only those funds appropriated to the University by the Commonwealth that are generated by the continuing education programs offered by the University.15 The University is specifically authorized “to expend nongeneral funds from continuing education programs in support of its share of the operating costs of the Hotel Roanoke Conference Center.”16

The Virginia Supreme Court has stated, “the plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction.”17 The Court has also noted, “[w]hile in the construction of statutes the constant endeavor of the courts is to ascertain and give effect to the intention of the legislature, that intention must be gathered from the words used, unless a literal construction would involve a manifest absurdity.”18

Therefore, based on the clear and unambiguous language of the Act, I must conclude that the Act does not authorize the University to contribute to capital expenditures of the Commission.

2Webster’s Third New International Dictionary of the English Language Unabridged 332 (1993).

1 Id.


1 Id. § 3, at 656.


1 Id. § 21(B).

3Id.

4Id.

Id. § 21(G).


7See Andrews v. Shepherd, 201 Va. 412, 414, 111 S.E.2d 279, 281 (1959) (noting that “shall” is word of command, used in connection with mandate); see also Schmidt v. City of Richmond, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965) (noting that “shall” generally indicates procedures are intended to be mandatory, imperative or limited); Op. Va. Att’y Gen.: 1997 at 16, 17; 1996 at 20, 21; 1991 at 126, 126, and opinions cited therein; id. at 127, 129, and opinions cited therein.


9See 1994 Va. Acts, supra note 1, § 21(G), at 902.

10Id.


Housing: Virginia Fair Housing Law.


House Bill 908, which allows locality to require special exception or special use permit for three or more persons unrelated by blood, marriage, or adoption residing in single-family dwelling in area zoned for single-family use, would not violate federal or state fair housing law unless applied in discriminatory manner. Whether bill applies to or affects specific piece of property must be decided on case-by-case basis. Incorporation of term “nonprofit” in definition of “residential facility” in Senate Bill 449 creates discriminatory distinction that violates Virginia Fair Housing Law.
You ask whether federal or state fair housing laws affect certain legislation considered by the 2000 Session of the General Assembly. Specifically, you inquire whether federal or state fair housing laws affect House Bill 908 or Senate Bill 449, and whether such bills constitute a regulatory taking of property.

House Bill 908 sought to amend § 15.2-2286(A)(3) of the Code of Virginia, relating to zoning and the granting of special exceptions by local governing bodies, by adding the following language:

Nothing in the planning and zoning chapter of Title 15.2 shall be construed to prevent a locality from requiring a special exception or special use permit for a use which includes three or more persons unrelated by blood, marriage or adoption residing in a single-family dwelling in an area zoned for single-family use.

Senate Bill 449 sought to amend § 15.2-2291, relating to zoning of group homes for mentally ill, mentally retarded, developmentally disabled, elderly, or otherwise disabled persons, to distinguish between for-profit and nonprofit group homes for purposes of defining a “residential facility.”

The Federal Fair Housing Act was enacted as part of the Civil Rights Act of 1968. It was amended by the Fair Housing Amendments Act of 1988 (“Federal Act”) to extend protection of the Fair Housing Act to handicapped persons. Likewise, the 1991 Session of the General Assembly recodified the Virginia Fair Housing Law, originally enacted in 1972, to complement the federal fair housing law to correct practices which denied to certain groups—among them the elderly and the handicapped—equal access to, and benefits from, housing opportunities. Both the federal and state fair housing laws are remedial in the sense that they seek to suppress the denial of housing opportunities to persons falling within the classifications designated in these laws. Neither the federal nor the state fair housing laws are intended to be land use or zoning statutes.

While zoning statutes that are facially neutral and otherwise constitutional enjoy a presumption of validity, the application of a particular zoning law may be challenged when it is applied in a manner that violates the federal or state fair housing law. With respect to House Bill 908, which allows a locality...
to require a special exception or special use permit for three or more persons unrelated by blood, marriage, or adoption residing in a single-family dwelling in an area zoned for single-family use, such bill appears facially neutral since it applies to all unrelated persons as described in the bill. If, however, in practice, it is applied only to housing for unrelated persons with disabilities, such application would appear to be discriminatory. Thus, the amendment proffered in House Bill 908 is not affected by the fair housing laws unless it is applied, in fact, in a discriminatory manner.

With respect to whether the proposed legislation could be considered a regulatory taking of property, the Taking Clause of the Fifth Amendment to the Constitution of the United States applies not only to a physical deprivation of property but also to regulations of property. The Taking Clause is violated when land use regulations do not substantially advance legitimate state interests, or they deny an owner the economically viable use of his land. A zoning regulation which does not in its terms arbitrarily discriminate, however, will not be declared unconstitutional, except where its effect upon an individual parcel of land is so great as to amount to a taking of the property without just compensation. The zoning amendment in House Bill 908 does not in its terms arbitrarily discriminate among those properties which are subject to it nor does it deprive an owner the economically viable use of his land. Accordingly, it is my opinion that there is no clear conflict between the amendment and any federal or state law. Again, whether it applies to or affects a specific piece of property must be decided on a case-by-case basis.

Regarding Senate Bill 449 and its proposed amendment to § 15.2-2291 to change the current definition of a “residential facility” from “any group home or residential facility in which aged, infirm or disabled persons reside” to “any nonprofit group home or other nonprofit residential facility,” it is my opinion that such an amendment violates the Virginia Fair Housing Law. Clearly, it is the policy of the Commonwealth, as expressed in the Virginia Fair Housing Law, “to provide for fair housing throughout the Commonwealth, to all its citizens, regardless of ... handicap, and to that end to prohibit discriminatory practices with respect to residential housing by any person or group of persons.” Nothing in the Virginia Fair Housing Law distinguishes between a nonprofit and a for-profit group home or residential facility. To incorporate such a distinction in § 15.2-2291, which seeks to implement the Virginia Fair Housing Law, would result in a direct conflict with the legislative intent of the law.
House Bill 908 was introduced and referred to the Committee on Counties, Cities and Towns on January 24, 2000, but was defeated in committee on February 12, 2000.

Senate Bill 449 was introduced and referred to the Committee on Local Government on January 21, 2000. The bill was continued to the 2001 Session of the General Assembly.

"Special exception" means a special use, that is a use not permitted in a particular district except by a special use permit granted under the provisions of this chapter and any zoning ordinances adopted herewith." Section 15.2-2201.

42000 H.B. 908, supra note 1.


See 1991 Va. Acts ch. 557, at 979 (repealing Chapter 5 of Title 36, §§ 36-86 to 36-96, and adding in Title 36 Chapter 5.1, §§ 36-96.1 to 36-96.23).


Id. at 124-25.


The Taking Clause provides that "private property [shall not] be taken for public use, without just compensation."


142000 S.B. 449, supra note 2 (quoting § 15.2-2291(C)).

Section 36-96.1(B).


17Compare § 36-96.6(D) (noting that "group home in which physically handicapped, mentally ill, mentally retarded, or developmentally disabled persons reside, with one or more resident counselors or other staff persons, shall be considered for all purposes residential occupancy by a single family when construing any restrictive covenant which purports to restrict occupancy") with § 36-96(A) (providing that "[z]oning ordinances for all purposes shall consider a residential facility in which no more than eight mentally ill, mentally retarded, or developmentally disabled persons reside, with one or more resident counselors or other staff persons, as residential occupancy by a single family").

INSURANCE: CONTINUING CARE PROVIDER, ETC.

CORPORATIONS: VIRGINIA NONSTOCK CORPORATION ACT.

Resident of continuing care retirement community is not prohibited from serving as director on facility provider's board of directors. Fact that individual is resident of
continuing care retirement community is not automatic compromise of his good faith judgment nor is it tantamount to personal interest in transaction. Resident's personal interest in transaction would not necessarily void transaction so long as material facts of his interest are made known to board. Fact that director is resident who may receive reasonable compensation for goods or services does not equate to inurement which would affect federal tax exempt status of facility.

THE HONORABLE EMILY COURIC
MEMBER, SENATE OF VIRGINIA
THE HONORABLE PAUL C. HARRIS AND MITCHELL VAN YAHRES
MEMBERS, HOUSE OF DELEGATES
SEPTEMBER 25, 2000

You ask whether § 13.1-870 of the Code of Virginia prohibits a resident of a nonprofit continuing care retirement community ("CCRC") from serving as a voting member on the facility's board of directors. You also ask whether allowing such a resident to serve as a director is considered inurement under the Internal Revenue Code which would jeopardize the facility's tax exempt status.

A continuing care "facility" is a place "in which a person undertakes to provide continuing care to an individual." The majority of these facilities are owned by nonprofit organizations. Chapter 49 of Title 38.2 sets forth various statutes regarding certain requirements of the provider of such facility, including registration by the provider with the State Corporation Commission, the filing of disclosure statements, and mandatory provisions of a resident's continuing care contract. Nothing in Chapter 49, however, addresses the composition or the duties of a CCRC provider's board of directors.

Chapter 10 of Title 13.1, §§ 13.1-801 through 13.1-944, governs Virginia nonprofit corporations, including matters related to the boards of directors of such corporations. With respect to directors serving on the board of directors of a nonprofit corporation, § 13.1-870(A) provides that "[a] director shall discharge his duties as a director, including his duties as a member of a committee, in accordance with his good faith judgment of the best interests of the corporation." Additionally, § 13.1-871 addresses director conflicts of interests and states that "[a] conflict of interests transaction is a transaction with the corporation in which a director of the corporation has a direct or indirect personal interest." Notably, § 13.1-871(A) specifically provides that such a transaction is not voidable solely because of the director's interest in the transaction, providing the material facts of the transaction and the director's interest were disclosed or known and the transaction was approved, authorized, or ratified by the board, and the transaction was fair to the corporation.
It is my opinion that nothing in the language of either § 13.1-870 or § 13.1-871 would prohibit a resident of a CCRC from serving as a director on its provider's board of directors. The mere fact that an individual is a resident of the CCRC is certainly no automatic compromise of his good faith judgment nor is his residency at the facility tantamount to a personal interest in a transaction. Even assuming that the individual did have a personal interest in a transaction before the board, such interest would not necessarily void the transaction so long as the material facts of his interest were known or disclosed.

Regarding the issue of inurement, an organization exempt from income taxation under § 501(c) of the Internal Revenue Code will lose its tax exempt status if any part of the organization's net earnings "inures to the benefit of any private shareholder or individual." This inurement prohibition "is generally directed at payments that are made to shareholders or individuals for purposes other than as reasonable compensation for goods or services." The singular fact that a director is a CCRC resident, and there is no indication that he is receiving unreasonable payments therefor, does not equate to inurement within the meaning of this section.

Accordingly, it is my opinion that a resident of a CCRC is not prohibited from serving as a voting member of the CCRC provider's board of directors.

1Section 38.2-4900.


3Sections 38.2-4900 to 38.2-4917.

4See § 38.2-4901.

5See §§ 38.2-4902 to 38.2-4904.

6See § 38.2-4905.

7Note that § 38.2-4910(A) provides that "[r]esidents shall have the right of self-organization"; § 38.2-4910(B) mandates that the provider's board of directors "shall hold meetings at least quarterly" with residents of the facility for discussion of issues related to the facility. There is no language in this statute, however, which indicates that it is the exclusive means for resident representation before the board.

8Section 13.1-871(A).

9Section 13.1-871(A)(1).

10Section 13.1-871(A)(3).

11Compare §§ 2.1-639.2 and 2.1-639.31 (defining "personal interest" as "financial benefit or liability").
See § 13.1-871(A); see also § 13.1-691(A) (governing director conflict of interests of stock corporations and containing parallel language to § 13.1-871(A)).


Note that the election of any director to the board must be in accordance with all applicable corporate law.

LIBRARIES: LAW LIBRARIES.

Costs imposed by locality in civil action for establishment of courthouse law library may be used for ordinary and reasonable decorating needs incident to maintaining suitable quarters for library; may not be used for improvement of hallways or elevators leading to library.

THE HONORABLE WALTER W. STOUT III
JUDGE, CIRCUIT COURT OF THE CITY OF RICHMOND
DECEMBER 28, 2000

You ask whether funds raised pursuant to § 42.1-70 of the Code of Virginia for law libraries may be used for the normal interior decorating needs of the library, such as carpeting, painting, shelving, and the purchase of desks and chairs. You also ask whether such funds may be used to carpet and paint access areas, such as hallways and elevators, used by the public to reach the area where the library is maintained.

Section 42.1-70 allows a locality to impose, by ordinance, an assessment for a law library "as part of the costs incident to each civil action." Specifically, § 42.1-70 authorizes the local governing body to disburse funds collected from such assessments

for the acquisition of law books, law periodicals and computer legal research services and equipment for the establishment, use and maintenance of a law library .... In addition to the acquisition of law books, law periodicals and computer legal research services and equipment, the disbursements may include ... acquisition of suitable quarters for such library.... [T]he cost of suitable quarters for such library shall be fixed by the governing body and paid out of the fund created by the imposition of such assessment of cost.
It is axiomatic that the primary goal of statutory interpretation is to ascertain the intent of the General Assembly.1 Thus, as the Supreme Court of Virginia has frequently stated, ""a statute ... should be read and applied so as to accord with the purpose intended.""2 Additionally, statutes should not be construed to frustrate their purpose.3 With respect to statutes prescribing costs, the Supreme Court has noted that such statutes ""are to be construed as remedial statutes, and liberally and beneficially expounded for the sake of the remedy which they administer.""4

The clear legislative purpose of § 42.1-70 is to generate funds for the establishment of a courthouse law library.5 Construing the statute ""liberally and beneficially"" to promote its purpose of providing for a law library, it is clear that the funds raised pursuant to § 42.1-70 may be used for the ordinary and reasonable decorating needs incident to maintaining ""suitable quarters"" for such library. The plain, obvious, and rational meaning of this statute6 supports the inclusion of items such as carpet, paint, shelving, desks, and chairs within its purview so that the library is organized and usable. Accordingly, funds raised pursuant to § 42.1-70 may be disbursed for the expenditures related in your first inquiry.

With respect to your second inquiry, however, it is my opinion that disbursement of the funds for the upkeep of hallways or elevators leading to the library does not fall within the purview of § 42.1-70. Unlike the expenditures you first propound, which are related to the housing of the law library, the elevators and hallways leading to the area where the library is maintained do not appear, under the facts presented, to be integral to the establishment or existence of library quarters.7 Thus, the funds assessed pursuant to § 42.1-70 for the maintenance of a law library may not be allocated for the improvement of such elevators and hallways.

5Compare 1990 Op. Va. Att’y Gen., supra, at 73 (noting that purpose in § 14.1-133.2 of assessing costs in criminal or traffic cases is to generate funds to be disbursed for "construction, renovation, or maintenance of courthouse or jail and court-related facilities"). The 1990 opinion quotes § 14.1-133.2, which has been repealed, see 1998 Va. Acts ch. 872, cl. 2, 10, at 2128, 2212; however, the quoted language has been transferred to § 17.1-281.
See Turner v. Commonwealth, 226 Va. at 459, 309 S.E.2d at 338 (noting that “plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction”).

7See Webster's Third New International Dictionary of the English Language Unabridged 1860 (1993) (defining “quarters” as “living accommodations”; “rooms, housing ... occupied by ... some ... group”).

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LIBRARIES: LOCAL AND REGIONAL LIBRARIES — STATE AND FEDERAL AID.

COUNTIES, CITIES AND TOWNS: TRANSITION OF CITY TO TOWN STATUS — JOINT ACTIONS BY LOCALITIES.

Clifton Forge will continue to receive separate state funding to operate independent library for 5 years from effective date of court order granting town status to city. State grant funding will continue to be made directly to library fund of Clifton Forge Public Library.

THE HONORABLE H. MORGAN GRIFFITH
MEMBER, HOUSE OF DELEGATES
AUGUST 30, 2000

You inquire concerning transition of the City of Clifton Forge to town status. You request interpretation of §§ 15.2-1302 and 15.2-4116 of the Code of Virginia, pertaining to state funding for local libraries, and question whether the Clifton Forge Public Library will continue to receive separate state funding for a full five-year period following the city's change to town status.

It is the policy of the Commonwealth "to promote the establishment and development of public library service throughout its various political subdivisions."1 The State Library Board makes grants of state-appropriated funds for the provision of public library service throughout the Commonwealth.2 The Library Board is authorized to provide grants of state aid from available funds to qualifying local and regional free library systems.3

"A city may change to town status in accordance with the provisions of [Chapter 41 of Title 15.2, §§ 15.2-4100 through 15.2-4120]."4 Section 15.2-4116 provides:

In any transition under the provisions of this chapter, ... if the former city continues to operate an independent library, the Commonwealth shall continue state aid to the former ... independent library the same as if no transition had occurred. The Commonwealth shall continue such aid for five years from the effective date of the court order granting town status.
You specifically state that the City of Clifton Forge is changing to town status. Section 15.2-1302 provides that “[a]ny state funds that were distributed to a locality” shall not be reduced below the amounts that would have been received prior to transition of a city to town status. In addition, following a court order granting town status to a city, such state funds shall continue to be distributed for a period of five fiscal years following the transition. The Commonwealth, however, may terminate or modify any program under which distribution has been made.

The goal of statutory interpretation “is to ascertain and give effect to legislative intent.” Statutes relating to the same subject should be considered in pari materia. When a statute creates a specific grant of authority, that power exists only to the extent plainly granted by the statute. The use of the word “shall” in a statute ordinarily implies that its provisions are mandatory.

It is clear that the General Assembly intends to continue state aid to independent libraries that continue to be operated by former cities for a period of five years from the date the court certifies “an order declaring the city eligible for town status.” Therefore, I am of the opinion that Clifton Forge will continue to receive separate state funding to operate an independent library “for five years from the effective date of the court order granting town status.”

You also inquire whether such state funding will be made to the Clifton Forge Public Library, the Town of Clifton Forge, or to Alleghany County.

Section 42.1-33 authorizes local governing bodies “to establish a free public library for the use and benefit of its residents.” Should a local governing body elect to establish such a library, the governing body must appoint a library board of not less than five members or trustees to manage and control the public library system. The library board has the policymaking power over the library, independent of any supervision by the governing body. Board appointments are made “by the governing body, chosen from the citizens at large with reference to their fitness for such office.” A 1983 opinion of the Attorney General concludes that the library board is a separate political subdivision. While the governing body provides financial support for the library, “[f]unds appropriated or contributed for public library purposes shall constitute a separate fund and shall not be used for any but public library purposes.” The library board has explicit statutory power to control the expenditure of all moneys credited to the library fund.

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.” In such situations, the plain meaning and intent of the particular statutes govern.
The language in §§ 42.1-33 and 42.1-35 is clear and free from ambiguity. I am of the opinion that state grant funding will continue to be made directly to the library fund of the Clifton Forge Public Library.

1Section 42.1-46.
2Section 42.1-47.
3See §§ 42.1-46 to 42.1-54.
4Section 15.2-4100. For the purposes of this opinion, I shall assume that an ordinance has been passed pursuant to § 15.2-4101 petitioning the circuit court for an order granting town status to the city.
5I note that in granting town status, § 15.2-4111 requires that the special court "specify the effective date of transition from city status to town status." You do not provide the date of such transition. Consequently, I must assume that the special court has not yet issued "an order declaring the city eligible for town status," as is required by § 15.2-4107. Section 15.2-4107(D).
6As used in Title 15.2, the term "locality" means "a county, city, or town as the context may require." Section 15.2-102.
7Section 15.2-1302(3).
8See §§ 15.2-4116, 15.2-1302(3).
9Section 15.2-1302.
13See Andrews v. Shepherd, 201 Va. 412, 414, 111 S.E.2d 279, 281 (1959) (noting that "shall" is word of command, used in connection with mandate); see also Schmidt v. City of Richmond, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965) (noting that "shall" generally indicates procedures are intended to be mandatory, imperative or limited); Op. Va. Att'y Gen.: 1997 at 16, 17; 1996 at 20, 21; 1991 at 126, 126, and opinions cited therein; id. at 127, 129, and opinions cited therein.
14Section 15.2-4106(D).
15Section 15.2-4116.
16See § 42.1-35(A).
18Section 42.1-35(A).
20Section 42.1-33.
21Section 42.1-39.
MOTOR VEHICLES: ABANDONED VEHICLES – TRESPASSING VEHICLES, PARKING, AND TOWING.
COUNTIES, CITIES AND TOWNS: POLICE AND PUBLIC ORDER.

Local police officers may not enforce statutory fee limit for which owner of trespassing vehicle is liable to towing company, in lieu of towing vehicle.

THE HONORABLE MARSHA L. GARST
COMMONWEALTH’S ATTORNEY FOR THE CITY OF HARRISONBURG/ROCKINGHAM COUNTY
OCTOBER 31, 2000

You ask whether local police officers may enforce the fee limit in § 46.2-1231 of the Code of Virginia charged by towing companies in lieu of towing trespassing vehicles.

You relate that Harrisonburg police officers often are called to arbitrate disputes regarding fees charged by towing companies in excess of the $25 fee established in § 46.2-1231, in lieu of towing a trespassing vehicle. You report that the towing companies allege that a hookup by a tow truck to a vehicle constitutes a tow, and that owners of trespassing vehicles frequently call the police for an interpretation of § 46.2-1231. You conclude that determination of the appropriate towing fee under § 46.2-1231 is a civil matter, and should be decided between the vehicle owner and towing company without police intervention.

Section 15.2-1704 sets forth the powers and duties of a police force in a locality of the Commonwealth. Section 15.2-1704(A) specifically invests a police force

with all the power and authority which formerly belonged to the office of constable at common law and is responsible for the prevention and detection of crime, the apprehension of criminals, the safeguard of life and property, the preservation of peace and the enforcement of state and local laws, regulations, and ordinances.

Section 15.2-1704(B), however, provides that “[a] police officer has no authority in civil matters,” except to serve temporary detention orders pursuant to § 37.1-67.01 or § 37.1-67.1. Although prior opinions of the Attorney General conclude that police officers have no authority in civil matters, a 1986 opinion concludes that police officers possess coequal authority with sheriffs to enforce the criminal and motor vehicle laws in the Commonwealth. The Supreme Court of Virginia has also held that it is the duty of both police officers and sheriffs “to investigate all violations of law and to serve criminal warrants.”
A primary rule of statutory construction is that one must look first to the language of a statute, and if it is clear and unambiguous, the statute should be given its plain meaning, without resort to the rules of statutory interpretation. When there are signs clearly warning that vehicles, "if parked without permission, will be removed, towed or immobilized," the owner, operator or lessee of areas used for vehicular parking may have any trespassing vehicle towed or immobilized. Furthermore, when the owner of the trespassing vehicle reaches the scene after arrival of the tow truck but before the actual towing of the vehicle, such owner "shall be liable for a reasonable fee, not to exceed twenty-five dollars or such other limit as the governing body of the county, city, or town may set by ordinance, in lieu of towing."

The General Assembly has made no provision in § 46.2-1231 for enforcement of the twenty-five-dollar fee by police officers. In addition, § 15.2-1704 grants no authority to police officers to enforce the § 46.2-1231 fee limit. When a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute.

Therefore, I must conclude that local police officers may not enforce the fee limit in § 46.2-1231 for which the owner of a trespassing vehicle is liable to a towing company, in lieu of towing the vehicle.

The fourth paragraph of § 46.2-1231 provides: "Notwithstanding the foregoing provisions of this section, if the owner or representative or agent of the owner of the trespassing vehicle is present and removes the trespassing vehicle from the premises before it is actually towed, the trespassing vehicle shall not be towed, but the owner or representative or agent of the owner of the trespassing vehicle shall be liable for a reasonable fee, not to exceed twenty-five dollars or such other limit as the governing body of the county, city, or town may set by ordinance, in lieu of towing."

Section 2.1-118 requires that any request by a Commonwealth's attorney for an opinion from the Attorney General "shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions."

'See, e.g., 1976-1977 Op. Va. Att'y Gen. 81, 82 (concluding that city police are expressly prohibited from serving civil process for collection of unpaid fines); id. at 204, 205 (concluding that transfer and movement of private funds between various locations are matters of civil nature and not within duties of police officer). These opinions were issued before the 1982 amendment to § 15.1-138 (repealed and recodified as § 15.2-1704), authorizing city and town police officers to "serve an order of temporary detention pursuant to § 37.1-67.1." 1982 Va. Acts ch. 38, at 136, 137. Prior opinions of this Office conclude that such an order is civil in nature. See Op. Va. Att'y Gen.: 1987-1988 at 408, 408; 1983-1984 at 235, 235.


'Section 46.2-1231.

'Id.


** MOTOR VEHICLES: LICENSURE OF DRIVERS. **

CRIMINAL PROCEDURE: RECOVERY OF FINES AND PENALTIES.

Court may establish time frame within which defendant may make deferred or installment payments of unpaid court-ordered fines or costs. Clerk of court may grant or deny request for time to pay in accordance with court's guidelines authorizing such practice. Clerk's decision concerning conditions of deferred or installment payment agreements is final and not appealable. Petitions filed by defendants requesting deferred or installment payments are considered to be traffic, and not civil, matters. Court decision regarding deferred or installment payments is not appealable. Court must enter order reinstating defendant's driver's license after defendant has paid reinstatement fee to Department of Motor Vehicles and agreement has been entered for defendant to make deferred or installment payments of unpaid court-ordered fines or costs.

THE HONORABLE GEORGE W. HARRIS JR.
JUDGE, TWENTY-THIRD JUDICIAL DISTRICT
DECEMBER 28, 2000

You ask several questions regarding the recent amendment to § 46.2-395(B) of the Code of Virginia.

Section 46.2-395 requires the court to suspend a person's driver's license for failure or refusal to pay fines or costs imposed upon such person for "violation of the law of the Commonwealth or of the United States or of any valid local ordinance." The 2000 Session of the General Assembly amended § 46.2-395(B) by adding the following language:
However, if the defendant, after having his license suspended, pays the reinstatement fee to the Department of Motor Vehicles and enters into an agreement under § 19.2-354 that is acceptable to the court to make deferred payments or installment payments of unpaid fines, costs, forfeitures, restitution, or penalties as ordered by the court, the court shall restore the defendant’s driver’s license.1

You first ask whether, pursuant to § 19.2-354, courts may grant a defendant time to pay, or whether the only discretion of the court is to determine the terms of the payment agreement.

When a person is unable to pay a fine and costs within ten days of sentencing, § 19.2-354(A) authorizes the court to order the person to pay the fine in deferred payments or installments. Section 19.2-354(A) also permits the court to “authorize the clerk to establish and approve the conditions of all deferred or installment payment agreements, pursuant to guidelines established by the court.” Section 19.2-354(D) provides that, when the court has ordered deferred or installment payments, the clerk is to give notice to the defendant that upon his failure to comply with the order, “his privilege to operate a motor vehicle will be suspended pursuant to § 46.2-395.” In addition, § 19.2-354(C) authorizes the discharge of all or a portion of the fine for the performance of community service work. When the person fails to pay the amount due by the date ordered, the court “shall proceed in accordance with § 19.2-358.”3 Section 19.2-358 prescribes the procedure to be followed upon default in the deferred payment or any installment payment of the fine and costs.

A 1986 opinion of the Attorney General notes that § 19.2-354 permits the court to set the terms and conditions for deferred or installment payments, “including the time in which payment is to be made.”14 I concur with this prior opinion and conclude, therefore, that § 19.2-354 permits the court to establish a time frame within which a defendant may make deferred or installment payments of unpaid fines or costs.

You next ask whether a clerk authorized by the court to establish and approve the conditions of the payment agreement under § 19.2-354 may grant or deny a request for time to pay if the guidelines of the court so authorize. You also ask whether the clerk’s denial of such a request is appealable.

Section 19.2-354(A) permits the court to “authorize the clerk to establish and approve the conditions of all deferred or installment payment agreements, pursuant to guidelines established by the court.” When a statute creates a
specific grant of authority, the authority exists only to the extent specifically
granted in the statute.\(^5\) In addition, the mention of one thing in a statute
implies the exclusion of another.\(^6\) Consequently, I must conclude that a clerk
may grant or deny a request for time to pay when the guidelines established
by the court authorize such a practice. Since § 19.2-354 makes no provision
for the appeal of a clerk's decision concerning the conditions of deferred or
installment payment agreements, I must also conclude that such decisions
are final and, accordingly, are not appealable.

Your third inquiry is whether the filing of a petition requesting deferred or
installment payments constitutes a civil case. You also ask whether the disposi-
tion of the petition, either granting or denying deferred or installment pay-
ments, may be appealed by the Commonwealth or the defendant who filed
such petition pursuant to §§ 19.2-354 and 19.2-355.

Section 19.2-355(a) authorizes the court to require a defendant claiming to
be unable to pay a fine “forthwith” “to file a petition, under oath, with the
court, upon a form provided by the court, setting forth the financial condition
of the defendant.” As noted above, the amendment to § 46.2-395(B) permits
restoration of a driver's license after payment of a reinstatement fee and entry
of an agreement acceptable to the court which provides for deferred or install-
ment payments. Section 46.2-395 is set forth in Article 12, Chapter 3 of
Title 46.2. Violations of Title 46.2 “shall constitute traffic infractions,” “[u]nless
otherwise stated.” The General Assembly has not provided in § 46.2-395
that petitions filed by defendants pursuant to § 19.2-354, now permitted
by § 46.2-395(B), are to be treated otherwise than as traffic infractions.
Upon default of an installment payment, § 19.2-358 prescribes the procedure
that may be implemented by the court. Therefore, it is clear that petitions
filed by defendants under § 19.2-355, as permitted by the amended language
in § 46.2-395(B), are considered to be traffic matters, and are not to be
considered civil cases.

As noted in response to your previous question, § 19.2-354 contains no
authority for the appeal of court decisions regarding the disposition of deferred
or installment payments. A statute specifying the method by which something
shall be done evinces a legislative intent that it not be done otherwise.\(^8\) Had
the General Assembly intended to permit an appeal of any such decision by
the court regarding deferred payments or installments, it could have done so
in plain language.\(^9\) Therefore, I conclude that there is no statutory authority
for appeal of a court decision regarding deferred or installment payments.\(^10\)
Your final inquiry is whether, pursuant to § 19.2-354, a court must order restoration of a driver's license when a defendant enters into a deferred or installment payment agreement, or whether restoration occurs by operation of law upon approval of the agreement.

"[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." Section 46.2-395(B) provides that when a person is convicted of violating the law and such person fails or refuses to make immediate payment in full of any fine assessed against him or fails to make deferred or installment payments ordered by the court, "the court shall forthwith suspend the person's privilege to drive a motor vehicle on the highways in the Commonwealth." The use of the word "shall" in a statute ordinarily implies that its provisions are mandatory. The driver's license suspension is "[i]n addition to any penalty provided by law." As the Supreme Court of Virginia has stated, "[t]he manifest intention of the legislature, clearly disclosed by its language, must be applied." The clear language of the amendment to § 46.2-395(B) requires the court to restore the driver's license of a defendant after such defendant has paid the reinstatement fee to the Department of Motor Vehicles and an agreement has been entered to make deferred or installment payments of unpaid fines or costs ordered by the court.

I am, therefore, of the opinion that a court must enter an order restoring the defendant's driver's license pursuant to § 46.2-395(B).

1Section 46.2-395(B).
3Section 19.2-354(A).
7Section 46.2-113 (emphasis added).
10Since I conclude that such decisions of the court are not appealable, there is no need to respond to your inquiry concerning application of the bond requirements of §§ 16.1-106 and 16.1-107.
You inquire regarding whether public school buses used to transport children in the Head Start Program must provide the younger children with child safety seats regardless of whether the buses have seat belts.

You relate that some of the school buses used to transport children in the Head Start Program in Appomattox have seat belts, while other buses have none. These buses transport children as young as three and four years of age. You advise that the police and school administration request clarification as to whether these children must be provided with child safety seats regardless of whether the buses have seat belts.

Section 46.2-1095(A) of the Code of Virginia provides that any person driving any motor vehicle on the highways of the Commonwealth “shall ensure that any child under the age of four whom he transports therein is provided with and properly secured in [an approved] child restraint device.” The use of the word “shall” in a statute ordinarily implies that its provisions are mandatory. § 46.2-1095(F), however, provides that nothing in § 46.2-1095 “shall apply to … school buses.”
A principle of statutory construction requires that statutes be read in accordance with their plain meaning and intent. Another dictates that statutes may be construed only where there is ambiguity. Otherwise, the clear and unambiguous words of a statute must be accorded their plain meaning.

Section 46.2-1095(F) clearly and unambiguously exempts school buses from the requirement that children under the age of four be properly secured in an approved child restraint device. The primary object in interpreting an act of the General Assembly is to ascertain and give effect to the legislative intent underlying the act. "The ascertainment of legislative intention involves appraisal of the subject matter, purposes, objects and effects of the [act], in addition to its express terms." I note that § 22.1-177 authorizes the Board of Education to establish school bus safety requirements "relating to the construction, design, operation, equipment, and color of public school buses." I am, however, not aware of any regulation established by the State Board that requires child safety seats or devices to be provided for younger children involved in the Head Start Program. The interpretation by the agency charged with the administration of state statutes is entitled to great weight.

The plain and unambiguous language in § 46.2-1095(F) exempts school buses from the requirement that a child under the age of four be properly secured in a child restraint seat or device. Consequently, I must conclude that, under current Virginia law, public school buses used to transport children in the Head Start Program are not required by the General Assembly to provide children under the age of four with child safety seats regardless of whether such buses have seat belts.


3See id. at 386-87, 297 S.E.2d at 663.


6Id.

MOTOR VEHICLES: REGULATION OF TRAFFIC – SPEED.

Motorist would not be convicted of speeding in an area where speed limit has been reduced unless posted signs advising of lower speed limit are placed at termini of such area. No requirement that such signs be posted in advance of approaching reduced speed limit area.

THE HONORABLE W. EDWARD MEEKS III
COMMONWEALTH’S ATTORNEY FOR AMHERST COUNTY
AUGUST 30, 2000

You ask whether § 46.2-879 of the Code of Virginia requires that a motorist be warned by a posted sign in advance of approaching a reduced speed limit zone.

You advise that some areas of reduced speed in Amherst County are announced in advance by warning signs that read “Reduced Speed Ahead” or similar language. Reduced speed in other such areas, however, is announced by the presence of the appropriate speed limit sign. It is your opinion that posted signs advising of a lower speed area must be placed at the beginning and end of the reduced speed area, and not posted in advance of approaching the reduced speed limit area.

Section 46.2-879 provides:

No person shall be convicted of a violation of a statute or an ordinance enacted by local authorities pursuant to the provisions of § 46.2-1300 decreasing the speed limit established in this article when such person has exceeded the speed limit in an area where the speed limit has been decreased unless such area is clearly indicated by a conspicuous marker at the termini of such area.

Section 46.2-879 clearly requires that areas where the speed limit has been decreased be “clearly indicated by a conspicuous marker at the termini of such area.” Because the statute does not define the word “termini,” it must be given its common, ordinary meaning. “Termini” is the plural of “terminus,” which generally is defined to mean “either end of a transportation line, travel route, pipe line, tunnel, canal.”

Several additional rules of statutory construction apply to your request. “[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction.” In addition, statutes should not be construed to frustrate their purpose. “[T]ake the words as written and give them their plain meaning.” Finally, when a statute creates a specific
grant of authority, the authority exists only to the extent specifically granted in the statute.\textsuperscript{7}

Based on the plain language of § 46.2-879, I am of the opinion that a motorist would not be convicted of exceeding the speed limit in an area where the speed limit has been reduced unless posted signs advising of the lower speed area are placed at the beginning and end of the area. It is also my opinion that § 46.2-879 does not require such signs to be posted in advance of the approaching reduced speed limit area.

\textsuperscript{1}Any request by a Commonwealth's attorney for an opinion from the Attorney General "shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions." Section 2.1-118.


\textsuperscript{3}WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2359 (1993).


\textsuperscript{• — • — •}

**NOTARIES AND OUT-OF-STATE COMMISSIONERS (VIRGINIA NOTARY ACT): APPOINTMENT.**

No statutory requirement for particular form of notary seal. Presence or absence of words "Commonwealth of Virginia" does not affect legal sufficiency of notary's seal. Any instructions that may be included in handbook prepared for notaries by Secretary of Commonwealth regarding form of notary seal are not tantamount to statutory requirement for form of such seal.

THE HONORABLE L. PRESTON BRYANT JR.
MEMBER, HOUSE OF DELEGATES
MAY 15, 2000

You inquire concerning the legal sufficiency of a notary seal appearing on a deed that references "Lynchburg, Virginia," but does not contain the words "Commonwealth of Virginia." You also inquire concerning the authority of the Secretary of the Commonwealth to mandate a particular form of such seal.
You relate that a deed involving the transfer of real property in North Carolina was signed in Virginia and duly notarized by a Virginia notary. You further relate that the notary's seal references "Lynchburg, Virginia," and contains no reference to the "Commonwealth of Virginia." You inquire whether such seal is legally sufficient.¹

A 1945 opinion of the Attorney General addresses a similar factual situation.² The opinion concludes that there is no requirement that a notary's seal be affixed to the acknowledgement in order for a deed to be recorded, and thus, is surplusage.³ Furthermore, the opinion notes that there is no Virginia statute requiring a notary's seal to be in any particular form.⁴ I concur with the conclusion of the 1945 opinion. The notary seal in issue in the 1945 opinion is similar to the one you present in that it reflected nothing more than the words "Notary Public."⁵ The inquiry was whether the notary's name was required to be on the seal.⁶ The opinion concludes that, in the absence of statutory requirements regarding a notary public's seal, "anything that comes within the purview" of the statutes governing the acknowledgments of notaries public⁷ is sufficient, and the name does not have to be on the seal.⁸ Similarly, it is my opinion that the presence or absence of the words "Commonwealth of Virginia" does not affect the legal sufficiency of the notary's seal.

With respect to the authority of the Secretary of the Commonwealth relative to notaries public, the Virginia Notary Act⁹ sets forth the procedure for commissioning an individual to be a notary pursuant to the Governor's power to appoint such notaries.¹⁰ Although the duty to prepare a notary commission for an applicant falls on the Secretary,¹¹ I can find no statute that prescribes a particular form for the notary's seal. Section 47.1-11 of the Code of Virginia authorizes the Secretary to prepare a handbook for notaries containing information the Secretary "shall deem useful." It is my opinion that instructions contained in such handbook regarding the form of a notary's seal, if any, are not tantamount to a statutory requirement for that form of a notary's seal.

¹You do not indicate any conflicts with North Carolina law and thus I assume there are none. Compare 1971-1972 Op. Va. Att'y Gen. 61, 62 (concluding that power of attorney signed by several persons and acknowledged before several out of state notaries, some of whom used their seals and some who did not, should be recorded under § 55-118.1 authorization for clerk to accept instruments acknowledged by notaries of other states).
³Id.
⁴Id.
⁵Id.
PENSIONS, BENEFITS, AND RETIREMENT: VIRGINIA RETIREMENT SYSTEM.

Statutory prohibition against allowing member of Virginia Retirement System to receive credit for prior active duty military service may not withstand constitutional scrutiny. Board of Trustees of Retirement System has limited authority to adopt rules and policies to conform conflicting military service credit provisions of Retirement System to federal law which allows credit for same service under state and federal retirement systems.

MR. WILLIAM H. LEIGHTY
DIRECTOR, VIRGINIA RETIREMENT SYSTEM
OCTOBER 20, 2000

You inquire concerning the prohibitions in §§ 51.1-142(B) and 51.1-143(B)(i) of the Code of Virginia, relating to the purchase of credit by a member of the Virginia Retirement System for prior active duty military service, and whether they conflict with federal law that also allows credit for military reservists.

You relate that a member of the Virginia Retirement System has applied to purchase credit for military service under § 51.1-142(B). You also relate that the member served in active military duty for three years, eleven months. You further relate that, after his release from active duty, the member entered a military reserve component and accumulated total military service of twenty-three years, eleven months.

You inquire whether the member is eligible to receive credit for prior active duty military service, despite the disallowance of such credit in § 51.1-142(B).

Sections 51.1-142(B)² and 51.1-143(B)(i)³ expressly prohibit a member of the Virginia Retirement System from purchasing prior active duty military service as a credit toward retirement. These statutes thus prevent the practice of receiving credit for the same service under both the state and federal systems.

Chapter 67 of Title 10 of the United States Code governs retired pay for certain members of the reserves.⁴ Generally, to be eligible for retirement benefits, a person must have served in the reserves for at least twenty years.⁵
Section 12736 of Chapter 67, which authorizes a person to receive credit for the same service under both systems, states:

No period of service included wholly or partly in determining a person's right to, or the amount of, retired pay under this [law] may be excluded in determining his eligibility for any annuity, pension, or old-age benefit, under any other law ... in determining the amount payable under that law, if that service is otherwise properly credited under it.1

The leading case concerning this matter, Cantwell v. County of San Mateo,7 involves a county employee who was eligible to receive retirement pay for service in the Naval Reserve. The amount payable to the employee under the reserve pension was based in part on his three-year, eight-month service on active duty, prior to his employment by the county. At that time, California law allowed employees to purchase service time for prior service, provided that such service time would not be calculated in any other public retirement service.8

The Ninth Circuit resolved the conflict in Cantwell between California and federal law by allowing the employee to receive credit for the same service under both systems. The court reasoned that, given Congress' intent of creating an inducement for service in a reserve component, prohibiting credit under both systems would discourage membership in the reserve.9 The court held that the California statute must yield under the Supremacy Clause of the Constitution of the United States to Congress' constitutional power to raise and maintain armies.10 Furthermore, the court concluded that the federal law was not invalid under the Tenth Amendment.11

Courts in other states have cited Cantwell in reaching similar conclusions.12 Additionally, in Wisconsin, the legislature cited Cantwell in amending its statutory provision prohibiting receipt of credit for the same service under both the state and federal retirement systems, so as to allow state employees to include active duty service time in the calculations for both the state retirement system and that of the reserves under federal law.13

Although the Attorney General has a long-standing policy of generally refraining from declaring a statute unconstitutional,14 it is my opinion that the provisions of §§ 51.1-142 and 51.1-143, which prohibit receipt of credit for the same service under both the state and federal retirement systems, clearly would not withstand constitutional challenge by a member of the Virginia Retirement System who was similarly situated.
In light of my opinion that §§ 51.1-142(B) and 51.1-143(B)(i) do not conform with the federal statutes allowing military reservists to receive credit for the same service under both systems, you also inquire whether the Board of Trustees of the Virginia Retirement System ("Board") may adopt rules and policies that, in order to comply with federal law, are inconsistent with Virginia's statutes which prohibit a member of the Retirement System from receiving credit for the same service under both the state and federal retirement systems.

Section 51.1-124.22(A)(8) sets forth as one of the powers and duties of the Board, "[p]romulgating regulations and procedures and making determinations necessary to carry out the provisions of [Title 51.1]." This authority is typical of the authority granted to most state agencies and localities. Regulations under this type of authority must implement the policies of the enabling statute and be consistent with the enabling statute, other Virginia laws and the Constitution of Virginia.*

Additionally, § 51.1-124.22(A)(10) imbues the Board with the power and duty of "[a]dopting rules and policies that bring the Retirement System into compliance with any applicable law or regulation of this Commonwealth or the United States." This authority contemplates a situation in which regulations, policies, and procedures adopted to implement an enabling statute are in conflict with other state statutes, the regulations of other state agencies, federal statutes, or regulations of federal agencies. Such conflict may arise because (1) the particular method chosen to implement the enabling statute violates another state or federal law, or (2) the enabling statute itself is in conflict with another law or regulation (i.e., any method implementing the enabling statute would be in conflict).

In the first situation, it is clear that the authority granted pursuant to § 51.1-124.22(A)(8) is broad enough to correct the situation. The Retirement System would merely be switching from one authorized method of implementing the enabling statute to another. A principle of statutory construction is that every word be given its intended meaning,** and another provides that every section is given effect, if possible.*** Construing § 51.1-124.22(A)(10) to address only the first situation would be superfluous. Accordingly, this section addresses the second situation, where the conflict is attributable to the enabling statute itself.

Although I am mindful that an agency generally would not have the authority to adopt regulations, rules, policies, and procedures that are contrary to the Virginia Constitution or state law, in this case, the General Assembly clearly has delegated such authority to the Board and has limited the exercise of
such authority to actions necessary to conform to a conflicting provision of Virginia or federal law or regulation. Thus, the Board may adopt rules and policies in conformance with the federal law at issue.

"[A]ctive duty military service' means full-time service of at least 180 consecutive days in the United States ..., reserve components ...." Section 51.1-142(B).

Section 51.1-142(B) provides:
"Any vested member in service with at least twenty-five years of creditable service in the Retirement System may purchase prior service credit for (i) active duty military service in the armed forces of the United States .... "... Such prior service credit shall not be otherwise creditable as prior service in the calculation of any retirement benefit by [the Virginia Retirement System], but shall be creditable as prior service under [the Retirement System] and, if applicable, shall be considered in determining the actuarial equivalent for early retirement."

Section 51.1-143(B) provides that "[s]ervice purchased under this section shall not be considered (i) in the calculation of any retirement benefit by another retirement system."


See id. § 12731(a)(2) (West 1998).

Id. § 12736 (West 1998).

731 F.2d 631 (9th Cir. 1980).

See id. at 633-34.


"The Supremacy Clause commands that the Constitution and laws of the United States "shall be the supreme law of the land," notwithstanding the laws of any state to the contrary. U.S. CONST. art. VI.

See 631 F.2d at 635-36.

See id. at 636-37. The Tenth Amendment to the U.S. Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states."


When an enabling statute is silent on the method by which a regulatory power is to be exercised, the state agency or local governing body adopting regulations under that enabling statute normally is free to select any method that is reasonable and not in conflict with the state constitution or laws. See Commonwealth v. Arlington County Bd., 217 Va. 558, 572-81, 232 S.E.2d 30, 39-44 (1977); Op. Va. Att'y Gen.: 1992 at 53, 56; 1989 at 352, 353.

PRISONS AND OTHER METHODS OF CORRECTIONS: LOCAL CORRECTIONAL FACILITIES – PRISONER PROGRAMS AND TREATMENT — STATE CORRECTIONAL FACILITIES.

COURTS OF RECORD: CIRCUIT COURTS.

CRIMINAL PROCEDURE: SENTENCE; JUDGMENT; EXECUTION OF SENTENCE.

Circuit court has authority to assign felon confined in jail or held in jail pending completion of presentence report to work release program under supervision of sheriff or jail administrator, based on criteria established by court. Sheriff or jail administrator operating local or regional jail has authority to assign to work release felon serving sentence in such jail. Sheriff or jail administrator must notify sentencing court in writing of work release assignment which court may choose to revoke.

THE HONORABLE GARY W. WATERS
SHERIFF FOR THE CITY OF PORTSMOUTH
MAY 26, 2000

You ask whether a circuit or general district court may order the local sheriff to assign to a work release program a felon who, in the opinion of the sheriff, does not meet the work release criteria established by the sheriff.

Sections 53.1-131 and 53.1-132 of the Code of Virginia generally govern the work release programs of prisoners confined in local jails. Specifically, the first two paragraphs of § 53.1-131(A) provide:

[1] If it appears to the court that such offender is a suitable candidate for work release, [the court may] assign the offender to a work release program under the supervision of a probation officer, the office of the sheriff or the administrator of a local or regional jail or a program designated by the court. The court further may authorize the offender to participate in educational or other rehabilitative programs designed to supplement his work release employment. The court shall be notified in writing by the director or administrator of the program to which the offender is assigned of the offender's place of employment and the location of any educational or rehabilitative program in which the offender participates.

Any person who has been sentenced to confinement in jail or who has been convicted of a felony but is confined in jail pursuant to § 53.1-20, in the discretion of the sheriff or the administrator of a local or regional jail, may be assigned by
the sheriff or the administrator of a local or regional jail to a work release program under the supervision of the office of the sheriff or the administrator of a local or regional jail. The sheriff or the administrator of a local or regional jail may further authorize the offender to participate in educational or other rehabilitative programs as defined in this section designed to supplement his work release employment. The court that sentenced the offender shall be notified in writing by the sheriff or the administrator of a local or regional jail of any such assignment and of the offender's place of employment or other rehabilitative program. The court, in its discretion, may thereafter revoke the authority for such an offender to participate in a work release program.

A 1987 opinion of the Attorney General concludes in an analogous context that a sheriff "must accept offenders assigned to a work release program by a court, whether the offenders are assigned to other work release programs or to a program under the sheriff's supervision." The first two paragraphs of § 53.1-131(A) establish two entirely separate procedures for assignment of jail prisoners to work release programs. The first paragraph authorizes any court to assign to a work release program a person convicted of a criminal offense, "if the defendant is ... (i) sentenced to confinement in jail or (ii) being held in jail pending completion of a presentence report." The second paragraph confers on sheriff and jail administrators the authority to assign to work release programs "[a]ny person who has been sentenced to confinement in jail or who has been convicted of a felony but is confined in jail pursuant to § 53.1-20."

A primary rule of statutory construction is that one must look first to the language of a statute, and if it is clear and unambiguous, the statute should be given its plain meaning, without resort to the rules of statutory interpretation. "The manifest intention of the legislature, clearly disclosed by its language, must be applied." A related principle is that the plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction. 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 language in the first paragraph of § 53.1-131(A) grants a trial court the authority to assign a defendant, who has been convicted and is held in jail
pending completion of a presentence report or is sentenced to confinement in jail, to a work release program under the supervision of the sheriff or jail administrator. In such instances, and consistent with the 1987 opinion, it is my opinion that a circuit court may assign a felon to a work release program based on its criteria, and not those established by the sheriff.\footnote{For the purposes of this opinion, I shall assume that § 53.1-20(D) of the Code of Virginia applies to such felon. Section 53.1-20 provides for the commitment of felons into the state corrections system. "All felons sentenced to a period of incarceration and not placed in an adult state correctional facility pursuant to this section shall serve their sentences in local correctional facilities which shall not include a secure facility or detention home as defined in § 16.1-228." Section 53.1-20(D).}

The language in the second paragraph of § 53.1-131(A) authorizes the sheriff or jail administrator to assign to work release a felon serving a sentence pursuant to § 53.1-20 in a local, rather than a state, correctional facility. It is also my opinion, therefore, that the General Assembly intends that the authority to assign such prisoners to work release lies with the sheriff or jail administrator operating the jail, and not with the sentencing court. The sentencing court, however, must be notified in writing by the sheriff or jail administrator of such work release assignment which the court, in its discretion, may revoke.\footnote{1986-1987 Op. Va. Att'y Gen. 255, 258.}

In short, the answer to your question whether a court may order the local sheriff to assign a felon to a work release program depends on the type of sentence under which the prisoner is serving. If a prisoner is held in jail pending completion of a presentence report or is sentenced to confinement in jail, then any court having jurisdiction for the trial of a person charged with a criminal offense has the authority to assign such person to a work release program under the supervision of the sheriff or jail administrator, based on the criteria established by the court—not the sheriff. If, however, a felon is serving a sentence pursuant to § 53.1-20 in a local or regional jail, rather than a state correctional facility, then the authority to assign such a prisoner to work release rests with the sheriff or jail administrator operating the jail—and not with the sentencing court. The sheriff or jail administrator in the latter situation must notify the sentencing court in writing of the work release assignment which the court has the authority to revoke if the court so chooses.\footnote{Section 53.1-131(A).}

\footnote{Section 53.1-131(A).}

\footnote{Loudoun Co. Dept. Soc. Serv. v. Etzold, 245 Va. 80, 425 S.E.2d 800 (1993); Last v. Virginia State Bd. of Medicine, 14 Va. App. 906, 421 S.E.2d 201 (1992).}


Circuit courts, not general district courts, have jurisdiction to try adult felony cases and impose punishment upon conviction. See § 17.1-513. In addition, § 19.2-299, by its terms, applies only to presentence reports prepared for sentencing procedures in a circuit court. Accordingly, there is no situation in which a general district court would have authority to assign a felon to a work release program pursuant to § 53.1-131(A). See also § 16.1-123.1(1)(b).


Section 53.1-131(A) (citing last two sentences of second paragraph).

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PROFESSIONS AND OCCUPATIONS: FUNERAL SERVICES – PRENEED FUNERAL CONTRACTS.

Funeral director, residing or doing business within Commonwealth, may establish irrevocable trust for purpose of holding payment pursuant to preneed funeral contract so that Medicaid applicant may qualify for resource exclusion.

MR. DENNIS G. SMITH
DIRECTOR, DEPARTMENT OF MEDICAL ASSISTANCE SERVICES
MARCH 31, 2000

You ask whether § 54.1-2820(A)(7) of the Code of Virginia permits a funeral director to establish an irrevocable trust for a Medicaid applicant for the purpose of holding payment made pursuant to a preneed funeral contract so that the applicant may qualify for a resource exclusion under regulations of the Department of Medical Assistance Services.

Section 54.1-2820(A) provides:

It shall be unlawful for any person residing or doing business within this Commonwealth, to make, either directly or indirectly by any means, a preneed funeral contract unless the contract:

* * *

7. Provides that any person who makes payment under the contract may terminate the agreement at any time prior to the furnishing of the services or supplies contracted for; if the purchaser terminates the contract within thirty days of execution, the purchaser shall be refunded all consideration paid or delivered, together with any interest or income
accrued thereon; if the purchaser terminates the contract after thirty days, the purchaser shall be refunded any amounts required to be deposited under § 54.1-2822, together with any interest or income accrued thereon; however, nothing herein shall prohibit the creation of an irrevocable inter vivos trust which may be established by any person residing or doing business within this Commonwealth for the purpose of paying the grantor's funeral and burial expenses.

A 1997 opinion of the Attorney General concludes that it is a violation of § 54.1-2820(A)(7) for a funeral director to establish an irrevocable trust for a Medicaid applicant for the purpose of holding payment pursuant to a pre-need funeral contract in order to qualify the applicant for a resource exclusion.1 The 1998 Session of the General Assembly added to § 54.1-2820(A)(7) the phrase "however, nothing herein shall prohibit the creation of an irrevocable inter vivos trust for the purpose of paying the grantor's funeral and burial expenses."2 Furthermore, the 1999 Session of the General Assembly inserted in § 54.1-2820(A)(7) the phrase "which may be established by any person residing or doing business within this Commonwealth" after the term "irrevocable inter vivos trust."3 When the legislature intends to include broader language, it so states by the use of that language.4

A rule of statutory construction requires the presumption that, in amending or enacting statutes, 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.5 Furthermore, when new provisions are added to existing legislation by an amendatory act, a presumption normally arises that a change in the law was intended.6 In addition, when the legislature amends existing statutes following issuance of an opinion of the Attorney General, it is presumed that the legislature acted purposefully with the intent to change existing law.7

Several other principles of statutory construction are also applicable to this matter: "If the language of a statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it."8 It is unnecessary to resort to any rules of statutory construction when the language of a statute is unambiguous.9 In such situations, the statute's plain meaning and intent govern. In addition, when a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute.10

The 1998 and 1999 Sessions of the General Assembly added plain and unambiguous language to § 54.1-2820(A)(7) that qualifies the general limitation
placed on preneed funeral contracts. The law clearly was changed by the 1998 and 1999 Sessions of the General Assembly. It, therefore, is my opinion that § 54.1-2820(A)(7) permits a funeral director, residing or doing business within the Commonwealth, to establish an irrevocable trust for a Medicaid applicant for the purpose of holding payment made pursuant to a preneed funeral contract, in order that a Medicaid applicant may qualify for a resource exclusion under Medicaid law and regulations without violating the laws regulating preneed funeral contracts.


See Richmond v. Sutherland, 114 Va. 688, 693, 77 S.E. 470, 472 (1913); Op. Va. Att'y Gen.: 1995 at 130, 131 (General Assembly, in amending statute, had full knowledge of existing law and construction placed upon it by courts, and intended to change then existing law); 1996 at 51, 52 (General Assembly, in repealing one statute and enacting another, had full knowledge of existing law and construction placed upon it by Attorney General, and intended to change then-existing law).


See Tate v. Ogg, 170 Va. 95, 103, 195 S.E. 496, 499 (1938); 2A Norman J. Singer, Sutherland Statutory Construction § 47.23 (5th ed. 1992 & Supp. 1999) ("Expressio unius est exclusio alterius.").

PROFESSIONS AND OCCUPATIONS: GENERAL PROVISIONS.

Dentists who provide free dental services to Mission of Mercy are liable for civil damages only for acts or omissions resulting from gross negligence or willful misconduct.

THE HONORABLE TERRY G. KILGORE
MEMBER, HOUSE OF DELEGATES
NOVEMBER 13, 2000

You ask whether the civil liability exemption in § 54.1-106(A) of the Code of Virginia applies to dentists who provide voluntary dental care to individuals in underserved areas of the Commonwealth.
You advise that members of the Virginia Dental Association have provided dental services, free of charge, to over 700 patients for the Mission of Mercy project in Wise, Virginia. A nonprofit group, Remote Area Medical, has coordinated with the project for the provision of equipment, such as dental chairs, lamps, and sterilization machines. Dental companies provide supplies, such as gloves, gauze, and preventive care products. You state that many of the participating volunteer dentists donate supplies, products and machines from their dental offices.

The first paragraph of § 54.1-106(A) provides:

No person who is licensed or certified by the Board of Dentistry; ... who renders at any site any health care services within the limits of his license or certification, voluntarily and without compensation, to any patient of any clinic which is organized in whole or in part for the delivery of health care services without charge, shall be liable for any civil damages for any act or omission resulting from the rendering of such services unless the act or omission was the result of his gross negligence or willful misconduct.

The above statute limits the common law right of recovery in tort to instances involving the gross negligence or willful misconduct of a volunteer health care provider, including a dentist, in rendering, at any site, the health care services permitted by his license or certification. "Statutes in derogation of the common law are to be strictly construed and not to be enlarged in their operation by construction beyond their express terms."1

It is certainly the case that, "[where] the language of a statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it."2 It is, therefore, unnecessary in this situation to resort to any rules of statutory construction when the language of a statute is unambiguous.3 In such situations, the statute's plain meaning and intent govern, and I believe the language of § 54.1-106 to be clear. Therefore, it is my opinion that dentists who provide free dental services for the Mission of Mercy project are only liable for civil damages when their acts or omissions result from gross negligence or willful misconduct.


You inquire concerning the meaning and definition of "commercial or mercantile establishment" in § 54.1-3205(A) and (C) of the Code of Virginia. You first ask whether a business that engages in the sale of prescriptive eyeglasses and contact lenses and nonprescriptive ophthalmic products, including the business of a licensed optician, constitutes a "commercial or mercantile establishment." The prohibition against practicing optometry in a commercial or mercantile establishment has existed in Virginia since 1938. The initial statutory provision classified as unprofessional conduct, the employment of an optometrist, directly or indirectly, by a commercial or mercantile establishment, or the advertisement of such practice, unless the establishment was employing such optometrist on the effective date of the act. The 1948 Session of the General Assembly enacted former § 54-397.1, making it a misdemeanor for an optometrist to practice optometry or to advertise the practice of optometry as a lessee of any commercial or mercantile establishment. As part of the recodification of the laws relating to professions and occupations, the 1988 Session of the General Assembly enacted § 54.1-3205. Section 54.1-3205(A) expanded the prior prohibition to make it unlawful for an optometrist to practice his profession or to advertise the practice of optometry in a commercial or mercantile establishment; § 54.1-3205(B) prohibits the practice of optometry by an optometrist "as an employee, directly or indirectly, of a commercial or mercantile establishment, unless such … establishment was employing [the] optometrist [full-time] on June 21, 1938." Questions relating to the practice of optometry and the definition of the term "commercial or mercantile establishment" have been the subject of earlier
opinions of the Attorney General. A 1985 opinion concludes that an ophthalmologist using rent-free space in an optician's office within a shopping center is practicing medicine as a lessee of a commercial or mercantile establishment. The opinion also notes the definition of "commercial establishment" as "[a] place where commodities are exchanged, bought or sold," and the definition of "mercantile" as "[o]f, pertaining to, or characteristic of, merchants, or the business of merchants; having to do with trade or commerce or the business of buying and selling merchandise." The 1985 opinion further concludes that, since the optician's portion of the premises in the shopping center includes "a showroom for the retail sale of eyeglasses, contact lenses and other ophthalmic goods," it "is a commercial or mercantile establishment under § 54-278.1." Although § 54-278.1 has been repealed, the use of the phrase "commercial or mercantile establishment" in that section is identical to its use in § 54.1-3205. Therefore, the 1985 opinion is both applicable to and dispositive of the first question.

You next ask whether an optometrist, who sells prescriptive eyeglasses and contact lenses and nonprescriptive ophthalmic products out of an optical dispensary located within his professional optometric office, may also be deemed to be a "commercial or mercantile establishment" within the definition of § 54.1-3205(C). To answer your question, it is necessary to recognize that § 54.1-1701 permits optometrists and ophthalmologists to sell and dispense prescriptive ophthalmic eyewear as an exemption to the licensure requirement in § 54.1-1704 "to practice as an optician." Therefore, notwithstanding the exemption, the sale of ophthalmic goods, whether sold by an ophthalmologist, optometrist or optician, nevertheless constitutes the sale of commodities.

What differentiates ophthalmologists and optometrists from opticians, however, are the statutory exemptions in §§ 54.1-1701, 54.1-2914(D) and 54.1-3202. Pursuant to these statutes, neither ophthalmologists nor optometrists may be deemed to be a "commercial or mercantile establishment" according to the definition of that term as set forth in the 1985 opinion. Moreover, the sale of the prescriptive ophthalmic goods is incidental to the professional practice of ophthalmology and optometry, which includes, among other things, performing eye examinations and issuing prescriptions for corrective eyeglasses and contact lenses. This construction is consistent with the longstanding legislative public policy allowing optometrists to dispense and sell ophthalmic goods, which in turn is reinforced by the 1998 amendment to § 54.1-2914(D). This amendment authorizes a physician who performs an eye examination to sell prescriptive eyeglasses and dispense contact lenses.
(just as optometrists have been so authorized for many years) as a way of assuring a patient's eye health. Further support for this construction is predicated on the fact that the practice of opticians is expressly limited by § 54.1-1700 as one where the "[o]ptician... prepares or dispenses eyeglasses, spectacles, lenses, or related appurtenances, for the intended wearers or users, on prescriptions from licensed physicians or licensed optometrists." (Emphasis added.)

The legislative policy inherent in § 54.1-3205 is two-fold: (1) to maintain an extrication of the practice of optometry from commercial or mercantile establishments; and (2) to prevent commercial enterprises from exercising control over an optometrist's professional practice. Although the 1985 opinion references physicians, the same concerns are applicable to the practice of optometry. In addition, §§ 54.1-3205.1 and 54.1-3215(11), (13)-(16) constitute further indications of a continuing legislative policy of preventing improper lay control over professional decisions.

1A "licensed optician" is "the holder of a license issued by the Board for Opticians." Section 54.1-1700. "Optician" means any person, not exempted by § 54.1-1701, who prepares or dispenses eyeglasses, spectacles, lenses, or related appurtenances, for the intended wearers or users, on prescriptions from licensed physicians or licensed optometrists, or as duplications or reproductions of previously prepared eyeglasses, spectacles, lenses, or related appurtenances; or who, in accordance with such prescriptions, duplications or reproductions, measures, adapts, fits, and adjusts eyeglasses, spectacles, lenses, or appurtenances, to the human face." Id.

2Section 54.1-3205(A) makes it "unlawful for any optometrist to practice his profession as a lessee of or in a commercial or mercantile establishment, or to advertise, either in person or through any commercial or mercantile establishment, that he is a licensed practitioner and is practicing or will practice optometry as a lessee of or in the commercial or mercantile establishment."

3See 1938 Va. Acts ch. 442, at 995, 997-98 (enacting § 1635(2)(k)).

4See id.


9See, e.g., Op. Va. Att'y Gen.: 1977-1978 at 318 (defining "mercantile" and "commercial establishment" within meaning of predecessor statute § 54-388(2)(j), (k)); 1970-1971 at 312, 313 (concluding that practice of optometry through professional corporation does not fit within definition of "mercantile" and, therefore, would not be prohibited act under predecessor statute § 54-397.1).
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1985-1986 Op. Va. Att'y Gen. at 235, 236 (citing § 54-278.1, repealed statute similar to optometric prohibition in § 54-397.1, recodified as § 54.1-3205, and to § 54.1-2716, prohibiting practice of dentistry in commercial or mercantile establishment).

"Id. at 237 n.1 (quoting BLACK'S LAW DICTIONARY 245, 890 (5th ed. 1979))."

"Id. at 236.


"See also 1984-1985 Op. Va. Att'y Gen. 339, 340. This opinion notes that the terms "merchant" and "manufacturer" are not defined in the Virginia Code; however, the Supreme Court of Virginia has considered their meaning and discussed their applicability in various fact situations. See, e.g., Commonwealth v. Meyer, 180 Va. 466, 472-73, 23 S.E.2d 353, 356 (1942) (defining "merchant" as "one who is engaged in the business of buying commercial commodities and selling them again for the sake of profit" (citation omitted))."

"Section 54.1-3205(C) defines "commercial or mercantile establishment" as "business enterprise engaged in the selling of commodities."

"Beginning with the 1954 enactment of legislation creating the Virginia State Board of Opticians, licensed physicians (ophthalmologists) and optometrists have been exempt from licensure as opticians. See 1954 Va. Acts ch. 237, at 280, 280 (enacting § 54-398.1, predecessor to § 54.1-1701).


"See, e.g., § 54.1-3200 (defining "practice of optometry").


"See 1985-1986 Op. Va. Att'y Gen., supra note 10, at 237 (referencing repealed § 54-278.1 (physicians), which is applicable to § 54.1-3205 (optometrists)); see also 1992 Op. Va. Att'y Gen. 147, 150 (explaining that "corporate practice of medicine" doctrine adopted by other states is influenced primarily by statutory and public policy concerns that medical community could be subject to commercial exploitation that would result in divided loyalties, motivated by profit and improper lay control over professional decisions).

"Section 54.1-3205.1 prohibits the supervision of an optometrist by any officer, employee or agent of a commercial or mercantile establishment who is not licensed to practice optometry. Section 54.1-3215(11), (13)-(16) authorizes the Board of Optometry to revoke or suspend the license of, or to reprimand, an optometrist for violating certain standards of conduct adopted by the Board.

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PROPERTY AND CONVEYANCES: CONDOMINIUM ACT.

CONSTITUTION OF VIRGINIA: BILL OF RIGHTS.

Authority of board of directors of condominium association to forbid door-to-door solicitation and/or dissemination of material and to censor material is governed by Act and recorded documents. Rules and regulations adopted by board constitute mutual agreements among several unit owners that cannot infringe on free speech and expression. Unit owner's dissemination of printed materials announcing time and place of board meeting and encouraging attendance by other unit owners violates no Virginia law. Attorney General declines to render opinion regarding reasonableness of house rule without availability of condominium documents and specific facts.
THE HONORABLE VINCENT F. CALLAHAN JR.  
MEMBER, HOUSE OF DELEGATES  
JUNE 5, 2000

You ask several questions regarding certain restrictions that a condominium unit owners' association ("association") imposes on its unit owners. You first ask whether a condominium unit owner may distribute printed material to other unit owners without receiving prior approval from the board of directors. You next ask whether an association's board of directors has the authority to preapprove and to censure material that a unit owner seeks to distribute within the condominium. You also ask whether dissemination of printed materials constitutes solicitation under Virginia law. Finally, you seek guidance regarding changes in the law that may be necessary to permit the dissemination of such materials without prior approval of the board of directors.

You advise that a condominium unit owner distributed printed materials by placing them under the entrance doors of unit owners. The materials announced the time and place for upcoming board of directors' meetings and encouraged unit owner attendance and participation. The materials state that unit owners are not provided information about issues scheduled for board discussion and are therefore unable to make informed suggestions and comments for consideration by the board. The materials further state that unit owners are entitled to be heard regarding decisions affecting the quality of life of all unit owners.

You state that the board of directors of the association adopted a house rule at a regular board meeting that may violate free speech. The house rule forbids door-to-door solicitation and/or dissemination of materials, either by residents or others, without prior approval of the board of directors. A violation of this rule must be reported to the site manager.

You also advise that, following adoption of this house rule, a unit owner requested permission from the board of directors to distribute periodically, during the remainder of the year, informational flyers to owner units. In addition, the unit owner indicated that he would not place flyers under the door of any unit owner who objected to such distribution. The board of directors asked to review the proposed materials before granting permission to distribute same. You believe that such a request infringes on free speech and is intended to censure the content of the material before distribution. You conclude that the board may disapprove the content of any material with which it does not agree.
Chapter 4.2 of Title 55, §§ 55-79.39 through 55-79.103 of the Code of Virginia, comprises the Condominium Act. The facility referred to and owned as a "condominium" is one in which owners have individual ownership and use of distinct units along with ownership in undivided common interests in the common elements of the facility. Section 55-79.40(A) provides that the Condominium Act "shall apply to all condominiums." Section 55-79.45 provides that "[n]o condominium shall come into existence except by the recordation of condominium instruments pursuant to the provisions of this chapter." Section 55-79.73(A) provides for the self-government of a condominium by requiring that "[i]t shall be recorded simultaneously with the declaration of a set of bylaws providing for the self-government of the condominium by an association of all the unit owners." Section 55-79.73(B) provides:

The bylaws shall provide whether or not the unit owners' association shall elect an executive organ. If there is to be such an organ, the bylaws shall specify the powers and responsibilities of the same and the number and terms of its members.... The bylaws may delegate to such organ, inter alia, any of the powers and responsibilities assigned by this chapter to the unit owners' association. The bylaws shall also specify which, if any, of its powers and responsibilities the unit owners' association or its executive organ may delegate to a managing agent.

It is clear, both from the language quoted in § 55-79.45, and from an opinion of the Supreme Court of Virginia in the case of Unit Owners Association of BuildAmerica-1 v. Harry F. Gillman, that "[n]o condominium shall come into existence in Virginia except on the recordation of condominium instruments pursuant to the Condominium Act.... The entire condominium concept, and all pertaining to it, is therefore a statutory creation."5

"The power exercised by the Association is contractual in nature and is the creature of the condominium documents to which all unit owners subjected themselves in purchasing their units. It is a power exercised in accordance with the private consensus of the unit owners."6 Unit owners' concerns about the application of the bylaws of an association to a specific factual situation, such as the house rule adopted by the board, is one that may be settled pursuant to §§ 55-79.79(a) and 55-79.80(B).7

You have provided no condominium documents pertaining to the association you describe. Your inquiries regarding the authority of the association's board
of directors to forbid door-to-door solicitation and/or dissemination of material and to censor such material is governed entirely by such condominium documents. This Office is required to decline to render an opinion regarding interpretation of any such condominium documents which, in reality, are private agreements among the several co-owners of the association. This Office traditionally has declined to render opinions in matters of a purely private nature and has limited responses to requests for opinions to matters which concern an interpretation of federal or state law, rule or regulation. I trust you will understand the rationale for this long-standing practice.

I am, however, of the view that the house rule adopted by the board of directors cannot constitute infringement of free speech by the board of directors.

Most of the protections for individual rights and liberties contained in the Constitution [of the United States] and its amendments apply only to the actions of governmental entities. The safeguards against deprivations of individual rights ... specifically apply only to the activities of either the state or federal governments. Similarly, the Bill of Rights by its terms and necessary implications has been viewed only to limit the freedom of the government when dealing with individuals.

Consequently, the actions by the association's board of directors do not implicate First Amendment issues. The actions of a private association, such as the association you describe, do not constitute governmental or "state" action of a type proscribed by the First Amendment. "While the unit owners are vested with an undivided interest in the common elements [of the condominium], the authority to control the use of the common elements is vested in the Association by the condominium documents and such amendments thereof as may thereafter be adopted." Furthermore, when rules and regulations of the Association are adopted by the board of directors, such become "a mutual agreement entered into by the condominium unit owners." 

Freedom of speech and expression is also protected by Article I, § 12 of the Constitution of Virginia (1971). Generally, however, the Virginia Supreme Court "has treated section 12 of the Virginia Bill of Rights as coextensive with the First Amendment" to the United States Constitution. In the case of Claude E. Finney v. Harley A. Hawkins, the Court observed that Article I, § 12 and the First Amendment are quite similar. "Both guarantee to the citizen certain inherent rights, and, in our opinion, if the act ... does not offend the Federal Constitution, then it will not offend the Virginia Constitu-
Consequently, since the actions of the board of directors cannot offend the First Amendment to the United States Constitution, such actions also cannot offend the Virginia Constitution.

You next ask whether the dissemination of such printed materials as you describe by a unit owner to other unit owners constitutes solicitation under Virginia law. I can find no Virginia statute that responds to the factual matters you describe. Consequently, I must conclude that the dissemination of printed materials by a unit owner to other unit owners, as you describe, does not violate any Virginia law.

You finally request suggestions for changes in Virginia law to permit condominium unit owners to disseminate information to other unit owners without first seeking approval from the board of directors.

As noted above, the condominium concept is a statutory creation. Therefore, the powers exercised by an association of unit owners through its board of directors "are limited by general law and by the Condominium Act itself." Amendments to condominium restrictions, rules, and regulations should be measured by a standard of reasonableness, and ... courts should refuse to enforce regulations that are found to be unreasonable. In doing so, inquiry must be made whether an association has acted within the scope of its authority as defined under the Condominium Act and by its own master deed and bylaws, and whether it has abused its discretion by promulgating arbitrary and capricious rules and regulations bearing no relation to the purposes of the condominium. Ultimately, however, the determination whether such a house rule is reasonable depends on a complete and detailed set of facts, as well as a review of the condominium documents. You have not detailed specific facts upon which a precise conclusion may be drawn. When such case-by-case determinations are required, this Office has refrained from rendering an opinion on general hypothetical questions without specific facts being set forth.

Therefore, resolution of the inquiry regarding whether the house rule is reasonable depends on the particular facts and circumstances of the matter, as well as the condominium documents. Since you provide no such facts, I must respectfully decline to render an opinion regarding whether such a house rule is reasonable, and, consequently, whether a change in the Condominium Act is appropriate.
See § 55-79.41 (defining "common elements," "condominium," "condominium unit," "convertible space," "limited common element," "unit").

2See § 55-79.54 (explaining contents of declaration as containing, e.g., name of condominium, its location, metes and bounds description, delineation of common elements and unit boundaries, etc.).


Id. at 762, 292 S.E.2d at 383.

Id. at 766, 292 S.E.2d at 385.

Except as prohibited by the condominium instruments, § 55-79.79(a) places the responsibility for upkeep of condominiums (1) in the association "in the case of the common elements," and (2) in the unit owner "in the case of any unit"; and § 55-79.80(B) gives to the executive organ of the association, or the association itself, "irrevocable power as attorney-in-fact on common elements." Compare Montgomery v. Columbia Knoll Condo. Council, 231 Va. 437, 344 S.E.2d 912 (1986) (differentiating between authority of unit owners' association to replace windows in common elements and windows within individual units).


Unit Owners Assoc. v. Gillman, 223 Va. at 766, 292 S.E.2d at 385.

Id.


189 Va. 878, 54 S.E.2d 872 (1949).

Id. at 884, 54 S.E.2d at 875 (quoting Reynolds v. Milk Commission, 163 Va. 957, 963, 179 S.E. 507, 509 (1935)).

Unit Owners Assoc., 223 Va. at 763, 292 S.E.2d at 383.

Id. at 768-69, 292 S.E.2d. at 386-87.


I reach this conclusion based on the following language in the case of Unit Owners Association v. Gilman:

"The power exercised by the Association is contractual in nature and is the creature of the condominium documents to which all unit owners subjected themselves in purchasing their units. It is a power exercised in accordance with the private consensus of the unit owners. While the unit owners are vested with an undivided interest in the common elements, the authority to control the use of the common elements is vested in the Association by the condominium documents and such amendments thereof as may thereafter be adopted."

223 Va. at 766, 292 S.E.2d at 385.

Property and Conveyances: Uniform Custodial Trust Act.

Wills and Decedents' Estates: Wills.

No requirement that fiduciary obtain court approval before distributing property or debt to custodial trustee for use and benefit of incapacitated individual in amount exceeding $10,000.
You ask whether § 55-34.5 of the Code of Virginia requires a fiduciary exercising administrative powers under § 64.1-57(1)(p)(5) to obtain court approval before distributing to a custodial trustee under the Uniform Custodial Trust Act an amount exceeding $10,000.

In the letter enclosed with your request, a constituent observes that, pursuant to § 55-34.3, a person may make gifts under the Virginia Uniform Custodial Trust Act in a will or trust without limitation. He believes the General Assembly intends § 64.1-57(1)(p)(5) to authorize a fiduciary to make transfers of such gifts for an incapacitated beneficiary to an authorized custodial trustee. Because § 55-34.5 authorizes the distribution of amounts both over and under $10,000, with and without court approval, the constituent argues there is no need to exercise the administrative power of § 64.1-57(1)(p)(5). Furthermore, if such administrative power were subject to the limitation in § 55-34.5, it could not operate separately. The constituent concludes that § 55-34.5 is a “facility of payment” provision that is available absent any controlling provision in a will or trust, and further, that § 55-34.5 imposes no restriction on a fiduciary making distribution under such documents in accordance with §§ 55-34.3 and 64.1-57(1)(p)(5).

Section 55-34.5 permits “the debtor of an incapacitated person who has no conservator to make an effective payment of the debt to an adult member of the beneficiary's family or a trust company as custodial trustee.” Section 55-34.5(A) permits the transfer of property or debt to “an adult member of the beneficiary's family or to a trust company as custodial trustee for the use and benefit of the incapacitated individual.” A court, however, must approve any transfer exceeding $10,000 in value. Section 55-34.5(B) requires court approval for the transfer of property or debt “to any person as a custodial trustee for the use and benefit of the incapacitated individual.” (Emphasis added.) Section 55-34.5(C) permits “[a] written acknowledgment of delivery, signed by a custodial trustee,” to constitute “a sufficient receipt and discharge” of the property so transferred. I am required to “take the words as written” … and give them their plain meaning.” The provisions of § 55-34.5(A) and (B) clearly require court approval for certain types of transfers. The first type pertains to the transfer of property or debt, which exceeds $10,000 in value, to an adult member of a beneficiary's family or to a trust company acting as a custodial trustee; the second pertains to the transfer of property or debt to any person acting as custodial trustee for the use and benefit of an incapacitated individual.
Your inquiry is directed to distributions of property or debt in excess of $10,000 in value to a custodial trustee under the Virginia Uniform Custodial Trust Act. For the purposes of this opinion, therefore, I shall assume that the term "custodial trustee" refers to an adult member of the beneficiary's family or to a trust company acting as custodial trustee for the incapacitated individual under § 55-34.5(A). I shall also assume that such transfer is to an incapacitated individual who does not have a conservator.

Section 64.1-57(1) itemizes administrative powers that may be granted, in whole or in part, to a fiduciary in a will or trust. In 1992, the General Assembly amended § 64.1-57(1)(p), granting the power to make distributions to an incapacitated beneficiary under the Virginia Uniform Custodial Trust Act:

During the minority, incapacity or the disability of any beneficiary, the fiduciary may, in his sole discretion, distribute income and principal to such beneficiary in any one of the following ways: ... (5) to an adult person or bank authorized to exercise trust powers as custodial trustee for an incapacitated beneficiary under the Uniform Custodial Trust Act (§ 55-34.1 et seq.) to be held as custodial trustee under the terms of such act.\[8\]

In 1990, prior to the enactment of § 64.1-57(1)(p)(5), the General Assembly created the Uniform Custodial Trust Act.\[9\] Section 55-34.5 is the Act's "facility of payment" statute, and provides:

Unless otherwise directed by an instrument designating a custodial trustee pursuant to § 55-34.3, a person, including a fiduciary other than a custodial trustee, who holds property of or owes a debt to an incapacitated individual not having a conservator may make a transfer to an adult member of the beneficiary's family or to a trust company as custodial trustee for the use and benefit of the incapacitated individual. If the value of the property or the debt exceeds $10,000, the transfer is not effective unless authorized by the court.\[10\]

The 1995 Session of the General Assembly amended § 55-34.5, designating the 1990 enactment as subsection A, adding subsection B, and inserting subsection C:

B. With court approval, any person, including a conservator, guardian or other fiduciary who holds property of or owes a debt
to an incapacitated individual, may make a transfer to any person as a custodial trustee for the use and benefit of the incapacitated individual. The court, in the exercise of its discretion, may require the custodial trustee to furnish a bond with surety for the faithful performance of his fiduciary duties.

C. A written acknowledgment of delivery, signed by a custodial trustee, is a sufficient receipt and discharge for property transferred to the custodial trustee pursuant to this section.\(^{[11]}\)

Section 55-34.5(B) was added to address instances where the amount owed by a debtor to an incapacitated person was so small "that a trust company would not be interested in serving, and either no adult member of the beneficiary's family could be located or such as could be located were not thought appropriate to serve as custodial trustee."\(^{[12]}\)

The primary goal of statutory construction "is to ascertain and give effect to legislative intent."\(^{[13]}\) In addition, "the plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction."\(^{[14]}\) When a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute.\(^{[15]}\) The General Assembly is presumed to be aware of the law existing at the time it adopts a statute.\(^{[16]}\) Finally, the principles of statutory construction require that statutes be harmonized with other existing statutes, if possible, to produce a consistently logical result that gives effect to the legislative intent.\(^{[17]}\)

Section 64.1-57 contains specific administrative powers to be exercised by a fiduciary. Such powers may be incorporated by reference into a will or trust, in whole or in part.\(^{[18]}\) The administrative power contained in § 64.1-57(1)(p)(5) specifically allows a fiduciary to distribute income and principal to a beneficiary who is a minor, or is either incapacitated or disabled. This provision does not contain any requirement for the fiduciary to obtain court approval before making any such distribution. The fiduciary may make such distribution "to an adult person or bank authorized to exercise trust powers as custodial trustee for a beneficiary ... under the Uniform Custodial Trust Act ... to be held as custodial trustee under the terms of such act."\(^{[19]}\) The Uniform Custodial Trust Act is designed to provide a simple trust that is easy to create, administer and terminate.\(^{[20]}\) Section 64.1-57 specifically addresses the administrative powers granted to fiduciaries in wills or trusts. The more specific statute must be deemed controlling over other general statutes.\(^{[21]}\) I am of the view that § 55-34.5 is a general statute in regard to the administrative powers of a fiduciary.
I must, therefore, conclude that § 55-34.5 does not require a fiduciary exercising administrative power under § 64.1-57(1)(p)(5) to obtain court approval before distributing to a custodial trustee under the Virginia Uniform Custodial Trust Act an amount in excess of $10,000.

1Tit. 55, ch. 2.1, §§ 55-34.1 to 55-34.19.

2Section 55-34.3 provides: "A person having the right to designate the recipient of property payable or transferable upon a future event may create a custodial trust upon the occurrence of the future event by designating in writing the recipient, followed in substance by: 'as custodial trustee for ............... (name of beneficiary) under the Virginia Uniform Custodial Trust Act.'

"Persons may be designated as substitute or successor custodial trustees to whom the property must be paid or transferred in the order named if the first designated custodial trustee is unable or unwilling to serve.

"A designation under this section may be made in a will, a trust, a deed, a multiple-party account, an insurance policy, an instrument exercising a power of appointment, or a writing designating a beneficiary of contractual rights. Otherwise, to be effective, the designation must be registered with or delivered to the fiduciary, payor, issuer, or obligor of the future right."


4Section 55-34.5(A).


6Section 55-34.5(A).

7Section 55-34.5(B).

81992 Va. Acts ch. 584, at 780, 782. The 1999 amendments to § 64.1-57(1)(p)(5) replaced "an incapacitated beneficiary" with "a beneficiary who is incapacitated as defined in § 55-34.1."


10Id. at 362.


12Johnson, supra note 3, at 1180.


16See Richmond v. Sutherland, 114 Va. 688, 693, 77 S.E. 470, 472 (1913; 1995 Op. Va. Att’y Gen. 130, 131 (presumption that General Assembly, in amending statute, had full knowledge of existing law and construction placed upon it by courts, and intended to change then existing law); see also 1996 Op. Va. Att’y Gen. 51, 52 (presumption that General Assembly, in repealing one statute and enacting another, had full knowledge of existing law and construction placed upon it by Attorney General, and intended to change then-existing law).
TAXATION: LICENSE TAX ON CERTAIN INSURANCE COMPANIES — LICENSE TAXES.

INSURANCE: GENERAL PROVISIONS.

Surety insurance company serving in capacity of bail bondsman is exempt from local business license taxation.

THE HONORABLE WILLIAM PAGE JOHNSON II
COMMISSIONER OF THE REVENUE FOR THE CITY OF FAIRFAX
OCTOBER 30, 2000

You ask whether a bail bondsman licensed as a surety insurance company under Chapter 25 of Title 58.1, §§ 58.1-2500 through 58.1-2530 of the Code of Virginia, is subject to local business license tax under § 58.1-3724. You provide a copy of the City of Fairfax ordinance requiring bail bondsmen to obtain an annual business license based on gross receipts.¹

You relate that § 58.1-3724 specifically authorizes localities to adopt an ordinance requiring the licensure of any person engaged, either as a principal or surety, in the business of bail bonding. You also note that § 58.1-3703(C)(11) specifically exempts from local license tax any insurance company subject to taxation under Chapter 25 of Title 58.1 or any agent of such company. Finally, you observe that §§ 58.1-3703(C)(11) and 58.1-3724 appear to be in conflict.

Section 58.1-3703(C)(11) prohibits a locality from imposing a license fee or tax “[o]n any insurance company subject to taxation under Chapter 25 (§ 58.1-2500 et seq.) of [Title 58.1] or on any agent of such company.” A surety insurance company is subject to taxation under Chapter 25.² Section 58.1-3724 provides, in part:

The governing body of any county or city may by ordinance require that every person who shall, for compensation, enter into any bond or bonds for others, whether as a principal or surety, shall obtain a revenue license, the amount of which

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shall be prescribed in such ordinance; and no such professional bondsman or his agent shall enter into any such bond or bonds in any such county or city until he shall have obtained such license.

To determine legislative intent in this instance, statutes dealing with the same subject matter should be construed together to achieve a harmonious result, resolving conflicts to give effect to each statute, to the maximum extent possible. Another accepted principle of statutory construction is that, when it is not clear which of two statutes applies, the more specific statute prevails over the more general. Also, when statutes provide different procedures on the same subject matter, the more general gives way to the more specific.

It is clear that both §§ 58.1-3703(C)(11) and 58.1-3724 apply to this matter. It is also apparent that § 58.1-3703(C)(11) is the more specific statute pertaining to a surety insurance company, and that § 58.1-3724 is the more general statute. Consequently, § 58.1-3724 must give way to the more specific § 58.1-3703(C)(11).

Therefore, I must conclude that § 58.1-3703(C)(11) exempts a surety insurance company serving in the capacity of bail bondsman from the local business license tax imposed pursuant to § 58.1-3724. Accordingly, a surety insurance company serving in the capacity of bail bondsman is not subject to local business license tax under § 58.1-3724.

1The ordinance provides that "[e]very person engaged in the business of a bondsman shall pay for the privilege an annual license tax as a personal service provider." FAIRFAX, VA., CODE § 12-46 (Mun. Code Corp. 1997).
2See § 58.1-2501(A)(1), see also § 38.2-121 (defining "surety insurance").
3VEPCO v. Prince William Co., 226 Va. 382, 387-88, 309 S.E.2d 308, 311 (1983); 1991 Op. Va. Atty Gen. 7, 8; id. at 159, 160; see also Prillaman v. Commonwealth, 199 Va. 401, 405-06, 100 S.E.2d 4, 7-8 (1957) (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).

TAXATION: LICENSE TAXES.

COMMISSIONS, BOARDS AND INSTITUTIONS: VIRGINIA CODE COMMISSION.
1985 recodification of taxation title does not repeal 1972 uncodified enactment clause authorizing localities to continue imposing gross receipts tax on public service corporations at greater rate than that in effect January 1, 1972. City that reduces its continued higher tax rate in compliance with prescribed rate has no authority to reinstate rate permitted by uncodified enactment.

THE HONORABLE GENE R. ERGENBRIGHT
COMMISSIONER OF THE REVENUE FOR THE CITY OF STAUNTON
MAY 12, 2000

You ask whether a city which, prior to 1972, had imposed a license tax on telephone companies at a rate of one percent of the company's gross receipts may reduce the rate of taxation and then reinstate it at the higher level.

You relate that, prior to 1972, and in accordance with former § 58-578 of the Code of Virginia, a city imposed a license tax of one percent on the gross receipts of certain telephone companies. You further relate that in 1972, § 58-578 was amended to provide that such tax could not exceed one-half of one percent of such receipts; however, also enacted in 1972 was an uncodified enactment permitting localities which previously had imposed a higher tax rate to continue to do so. You also state that, in accordance with this enactment, the city continued its imposition of the one percent rate. You further state that the recodification of Title 58 in 1985 recodified § 58-578 as § 58.1-3731, but such recodification did not include any language regarding the uncodified enactment. You also relate that in 1996, when the city updated and reenacted its tax code, the license tax rate was reduced to one-half of one percent. You further provide that this reduction in the rate was predicated on the belief that the recodification of Title 58 operated to repeal the uncodified enactment. You inquire whether this interpretation of the effect of the recodification is correct and, if not, whether the city may now reinstate the earlier, higher rate of one percent.

The 1972 amendments1 to § 58-578 provided that a locality may impose a license tax upon certain telephone companies, “which shall not exceed one half of one percent of the gross receipts of such business accruing to such corporation from such business in such [locality].” Along with these amendments, the General Assembly provided an enactment clause stating:

All taxes imposed by any city, town or county prior to the effective date of this act are hereby validated. Nothing contained herein shall prohibit any city, town or county from continuing to impose any gross receipts tax upon public service corporations at rates no greater than those in effect on January 1, 1972.2
Effective January 1, 1985, Title 58 was recodified as Title 58.1. This recodification repealed § 58-578. The pertinent provisions of the repealed statute are recodified in § 58.1-3731. No reference is made to the 1972 enactment clause in issue. Section 9-77.11 pertains to recodification of the Virginia Code and provides:

Whenever in a title revision or recodification bill an existing section of a title of the Code of Virginia is repealed and replaced with a renumbered section and that section so repealed was effective with an uncoded enactment, the repeal of that section, alone, shall not affect the uncoded enactment. The title revision or recodification bill shall expressly repeal the uncoded enactment in order for the enactment to be repealed. [Emphasis added.]

The plain language of a statute should be given its clear and unambiguous meaning. Section 9-77.11 clearly articulates that the recodification of a title alone does not operate to repeal an uncoded enactment that existed prior to the act. This statute is aligned with the general premise that a legislative enactment evinces the legislature’s intent to grant therein appropriate statutory authority. Accordingly, with respect to your first inquiry, the mere recodification of Title 58 to Title 58.1 did not operate to repeal a locality’s authority under § 58-578 to impose its one percent rate.

You next inquire whether the city may reinstate its one percent gross receipts tax rate, which it reduced in 1996 to comply with § 58.1-3731 on the belief that the recodified statute repealed the 1972 enactment clause.

As I have stated, an enactment clause reflects the legislature’s intent to grant specific statutory authority. In this case, the General Assembly specifically allowed those localities whose rates on January 1, 1972, were higher than the one-half of one percent rate prescribed in the 1972 amendments to § 58-578 to continue to impose the license tax at the higher rate. Thus, the legislature granted these localities the statutory authority to impose the higher rate. Once the rate is reduced, however, the locality loses this grant of authority to impose the higher rate. Neither § 58.1-3731, former § 58-578, nor the enactment clause contains a definition for the term “continuing.” In the absence of a statutory definition, the term “continuing” should be given its common, ordinary and accepted meaning. “Continuing” is defined as “maintaining without interruption a condition, course, or action.” Because there has been an interruption in the imposition of the tax at the higher rate, the locality no longer is subject to the limited exception to the general applicability...
of the statute contained in the enactment clause. That is, because the locality has failed to “continu[e] to impose” the tax at the higher rate in effect January 1, 1972, the enactment clause provides no authority for such rate to be the current rate. Accordingly, with regard to your second inquiry, it is my opinion that the locality does not have the authority to reinstate the rate permitted by the uncodified enactment.

1See 1972 Va. Acts ch. 858, at 1584, 1584.
2Id. ch. 858, cl. 3, at 1585 (emphasis added).
31984 Va. Acts ch. 675, at 1178; see id., cl. 9, at 1462.
4See id. ch. 675, cl. 8, at 1462.
5Id. ch. 675, at 1441.
8I assume that the tax is a gross receipts tax imposed on a public service corporation in accordance with the 1972 enactment clause. I further assume that the one percent rate was the rate the city imposed on January 1, 1972.
11MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 251 (1996).
121972 Va. Acts ch. 858, cl. 3, supra note 1, at 1585.

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TAXATION: LOCAL TAXES — REAL PROPERTY TAX.

Limitation on authority of calendar-year locality to change real property tax rate during any such year before date of delivery of land books to local treasurer does not apply to fiscal year locality. Fiscal year locality may change its tax rate during such year without limitation.

MS. BETTY K. CAULEY
COUNTY ATTORNEY FOR BATH COUNTY
MAY 9, 2000

You ask whether a board of supervisors may change the rate of tax established on real property at any time during the fiscal year or only prior to the date land books are delivered to the treasurer.

You advise that the Bath County Board of Supervisors has levied and imposed real property taxes in the county on a fiscal year basis pursuant to § 58.1-3010 of the Code of Virginia. You further advise that the board seeks to change the rate of tax. You inquire whether it may do so at any time during the fiscal
year or whether, pursuant to § 58.1-3012, such action is limited to a date prior to the date on which the land books are delivered to the treasurer of the county.

Section 58.1-3012 addresses the levying of taxes on a calendar-year basis and provides:

The governing body of any county ... which levies taxes on real estate ... on a calendar-year basis is authorized and empowered to change the rate of its tax on real estate ... during any calendar year, provided such change is made prior to the date on which the ... land books are delivered to the treasurer of the applicable county.[.]

Section 58.1-3010 addresses the levying of taxes on a fiscal year basis and provides:

Notwithstanding any other provision of law, special or general, to the contrary, the governing body of any county ... may by ordinance provide that taxes on real estate ... be levied and imposed on a fiscal year basis.... Such locality is authorized and empowered to change the rate of any such levy during any fiscal year.

All provisions of this Code specifying a date or month relative to the levy, payment or collection of such taxes shall be interpreted to specify the corresponding date or month of the fiscal year.[.]

You contend that the language of § 58.1-3010 may be interpreted to infer that the prohibition contained in § 58.1-3012 against changing the tax rate once the land books have been delivered to the treasurer is likewise applicable in a fiscal year locality.

The 1996 Session of the General Assembly amended § 58.1-3012 limiting the time a governing body of a locality in which taxes are levied on a calendar-year basis may change the rate of taxes to the date on which the land books are delivered to the locality's treasurer. Prior to the 1996 amendment, an opinion of the Attorney General addressed the inquiry of whether a county board of supervisors for a county levying taxes on a calendar-year basis may reduce the tax rate on personal property after the date established for payment of such taxes. The opinion discusses § 58.1-3012 as it then existed and notes that "[t]he General Assembly has not provided any guidance for the dates of any [tax rate] changes." Accordingly, the opinion concludes that the
county could reduce the personal property tax rate “at any time ‘during any calendar year’ ... until July 1, 1996, when the amendment to § 58.1-3012 becomes effective.”

Section 58.1-3010 authorizes a locality to levy and impose taxes on a fiscal year basis. Unlike § 58.1-3012, however, § 58.1-3010 provides no guidance for the dates of any tax rate changes. The primary goal of statutory interpretation is to ascertain and give effect to the intent of the legislature. Additionally, the General Assembly is presumed to know what statutes previously have been enacted. Given that the legislature amended § 58.1-3012 to place a restriction related to the changing of a tax rate but did not similarly amend § 58.1-3010, it is my opinion that there is no legislative intent to alter the authority of fiscal year localities to change the tax rate at any time during the fiscal year.

In addition, a prior opinion concludes that when one of these statutes reflects a certain treatment of the tax rate, the other statute must be amended to effect the same treatment. In this opinion, it is noted that § 58-851.6 (the predecessor statute to § 58.1-3010) permitted a fiscal year locality to change its rate of levy during the fiscal year, but § 58-851.8 (the predecessor statute to § 58.1-3012) contained no such provision for a calendar-year locality. Accordingly, the opinion concludes that a calendar-year locality did not have the privilege of changing its rates of levy during the year until § 58-851.8 was amended to do so. Similarly, it is my opinion that until § 58.1-3010 is amended to include a date limitation for a tax rate change, a fiscal year locality may change its tax rate during such year without limitation.

Regarding your contention that the language in § 58.1-3010 makes applicable to a fiscal tax year locality other statutory provisions specifying a date or month related to taxes on a corresponding basis, I am not persuaded that such language can be interpreted to infer the date incorporated by reference in § 58.1-3012. “Section 58.1-3010 provides express authority to interpret statutory dates relating to levy, payment or collection of taxes as the corresponding dates in a fiscal year” for a fiscal tax year locality. Thus, for example, the dates articulated in § 58.1-3292 related to the assessment of property of new buildings as November and September 1, and December and February 5, are, by virtue of § 58.1-3010, to be interpreted as the corresponding dates of May and April 1, and June and September 5, respectively.

Section 58.1-3012 articulates no specific date but rather incorporates the date “on which the ... land books are delivered to the treasurer of the applicable county.” Such date is found in § 58.1-3310 and is described as “September
1 of each year or within ninety days from the date on which the rate of tax on real property has been determined, whichever is later.” This statutory date for delivery of the land books to the treasurer applies to either a fiscal or calendar-year locality and needs no interpretation as to a corresponding date. Accordingly, it is my opinion that the language in § 58.1-3010, making applicable to a fiscal tax year locality other statutory provisions specifying a date or month related to taxes on a corresponding basis, does not support reading into § 58.1-3010 a limitation on such locality's authority to change the tax rate during the year up to the date referred to in § 58.1-3012.

2Section 2.1-118 requires that any request by a county attorney for an opinion from the Attorney General "shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions."
5Id. at 198.
6Id. (quoting § 58.1-3012, prior to 1996 amendment) (footnote omitted).
10See id.
11Id. This opinion notes that § 58-851.8 was amended to permit the county to change the tax rate any time during the calendar year effective July 1, 1974. This privilege is, of course, now limited by the 1996 amendment to the successor statute, § 58.1-3012.
13Id.

TAXATION: LOCAL TAXES — REVIEW OF LOCAL TAXES — CORRECTION OF ASSESSMENTS, REMEDIES AND REFUNDS.

COUNTIES, CITIES AND TOWNS: BUDGETS, AUDITS AND REPORTS.

Authority of board of supervisors to expend funds appropriated in county budget only for activities supported by statute does not include authority to refund surplus real property taxes that have not been certified by commissioner of revenue as having been erroneously assessed.

THE HONORABLE PAUL CLINTON HARRIS SR.
MEMBER, HOUSE OF DELEGATES
JULY 12, 2000
You ask whether the Albemarle County board of supervisors has authority to refund to the citizens of the county surplus revenues from its fiscal year 1999-2000 budget, which were generated by an increase in real estate taxes collected from the county's taxpayers for calendar year 2000.

You report that on April 12, 2000, the county board of supervisors voted to increase the local real estate tax rate for calendar year 2000 from 72 to 76 cents per $100 of assessed value. You advise that the board assumed incorrectly that the tax increase would become effective during the 2000-2001 fiscal year beginning on July 1, 2000. You advise further that, since the county operates on a biannual billing cycle (spring and fall), the tax increase became effective immediately upon adoption by the board. Consequently, you advise that the increase in the county's real estate tax rate has resulted in an unanticipated revenue surplus of $1.2 million to the 1999-2000 budget for Albemarle County.

Section 58.1-3001 of the Code of Virginia provides that "[t]he governing body of each county shall, at its regular meeting in the month of January in each year, or as soon thereafter as practicable not later than a regular or called meeting in June, fix the amount of the county and district taxes for the current year." A 1973 opinion of the Attorney General concludes that the purpose of this provision is to require a county to set a tax rate early in the tax year.¹

In the counties of the Commonwealth, boards of supervisors exercise fiscal control through two distinct processes, budgeting and appropriations. Budgeting is a planning process, required by the General Assembly, to anticipate revenue needs and to make decisions about the priority of programs and level of services to be provided.² Budgets adopted by local governing bodies are, therefore, for planning and informative purposes³ and are statutorily distinguished from appropriations.⁴ The appropriations process is the mechanism by which funds are made available for spending on those programs and operations the governing body has decided to support. The local governing body may disburse money only pursuant to an appropriation for a contemplated expenditure.⁵ Thus, adoption of a budget that contemplates certain expenditures does not automatically result in the expenditure of money for that purpose.

The General Assembly limits the board's discretionary control over county spending. The board may not spend county funds for activities that are not directly authorized or reasonably implied by law. Virginia follows the Dillon Rule of strict construction concerning the powers of local governing bodies, limiting such powers to those conferred expressly by law or by necessary
implication from such conferred powers. As a consequence, each expenditure planned in the budget must be supported by statutory authority.

A 1987 opinion of the Attorney General concludes that a “board [of supervisors] has no independent authority to compromise claims for legally assessed taxes.” Another 1987 opinion concludes that a city council lacks authority to refund a personal property tax payment that the commissioner of the revenue has not certified as an erroneous tax assessment. I am aware of no statutory enactment following these opinions that would authorize a board of supervisors to refund the real property taxes in question, in the absence of the local commissioner of the revenue’s certification of an erroneous tax assessment.

Absent further legislative action by the General Assembly, §§ 58.1-3981 and 58.1-3990 are the only statutes that permit the refund of such taxes. The provisions of § 58.1-3981(A)-(B) require the commissioner of the revenue, or other official performing the duties of a commissioner, to correct assessments when he is satisfied that he has erroneously assessed the applicant-taxpayer or that such assessment is the result of a factual error made by others conducting general assessments. Section 58.1-3990 authorizes localities to provide by ordinance for the refund of taxes erroneously paid. Under such an ordinance, the tax collecting officer has authority to refund local taxes that are certified by the commissioner as having been erroneously assessed by him. Section 58.1-3990 also permits a local governing body to refund any local tax that a court of competent jurisdiction declares unconstitutional.


See §§ 15.2-2500 to 15.2-2508.

See §§ 15.2-2503, 15.2-2506.


Section 15.2-2506.


1986-1987 Op. Va. Att’y Gen. 315, 316 (conclusion assumes court has not declared such tax unconstitutional); see id. at 317, 318 (authority of county board of supervisors to settle and compromise claims does not extend to authority of board to compromise claims or suits relating to legally assessed taxes, absent specific statutory authority).

Section 58.1-3990; see also § 58.1-3981(E).
TAXATION: MISCELLANEOUS TAXES.

Limited authorization to use taxes to pay personnel costs associated with operating E-911 system does not extend to contract costs for emergency medical services. Sussex County may not use taxes imposed on telephone service consumers for establishment and maintenance of E-911 system to pay volunteer rescue squad to contract with independent contractor for provision of emergency medical services.

MR. HENRY A. THOMPSON SR.
COUNTY ATTORNEY FOR SUSSEX COUNTY
SEPTEMBER 26, 2000

You ask whether Sussex County may pay a monthly sum to a volunteer rescue squad to contract with an independent contractor to provide emergency medical services for an area of the county, Monday through Friday, from 6:00 a.m. to 6:00 p.m., with the contract sum paid from taxes imposed pursuant to § 58.1-3813.1 of the Code of Virginia.1 You conclude that the county may not do so under the law.2

You relate that the county board of supervisors seeks to pay a monthly sum to a volunteer rescue squad that provides emergency medical services to the county. The volunteer rescue squad proposes to use the money to contract with an independent contractor to provide emergency medical services for an area of the county between the hours of 6:00 a.m. and 6:00 p.m., Monday through Friday. The board seeks to pay the contract sum from the monies in the county budget derived from taxes imposed pursuant to § 58.1-3813.1.

Section 58.1-3813.1(B) authorizes a locality to impose a special tax on telephone service consumers for the purpose of establishing and maintaining an E-911 system. Section 58.1-3813.1(F) provides that, in establishing the system, the jurisdiction shall use the taxes imposed under § 58.1-3813.1 solely to pay for reasonable, direct recurring and nonrecurring capital costs, and operating expenses incurred by a public safety answering point in designing, upgrading, leasing, purchasing, programming, installing, testing, administering, delivering, or maintaining all necessary data, hardware and software required to receive and process emergency telephone calls through an E-911 system.[.]

A recent opinion of the Attorney General concludes that the General Assembly intended only a limited authorization for payment of personnel costs associated with operating an E-911 system.3 A 1990 opinion considers whether § 58.1-3813(D) authorizes as a recurring expense the recovery of personnel costs necessary to operate an E-911 system.4 When the 1990 opinion was
rendered, § 58.1-3813(D) provided for a tax in an amount “necessary to offset recurring maintenance costs only” after recovery of the initial costs of implementing the system. The 1990 opinion distinguishes between recurring maintenance costs and recurring operational costs and concludes that, while the cost of personnel hired to repair and service the E-911 equipment constitutes a recurring maintenance cost contemplated within the language of the statute, no language indicates a legislative intent to authorize use of the tax to pay the personnel costs associated with operating an E-911 system.

Section 58.1-3813.1(F), the comparable statute to repealed § 58.1-3813(D), states that the “[a]mounts collected from the tax shall be used solely to pay” for certain personnel costs, including salaries and fringe benefits of dispatchers and direct call-takers of an E-911 system and costs incurred in training dispatchers and direct call-takers in receiving and dispatching emergency telephone calls, and the salary and fringe benefits of the public safety answering point director or coordinator so long as such person has no other duties other than the responsibility for the public safety answering point.

This language, in addition to the general principle that statutes authorizing a tax are to be narrowly construed against the government, directs me to conclude that you are correct that the taxes imposed pursuant to § 58.1-3813.1 may not be used to contract with an independent contractor to provide emergency medical services. It is my opinion, therefore, that you are correct that Sussex County has no authority to use the taxes collected pursuant to § 58.1-3813.1 to pay a volunteer rescue squad to contract with an independent contractor for the provision of emergency medical services.


2Section 2.1-118 requires that any request from a county attorney for an official opinion from the Attorney General “shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions.”


5Id. at 229 (quoting § 58.1-3813(D)).

6See id.

TAXATION: MISCELLANEOUS TAXES – CONSUMER UTILITY TAXES.

Universal service charge appearing separately as percentage on consumer’s bill for local telecommunication service does not meet statutory definition of “gross charges” for purposes of calculating consumer utility tax. Universal service charge billed as flat monthly charge is gross charge for purposes of calculating tax.

THE HONORABLE R. WAYNE COMPTON
COMMISSIONER OF THE REVENUE FOR ROANOKE COUNTY
JULY 24, 2000

You ask whether the universal service charge billed to customers by cellular telephone companies meets the definition of “gross charges” for purposes of calculating the consumer utility tax imposed pursuant to § 58.1-3812 of the Code of Virginia.

Section 58.1-3812(A) authorizes a locality to tax a telephone company consumer if the consumer’s service address is located in such locality. The service provider of local telecommunication services collects the tax from such consumer “by adding the tax to the monthly gross charge for such services.”

Section 58.1-3812(J) defines “gross charges” as “the amount charged or paid for the taxable purchase of local telecommunication services.” Section 58.1-3812(J) specifies, however, that “gross charges” shall not include:

1. Charges or amounts paid that vary based on the distance and/or elapsed transmission time of the communication that are separately stated on the consumer’s bill or invoice.

2. Charges or amounts paid for customer equipment, including such equipment that is leased or rented by the customer from any source, if such charges or amounts paid are separately identifiable from other amounts charged or paid for the provision of local telecommunication services on the service provider’s books and records.

3. Charges or amounts paid for administrative services, including, without limitation, service connection and reconnection, late payments, and roamer daily surcharges.

4. Charges or amounts paid for special features that are not subject to taxation under § 4251 of the Internal Revenue Code of 1986, as amended.

5. Charges or amounts paid that are (i) the tax imposed by § 4251 of the Internal Revenue Code of 1986, as amended or (ii) any other tax or surcharge imposed by statute, ordinance or regulatory authority.

Section 58.1-3812 clearly contemplates the imposition of the consumer utility tax on resident customers of a local telephone service provider who utilize such service. You advise that Roanoke County has adopted an ordinance levying a utility service tax on purchasers of mobile local telecommunications services in the amount of ten percent of the monthly gross charge made by the seller. You also advise that the universal service charge appears on the telecommunication company's monthly billing. Furthermore, you advise that this charge may be either a percentage of the customer's bill, typically between four and five percent, or a flat monthly charge, typically less than $1.

Pursuant to the Telecommunications Act of 1996, the Federal Communications Commission has ordered all telecommunication companies, both local and long distance, to contribute to the local service subsidy pool of funds subsidizing communications services for schools, libraries, rural health care facilities, and rural and low-income residential customers. Telecommunications companies have the option of billing this cost to their customers. If a company recovers some or all of its universal service charge payment from its customers, it may choose to do so based on a flat amount per month or on a percentage basis, and it may refer to the charge by a variety of names.

A primary goal of statutory construction is to interpret statutes in accordance with the legislature's intent. Whenever there is doubt, however, 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 citizen. This rule of construction is consistently applied in interpreting the extent of the consumer utility taxes authorized by § 58.1-3812.

Statutes granting the power of taxation to localities are to be strictly construed, with any reasonable doubt to be resolved against the taxation. Dillon's rule of strict construction likewise generally limits powers of local governing bodies to those conferred expressly by law or by necessary implication from express grants. Thus, the authority of a locality to impose a tax must be clear.

Section 58.1-3812(J) clearly and unambiguously mandates that "gross charges shall not include" charges or amounts paid that vary based on the distance and/or elapsed transmission time of the communication that are separately stated on the consumer's bill or invoice. "The manifest intention of the legislature, clearly disclosed by its language, must be applied." ""[T]ake the words as written" ... and give them their plain meaning."
You advise that the universal service charge may either be a percentage of the customer's bill, typically between four and five percent, or a flat monthly charge, typically less than $1. I must, therefore, conclude that when the universal service charge is a percentage of the customer's bill and is separately stated on the consumer's bill, it does not constitute "gross charges" for purposes of calculating the consumer utility tax imposed under § 58.1-3812. When the universal service charge is a flat monthly charge, however, I must conclude that it meets the definition of "gross charges" for purposes of calculating the consumer utility tax imposed under § 58.1-3812.

1Section 58.1-3812(F).
2See, e.g., 1993 Op. Va. Att'y Gen. 237 (concluding that cellular telephone customer of cellular telephone company which does not provide enhanced 911 emergency telephone service system is not "consumer" for purposes of § 58.1-3813 special tax on telephone consumers of such service).
14The use of the word "shall" in a statute ordinarily implies that its provisions are mandatory. See Andrews v. Shepherd, 201 Va. 412, 414, 111 S.E.2d 279, 281 (1959) (noting that "shall" is word of command, used in connection with mandate); see also Schmidt v. City of Richmond, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965) (noting that "shall" generally indicates procedures are

Section 58.1-3812(J)(1).


 TAXATION: MISCELLANEOUS TAXES – FOOD AND BEVERAGE TAX.

Authority of localities to impose food and beverage or meals tax remains unchanged. Inclusion of federal definition of “food” as amendment to §§ 58.1-3833 and 58.1-3840 is not intended to effectuate change, repeal, or modification of current local food and beverage or meals tax imposed on hot and cold foods ready for immediate consumption.

THE HONORABLE HARRY B. BLEVINS
MEMBER, HOUSE OF DELEGATES
JANUARY 17, 2000

You ask for guidance regarding the effect of recent legislative enactments to §§ 58.1-3833 and 58.1-3840 of the Code of Virginia upon a locality’s authority to impose a food and beverage or meals tax.¹

Section 58.1-3833(A) authorizes “[a]ny county … to levy a tax on food and beverages sold, for human consumption, by a restaurant.” Section 58.1-3840 authorizes “any city or town” to impose an excise tax on “meals.” The primary goal of statutory construction is to discern and give effect to legislative intent, with the reading of a statute as a whole influencing the proper construction of ambiguous individual provisions.² Both these statutes contemplate the imposition of a local tax on food sold in the context as a meal served by an entity operating as a restaurant as opposed to a retail sales tax on food sold as groceries.³

The 1999 Session of the General Assembly enacted the Food Tax Reduction Program, § 58.1-611.1,⁴ which gradually decreases the state sales tax on food from January 1, 2000, through April 1, 2003.⁵ Under this program, the local sales tax on food remains intact.⁶ The definition of the term “food” for purposes of § 58.1-611.1 has the same meaning as “food” defined in § 2012 of the Food Stamp Act of 1977 and the federal regulations adopted pursuant to that Act:⁷ “any food or food product for home consumption except … hot foods or hot food products ready for immediate consumption.”⁸ This definition is consistent with the premise that food stamps may be used
to purchase groceries rather than to purchase food prepared for immediate
consumption by a restaurant.

The 1999 Session of the General Assembly added to §§ 58.1-3833 and
58.1-3840 a paragraph providing that, "[n]otwithstanding any other provi-
sion of this section, no locality shall levy any tax under this section upon
food purchased for human consumption as 'food' is defined in the Food
adopted pursuant to that act." You ask whether this language has restricted
the food and beverage tax and the meals tax throughout the Commonwealth
so that only hot foods ready for immediate consumption are subject to such
taxes.

It is axiomatic that "[r]epeal of a statute by implication is not favored." Had the General Assembly intended to repeal the food and beverage tax and
meals tax on all foods except hot foods ready for immediate consumption it
could have done so expressly. It did not, however. Furthermore, statutes
should be interpreted to avoid an illogical result. To interpret the inclusion
of this language as permitting the tax only on hot foods prepared for immediate
consumption would result in restaurants having to distinguish between hot
and cold foods and calculate the tax accordingly, a result which, in my opinion,
is illogical.

Furthermore, with respect to grocery stores and convenience stores selling
both groceries and prepared foods, § 58.1-3833(A) specifically provides:

Grocery stores and convenience stores selling prepared foods
ready for human consumption at a delicatessen counter shall
be subject to the [food and beverage] tax, for that portion of
the grocery store or convenience store selling such items.
The food and beverage tax on meals sold by grocery store
delicatessens and convenience stores shall be limited to pre-
pared sandwiches and single-meal platters.

This section of the statute has remained unchanged and specifically permits
a local food and beverage tax on prepared sandwiches and single-meal platters
regardless of their temperature. Keeping in mind the rule of statutory construc-
tion that a specific statute supersedes a general statute, the tax is thus still
in effect on these items whether they are hot or cold.

Accordingly, it is my opinion that the inclusion of the federal definition of
"food" as an amendment to §§ 58.1-3833 and 58.1-3840 was not intended
by the General Assembly to effectuate any change, repeal, or modification of
the current local food and beverage or meals tax. Therefore, as before, a locality still has the authority to impose tax on both hot foods and cold foods that are ready for immediate consumption.

3Compare § 35.1-1(9)(a) (defining "restaurant" as "[a]ny place where food is prepared for service to the public" and excluding "places manufacturing ... foods which are distributed to grocery stores or other similar food retailers for sale to the public" (emphasis added)).
4See 1999 Va. Acts chs. 366, 466, at 416, 664, respectively.
5Section 58.1-611.1(A).
6See § 58.1-611.1(B) (stating that program shall not affect imposition of tax on food purchased for human consumption pursuant to §§ 58.1-605, 58.1-606).
7Section 58.1-611.1(C).
9The amendment replaces the term "locality" in § 58.1-3833(E) with the phrase "city or town" in § 58.1-3840. 1999 Va. Acts ch. 366, supra note 1, at 418.
10Id.
12Id.
16See 1999 Va. Acts ch. 953, at 2491 (amending § 58.1-3840 to provide language similar to that of § 58.1-3833(A) regarding grocery and convenience stores and to provide that amendments shall become effective on July 1, 2000, if reenacted by 2000 General Assembly Session).

TAXATION: MISCELLANEOUS TAXES — FOOD AND BEVERAGE TAX — LOCAL OFFICERS — COMMISSIONERS OF THE REVENUE.

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

COUNTIES, CITIES AND TOWNS: LOCAL CONSTITUTIONAL OFFICERS, ETC. — COMMISSIONER OF THE REVENUE.

Administration of locality's food and beverage tax is not duty local governing body may compel commissioner of revenue to assume. Commissioner may, in his discretion, agree to assume this duty.

THE HONORABLE MARY LOU EBINGER
COMMISSIONER OF THE REVENUE FOR MIDDLESEX COUNTY
MAY 3, 2000
You ask whether it is the responsibility of the local commissioner of the revenue to administer the local food and beverage tax imposed pursuant to § 58.1-3833 of the Code of Virginia.

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. The duties of commissioners of the revenue are set out specifically in Article 1, Chapter 31 of Title 58.1, §§ 58.1-3100 through 58.1-3122.2, as well as generally in Titles 15.2 and 58.1.

Absent specific legislation, local governing bodies have no authority to specify the duties of constitutional officers. Additionally, even when specific legislation authorizes a local governing body to specify the duties of a commissioner, it may not specify duties that are inconsistent with the duties of a commissioner as prescribed by law. In accordance with this proviso that 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, prior opinions of the Attorney General conclude, for example, that because a commissioner of the revenue is required by statute to assess business license taxes, he is the appropriate official to be designated by a county for issuing a business license, and to swear out warrants for certain unlicensed entities.

With respect to a duty which a local governing body seeks a constitutional officer to assume, but which does not fall within the purview of his statutorily prescribed duties, the Attorney General has determined that the officer "may, at [his] discretion, assume this duty." Additionally, § 15.2-1636 provides:

> The commissioner of the revenue shall exercise all the powers conferred and perform all the duties imposed upon such officer by general law. He may perform such other duties, not inconsistent with his office, as the governing body may request. [Emphasis added.]

It is well established that the use of the term "may" in a statute indicates that the statute is permissive and discretionary, rather than mandatory. Consequently, it is within the discretion of a local commissioner of the revenue to voluntarily assume duties that are not statutorily prescribed.

Section 58.1-3833 authorizes a county to levy a tax on certain food and beverages. A recent opinion of the Attorney General notes that state law does not direct local governments to maintain any particular type of system in connec-
tion with the administration of a local meals tax, and the adoption of reasonable recordkeeping requirements is a matter for determination by the governing body and local tax officials. Thus, the duty to administer the tax is not a statutorily prescribed duty of the commissioner of the revenue; however, it is a duty consistent with his office that may be voluntarily assumed by him.

Accordingly, the administration of a locality's food and beverage tax is not a duty that a local governing body may compel the local commissioner of the revenue to assume. The commissioner may, however, in his discretion, agree to assume this duty.

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2Id. at 49 (concluding that city council may not implement procedure for appeal of property assessments made by commissioner).

3Id. at 50 n.2. Compare 1975-1976 Op. Va. Att'y Gen. 137, 138 (concluding that local treasurer's statutory duty to collect taxes and other amounts payable into treasury of political subdivision includes duty to collect local parking fines).

4See § 58.1-3109.


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Transfer of funds from next biennial budget to current state budget, without approval of General Assembly, to meet reimbursement requirements of Act, provided such action is within legislative intent of Act and 1998 and 1999 Appropriations Acts for 1998-2000 biennium, is authorized by General Assembly.

THE HONORABLE PHILLIP A. HAMILTON
MEMBER, HOUSE OF DELEGATES
DECEMBER 8, 2000

You ask whether funds that are not available in a current state budget may be transferred from the next biennial budget without the approval of the General
Assembly. Your inquiry arises from the reported transfer of approximately $15.9 million from the budget approved by the General Assembly for fiscal year 2001 to pay for car tax relief in June 2000. You provide no additional facts concerning this transfer of funds. Therefore, I must analyze the transfer in the context of the Personal Property Tax Relief Act of 1998, the 1998 and 1999 Appropriation Acts for the 1998-2000 biennium, and relevant correspondence between the Auditor of Public Accounts and the Comptroller.

The Personal Property Tax Relief Act of 1998 contemplates phasing out local personal property tax obligations for personal use vehicles owned by natural persons. The Personal Property Tax Relief Act further contemplates that the Commonwealth will reimburse localities for the resulting loss in their operating revenues. The Act assigns the reimbursement responsibility to the Comptroller and requires the Comptroller, upon receipt of specified documentation, to effect reimbursement within two business days.

The Personal Property Tax Relief Act contains several controls to ensure, among other things, that the contemplated tax relief, and the resulting reimbursement obligation, extends to all vehicles owned by natural persons for private use. The Act, therefore, directs that the Department of Motor Vehicles promulgate guidelines for the reconciliation of local reimbursements. If reimbursements occur for nonqualifying vehicles, the Comptroller must deduct the amount of such overpayments from future payments that otherwise would be due the particular locality.

The Personal Property Tax Relief Act creates a special nonreverting fund, known as the Personal Property Tax Relief Fund, to receive appropriations from the General Assembly to make the contemplated reimbursements. The Act also requires the Commissioner of the Department of Motor Vehicles to certify, by November 1 of each year, the sum necessary to fully reimburse the localities during the upcoming year. The Act anticipates the possibility that the Commissioner may underestimate the reimbursement amount in any given year. If such underestimation occurs “in the first year of a biennium, the Governor is authorized to transfer moneys from the second year to the first to effect the payment[s].” If such underestimation occurs “in the second year of a biennium,” the Governor is directed to submit to the next regularly scheduled session of the General Assembly, “a budget including the sum, if any, required to restore the [Personal Property Tax Relief] Fund to a level sufficient to make payments [contemplated by the Act].”

The 1998 and 1999 Appropriation Acts provide the mechanism for funding the reimbursements contemplated by the Personal Property Tax Relief Act.
The Appropriation Acts also provide more generalized guidance concerning the administration of the Act. For example, Item 554 of both the 1998 and 1999 Appropriation Acts sets limits on the aggregate amounts available for equitable relief under the Personal Property Tax Relief Act.\textsuperscript{15}

The correspondence between the Auditor of Public Accounts and the Comptroller discloses that the subject transfer occurred during the last week of fiscal year 2000.\textsuperscript{16} The Comptroller maintains that the Act's requirement of reimbursing localities within two business days of the presentation of documentation evidencing taxpayers' payment of their reduced personal property tax liability necessitated payments before the end of the fiscal year.\textsuperscript{17} Because many Virginia localities operate on a fiscal year ending on June 30 and have personal property taxes due in June, one may reasonably conclude that the Comptroller could receive a large number of requests for reimbursement under the Personal Property Tax Relief Act during the final days each June. I am advised that, during the last half of June 2000, the Comptroller and Commissioner of the Department of Motor Vehicles first learned that the sum appropriated for relief under the Act in the fiscal year ending June 30, 2000, would not be sufficient to meet the localities' claims for reimbursement under the Act. Under these circumstances, the language of the Personal Property Tax Relief Act of 1998 and the 1999 Appropriation Act supports the conclusion that the transfer to fund the authorized reimbursements was appropriate.

First, the 1999 Appropriation Act directs that, within the aggregate dollar limit of the appropriation, the relief contemplated by the Personal Property Tax Relief Act be provided on an equitable basis.\textsuperscript{18} Thus, the Comptroller had two clear directives—to ensure that all qualifying taxpayers are treated the same and to reimburse localities within two business days of the presentation of properly documented personal property tax accounts. Since other taxpayers had already received the benefits contemplated by the Act prior to June 2000, failing to timely reimburse the localities in June would have run afoul of the 1999 Appropriation Act, as well as § 58.1-3526(C) of the Code of Virginia, a portion of the Personal Property Tax Relief Act. Moreover, § 58.1-3533(C) does not appear to anticipate what seems to have happened in this case. While that section does address underestimations of the reimbursement amount in the second year of a biennium, it does not provide a restorative funding mechanism until the next legislative session. The delay that would result cannot be reconciled with the 1999 Appropriation Act's mandate to provide relief under the Personal Property Tax Relief Act on an equitable basis within two business days. Thus, assuming the Comptroller and the Commissioner properly report the underestimation of the reimburse-
ment amount "to the presiding officer of each house of the General Assembly" and the Governor submits a budget addressing the transfer, there will have been compliance with the intent of the Act. I note the reports are due on November 1.

Consequently, it is my opinion that the transfer of funds to meet the reimbursement requirements of the Personal Property Tax Relief Act of 1998 was within the overall intent of the Act, and thus, was authorized by the General Assembly.

1"The fiscal year shall commence on the first day of July and end on the thirtieth day of June." Va. Code Ann. § 2.1-197.
2Sections 58.1-3523 to 58.1-3536.
3See § 58.1-3523 (defining "leased" and "privately owned" as those "qualifying vehicle[s]" "leased by a natural person as lessee" or "owned by a natural person and used for nonbusiness purposes").
4Section 58.1-3524(C).
5Section 58.1-3526(C).
6See § 58.1-3523 (defining "qualifying vehicle" as "passenger car, motorcycle, and pickup or panel truck, as those terms are defined in § 46.2-100, that is determined by the commissioner of the revenue of the county or city in which the vehicle has situs as provided by § 58.1-3511 to be (i) privately owned or (ii) leased pursuant to a contract requiring the lessee to pay the tangible personal property tax on such vehicle").
7Sections 58.1-3532, 58.1-3527.
8Section 58.1-3527.
9Section 58.1-3533(A). Section 58.1-3533 creates the Personal Property Tax Relief Fund and provides for restoration of the Fund in the event of underestimates of the reimbursement amounts in first- and second-year bienniums.
10Sections 58.1-3529, 58.1-3533(B).
11Section 58.1-3533(C).
12Id.
13Id.
17Letter from Walter J. Kucharski, supra, at 1 (reiterating statements made by Comptroller).
181999 Va. Acts, supra note 14, at 2294 (citing Item 554(B)).
19Section 58.1-3533(C).
20Sections 58.1-3529, 58.1-3533(B).
I have assumed that the necessary approvals within the Executive Branch for transfers in general occurred and that the transfer in question was proper in that respect.

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**TAXATION: REAL PROPERTY TAX – SPECIAL ASSESSMENT FOR LAND PRESERVATION.**

**CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE (ASSESSMENTS).**

**CONSERVATION: VIRGINIA CONSERVATION EASEMENT ACT.**

No authority for locality to issue tax credits for property devoted to agricultural and forestal production within agricultural and forestal districts or subject to conservation easements.

**THE HONORABLE R. STEVEN LANDES**
**MEMBER, HOUSE OF DELEGATES**
**SEPTEMBER 25, 2000**

You ask whether a county has the authority to issue tax credits to taxpayers whose land is used in agricultural and forestal production within agricultural and forestal districts or whose property is subject to conservation easements.

Pursuant to Article X, § 2 of the Constitution of Virginia (1971) and Article 4, Chapter 32 of Title 58.1, §§ 58.1-3229 through 58.1-3244 of the Code of Virginia, localities may adopt an ordinance providing that land devoted to agricultural, horticultural, forest and open-space use be assessed at a lower value, based on its use. The purpose of the land use assessment statutes is to create a financial incentive to encourage the preservation of land for preferred uses. These statutes authorize localities to grant a tax preference in the form of a reduction in the assessed value of qualifying real estate; however, they do not provide for a credit against taxes owed on such property.

Virginia adheres to the Dillon Rule of strict construction, which provides that local governing bodies have only those powers that are expressly granted, or those necessarily or fairly implied from expressly granted powers. Section 58.1-3220.01, for example, allows localities to grant tax credits for rehabilitated residential structures. I am unaware, however, of any statues authorizing a locality to grant a tax credit for the land use or conservation easements described in your inquiry. Accordingly, it is my opinion that a county does not have the authority to issue such a tax credit.

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1Article X, § 2 provides: "The General Assembly may define and classify real estate devoted to agricultural, horticultural, forest, or open space uses, and may by general law authorize any county, city, town, or regional government to allow deferral of, or relief from, portions of taxes otherwise payable on such real estate."

2Article 4, Chapter 32 of Title 58.1 was enacted under the constitutional authority of Article X, § 2. Article 4 authorizes localities to enact ordinances providing for the use value assessment and...
taxation of constitutionally permitted classes of property and details the procedures for the
evaluation and taxation of such property.

3See 1997 Op. Va. Att’y Gen. 199 (stating that General Assembly intended use value to be lower
than fair market value).

4See id. at 200.

5See also §§ 10.1-1009 to 10.1-1016 (regarding tax preferences applicable to conservation
easements).

6See City of Chesapeake v. Gardner Enterprises, 253 Va. 243, 482 S.E.2d 812 (1997); City of

7The General Assembly, however, has authorized localities to adopt ordinances providing that
land devoted to agricultural, horticultural, forest, and open-space use be assessed at a lower value
upon application of the landowner. See §§ 58.1-3231, 58.1-3234; see also § 10.1-1011 (relating
to taxation of conservation easements).

TAXATION: REAL PROPERTY TAX – TAXABLE REAL ESTATE.

Commissioner of revenue is officer responsible for making factual determination
whether facility use agreement between private business and federal government and
attendant fee indicate lessor/lessee relation that would subject lessee to
imposition of real property tax.

THE HONORABLE NANCY W. MILLER
COMMISSIONER OF THE REVENUE FOR MONTGOMERY COUNTY
JUNE 9, 2000

You inquire regarding the tax exempt status of certain property in your county.
Specifically, you ask whether § 58.1-3203 of the Code of Virginia permits the
assessment of local taxes on private businesses conducted on federal property
leased from the federal government.

You advise that the Radford Army Ammunition Plant is located in
Montgomery County. You advise further that, in the past, the entire property
has been exempt from taxation because it was owned and operated by the
federal government for the manufacture of munitions. You also relate that, in
recent years, portions of the plant have been leased by private businesses for
purposes other than tax exempt activities.

You have provided a basic outline of facts for consideration. Under the Arma-
ment Retooling and Manufacturing Support Act of 1992 (the “ARMS Act”),
privately owned businesses occupy portions of the Radford Army Ammunition
Plant pursuant to facility use agreements. The fee for the use of a particular
facility is based on the amortization of a loan extended by the United States
Department of Defense. Private businesses use such loans to convert the
facility to their needs, although some expend their own funds to modify a
particular facility. Consequently, such fees are not characterized as "rent," and there is no lessor/lessee relationship between the individual businesses and the federal government.

Ultimately, the determination of whether such an arrangement constitutes a lessor/lessee relationship depends on a complete and detailed set of facts. Your request, however, does not contain many specific facts upon which a precise conclusion may be drawn, so I am unable to render a completely definitive opinion in response to your question.

When a commissioner of the revenue makes a factual determination that an owner of property is exempt from taxation and that there is a lessor/lessee relationship with a tenant, the leasehold interest is taxable to the tenant pursuant to § 58.1-3203. The terms of the specific lease will determine whether all or only a portion of the assessed value will be taxable to the tenant.

The purposes of the ARMS Act are (1) to encourage nondefense commercial businesses to use government-owned, contractor-operated ammunition manufacturing facilities of the Department of the Army for commercial purposes; (2) to reduce the adverse effects of reduced spending by the Army that are experienced by communities, by providing such facilities to be used for commercial purposes that create employment opportunities; and (3) to enter into multiyear subcontracts with privately owned businesses for the commercial use of their facilities.

As a general rule, the states may not impose taxes directly on the federal government, nor may the states impose taxes the legal incidence of which falls on the federal government. "[T]he economic burden on a federal function of a state tax imposed on those who deal with the Federal Government does not render the tax unconstitutional so long as the tax is imposed equally on the other similarly situated constituents of the State." A state may not single out contractors who work for the United States for discriminatory treatment. It may, however, accommodate for the fact that it may not impose a tax directly on the United States as a project owner. As was noted by the Supreme Court of the United States in the case of United States v. New Mexico:

If the immunity of federal contractors is to be expanded beyond its narrow constitutional limits, it is Congress that must take responsibility for the decision, by so expressly providing as respects contracts in a particular form, or contracts under particular programs. And this allocation of responsibility is wholly appropriate, for the political process is "uniquely
adapted to accommodating the competing demands” in this area. But absent congressional action, we have emphasized that the States' power to tax can be denied only under “the clearest constitutional mandate.”[6]

There is no mention of state or local tax immunity in the ARMS Act. Therefore, the businesses in question are not automatically immune from local taxation. A determination must, however, be made as to whether such business is taxable pursuant to § 58.1-3203, which provides:

All leasehold interests in real property which is exempt from assessment for taxation from the owner shall be assessed for local taxation to the lessee. If the remaining term of the lease is fifty years or more, or the lease permits the lessee to acquire the real property for a nominal sum at the completion of the term, such leasehold interest shall be assessed as if the lessee were the owner. Otherwise, such assessment shall be reduced two percent for each year that the remainder of such term is less than fifty years; however, no such assessment shall be reduced more than eighty-five percent. If the lessee has a right to renew without the consent of the lessor, the term of such lease shall be the sum of the original lease term plus all such renewal terms.

When any real property is exempt from taxation under Section 6(a)(1) or (2) or by designation under Section 6(a)(6) of Article X of the Constitution of Virginia, the leasehold interest in such property may also be exempt from taxation, provided that the property is leased to a lessee who is exempt from taxation pursuant to § 501 (c) of the Internal Revenue Code and is used exclusively by such lessee primarily for charitable, literary, scientific, or educational purposes. No leasehold interest of tax exempt property of a governmental agency shall be subject to assessment for local property tax purposes where the property is leased to a public service corporation or subsidiary thereof or a nonstock, nonprofit corporation whose occupation, use or operation of the tax exempt property is in aid of or promotes the governmental purposes set out in Chapter 10 (§ 62.1-128 et seq.) of Title 62.1. The provisions of this section shall not apply to any leasehold interests exempted or partially exempted by other provisions of law.
Under § 58.1-3203, the holders of leasehold interests in real property which is exempt from assessment for taxation from the owner are to be taxed "as if the lessees of such interests were the owners of the property." Accordingly, "[a] leasehold is taxable in Virginia if the fee is exempt from assessment to the owner." If the commissioner of the revenue makes a factual determination that the owner of the property is exempt from taxation, then the leasehold interest is taxable to the tenant pursuant to § 58.1-3203. The terms of the specific lease will determine whether all or only a portion of the assessed value will be taxable to the tenant.

Whether the private businesses in this matter possess leasehold interests is a question of fact for the commissioner of the revenue to determine, based on all the facts and circumstances of the case. A 1970 opinion notes that there is no requirement that a lease be in writing. Furthermore, a 1978 opinion stipulates that a "loan" of [personal] property from a federal agency to a contractor for its use on a government construction project constitutes a lease for purposes of local personal property taxation. Under the facts presented in the 1978 opinion, the "loan" of the property is a lease in that it is "a contractual letting out of property for use during an ascertainable period, always for a shorter term than the lessor has in the property."

Since the ultimate question here is essentially one of fact, the commissioner of the revenue must ultimately determine whether, under the particular facts with which the commissioner is dealing, the facility use agreements between the private businesses and the federal government and the attendant fee, along with any other relevant information, indicate a lessor/lessee relationship such that local taxes may be imposed pursuant to § 58.1-3203.


1See 1975-1976 Op. Va. Att'y Gen. 339, 340 (concluding that, if commissioner of revenue finds college to be exempt from taxation on land and building leased by fraternity, fraternity will be liable for all assessed taxes since inception of lease).

10 U.S.C.A. § 2501 note (citing § 193(b)(1)).

1Id. (citing § 193(b)(3)).

1Id. (citing § 194(a)(2)).
The Supreme Court of the United States invalidated a Mississippi tax regulation which required out-of-state liquor distillers and suppliers to collect a markup—the practical equivalent of a tax—on liquor sold to military posts for remittance to the Tax Commission. United States v. Mississippi Tax Comm’n, 421 U.S. 599 (1975). Although the tax was nominally collected from the out-of-state sellers, the legal incidence of the tax was said to fall on the United States because the tax regulation required the sellers to charge and collect it from the military purchasers. Id. at 607-09 (citing First Agricultural Nat. Bank v. Tax Comm’n, 392 U.S. 339, 346-48 (1968)).

United States v. County of Fresno, 429 U.S. 452, 462 (1977); see also City of Detroit v. Murray Corp., 355 U.S. 489 (1958) (holding that there can be no discrimination against federal government, its property or those with whom it does business).

“United States v. County of Fresno, 429 U.S. 452, 462 (1977); see also City of Detroit v. Murray Corp., 355 U.S. 489 (1958) (holding that there can be no discrimination against federal government, its property or those with whom it does business).


Id. (citing Smith v. Payne, 153 Va. 746, 756, 151 S.E. 295, 298 (1930)).


Id. at 286.

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**TAXATION: RETAIL SALES AND USE TAX.**

Sales and use tax exemption applies to equipment used to provide Internet access service directly to end user subscribers and to equipment used to enable other companies to provide such service to end users.

THE HONORABLE WILLIAM C. MIMS
MEMBER, SENATE OF VIRGINIA
MARCH 15, 2000

You inquire regarding the applicability of the sales and use tax exemption in § 58.1-609.6(2) of the *Code of Virginia* to either equipment used in providing Internet access service directly to end users or to equipment and software used to enable other companies to provide such service to end users.¹

You present a hypothetical situation in which a company provides Internet service in two ways. The company sells Internet service directly to end users and, therefore, is an Internet service provider. In addition, the company sells “Internet access” to other Internet service providers that sell such service directly to end users. The company calls the first activity “retail sales” and the second activity “wholesale sales.”² For its “wholesale sales,” the company also purchases equipment and software that is not “used for storing, processing and retrieving end-user subscribers’ requests.”³
You relate that § 58.1-609.6 was enacted by the 1993 Session of the General Assembly. You advise further that the following two classes of electronic media equipment are exempt from sales tax: (1) broadcasting and related equipment used by common carriers; and (2) equipment (including software) used for amplification, transmission and distribution of video.

Section 58.1-609.6 contains the media-related exemptions to the sales and use tax. Section 58.1-609.6(2) exempts the following:

[A]mplification, transmission and distribution equipment used or to be used by ... open video systems or other video systems provided by telephone common carriers.

Section 58.1-602 defines the terms used in the Virginia Retail Sales and Use Tax Act. The following terms and definitions, which are pertinent to your inquiry, were added by the 1999 Session of the General Assembly:

"Amplification, transmission and distribution equipment" means, but is not limited to, production, distribution, and other equipment used to provide Internet-access services, such as computer and communications equipment and software used for storing, processing and retrieving end-user subscribers' requests.

* * *

"Internet" means collectively, the myriad of computer and telecommunications facilities, which comprise the interconnected world-wide network of computer networks.

"Internet service" means a service that enables users to access proprietary and other content, information electronic mail, and the Internet as part of a package of services sold to end-user subscribers.

* * *

"Open video system" means an open video system authorized pursuant to 47 U.S.C. § 573 and, for purposes of [the Virginia Retail Sales and Use Tax Act] only, shall also include Internet service regardless of whether the provider of such service is also a telephone common carrier.

* * *

"Video programmer" means a person or entity that provides video programming to end-user subscribers.

"Video programming" means video and/or information programming provided by or generally considered comparable
to programming provided by a cable operator including, but not limited to, Internet service.

The language used by the General Assembly in defining “amplification, transmission and distribution equipment” is not entirely free from ambiguity. When the language of a statute is ambiguous, it must be interpreted in a manner that will give effect to the intent of the General Assembly. Although tax exemptions generally are to be narrowly construed, it is my view that the language defining the terms in § 58.1-602 generally reflects that the General Assembly intended a broad, rather than restrictive, application of the term “amplification, transmission and distribution equipment.” The language of the definition provides that, while the exemption includes “production, distribution, and other equipment used to provide Internet-access services” and “software used for storing, processing and retrieving end-user subscribers’ requests,” it is “not limited to” such equipment. Equally clear is the fact that the definition expressly considers “software” as “equipment.” It is my view that the words following the term “software” are intended to be descriptive words and not words of limitation.

It is clear that the essence of the exemption is property used to provide Internet-access services. There is no language in the statutes expressly confining the exemption to purchases made by direct Internet providers. Clearly, as long as an Internet provider uses the subject equipment to deliver Internet service to end-user subscribers, the statutory language is satisfied.

The inclusion of the language “end-user subscribers” in this definition is, in my opinion, used to make clear that no other software a company uses to conduct any portion of its Internet business, other than the provision of Internet services to its customers, is exempt from taxation. As an example, software that is used by an Internet provider to maintain its internal accounting system clearly is not exempt under § 58.1-609.6. When the equipment and software are used directly in providing Internet service, however, it is my opinion that such items are clearly within the tax exemption.

The intent of the General Assembly with regard to the taxation of Internet providers reflects a generally broad application of the sales and use tax exemption. Simply stated, the question is whether the entity seeking an exemption must use the equipment to provide direct Internet service to end users or whether it is sufficient for the entity to use the equipment to enable others to provide the same service. It is my opinion that the definitions and exemption are sufficiently broad to include both the entity using equipment to provide Internet access service directly to end users and the entity using equipment
to enable other entities to provide such service to end users. Consequently, in the hypothetical situation you present, I must conclude that the sales and use tax exemption in § 58.1-609.6(2) is applicable to both equipment used in providing Internet access service directly to end users and to equipment used to enable other companies to provide Internet access service to end users.

1Section 58.1-609.6(2) provides that the retail sales and use tax shall not apply to "[b]roadcasting equipment and parts and accessories thereto and towers used or to be used by commercial radio and television companies, wired or land based wireless cable television systems, common carriers or video programmers using an open video system or other video platform provided by telephone common carriers, or concerns which are under the regulation and supervision of the Federal Communications Commission and amplification, transmission and distribution equipment used or to be used by wired or land based wireless cable television systems, or open video systems or other video systems provided by telephone common carriers."

2This language appears to have no significance for purposes of responding to your inquiry.

3Section 58.1-602 (defining "amplification, transmission and distribution equipment").


8Section 58.1-602 (emphasis added) (defining "amplification, transmission and distribution equipment").

9Id.

10Such constitutes, in essence, an indirect provision of Internet service to end users.

TAXATION: REVIEW OF LOCAL TAXES.

Mandatory payment of interest on overpayment of taxes. Award of interest on overpayment is not tied to equitable factors such as taxpayer's mistake or fault. Where statutory authority allows payment of such interest, it is recoverable from government upon refund of taxes erroneously assessed, collected and ordered refunded. Interest on overpayment of taxes arising from correction of erroneous assessment is effective as of July 1, 1999, and computed from that day forward. Penalty and interest calculated on part of payment that later is determined not to have been owed should be refunded with interest.

THE HONORABLE RAY A. CONNER
COMMISSIONER OF THE REVENUE FOR THE CITY OF CHESAPEAKE
MARCH 14, 2000

You ask whether a locality must pay interest on a refund arising from overpayment of an assessment that was taxed erroneously because the taxpayer failed
to provide accurate and sufficient information. You also ask for guidance regarding the effective date of the payment of interest on the overpayment of taxes resulting from the correction of an erroneous assessment. Finally, you ask whether interest is to be paid on any penalty and interest that had been assessed on the payment.

Prior to July 1, 1999, and pursuant to § 58.1-3991 of the Code of Virginia, interest on a refund of local taxes was awarded only if provision for the payment of interest was contained in an ordinance adopted by the affected local government. The 1999 Session of the General Assembly repealed this section but amended other related sections to include the payment of interest on the overpayment of taxes to the taxpayer, such repeal and amendments made effective July 1, 1999. Specifically, § 58.1-3916 mandates that “[a] locality that provides for payment of interest on delinquent taxes shall provide for interest at the same rate on overpayments due to erroneously assessed taxes to be paid to the taxpayer.” Additionally, the section mandates a court to award interest on the overpayment of taxes. Furthermore, interest on overpayments is also incorporated in § 58.1-3918 for localities that have no ordinance regulating interest, and in § 58.1-3981, which provides for the correction of erroneous assessments by the commissioner of the revenue.

A primary goal of statutory interpretation is to ascertain the intent of the legislature. Reading these statutes together, it is clear that the repeal of § 58.1-3991, coupled with the inclusion of interest on overpayments in the other statutes noted above, indicates that the General Assembly intended to make mandatory the payment of interest on the overpayment of taxes by a taxpayer. This Office has previously concluded that taxpayer mistakes do not abrogate the duty of the commissioner of the revenue to correct an erroneous assessment, and that a commissioner of the revenue may not deny a correction “based on equitable factors such as the taxpayer’s mistake.” For example, where a taxpayer files a tangible personal property return based on a method of valuing property that results in a higher valuation than the commissioner of the revenue had determined the valuation, this Office has concluded that the commissioner was obliged to correct the assessment and refund the overpayment of taxes with interest accordingly. Similarly, it is my opinion that the award of interest on an overpayment is not tied to equitable factors such as the taxpayer’s mistake or fault. Therefore, where there is statutory authority allowing payment of such interest, it is “recoverable from the government upon refund of taxes erroneously assessed, collected and ordered refunded.”
You next inquire as to the effective date of the payment of interest on overpayments. Generally, amendments are not retroactively applied unless the legislature evinces the intent to do so. Nothing in the language of these amendments suggests that the General Assembly intended for interest awarded on overpayments to be applied prior to July 1, 1999. Thus, with respect to assessments made prior to such date, it is my opinion that interest on the overpayment of taxes arising from the correction of an erroneous assessment is effective as of July 1, 1999, and computed from that day forward.

Lastly, you inquire as to whether interest on an overpayment includes interest on any penalty and interest that had been imposed due to late payment of the tax. Prior opinions of the Attorney General consistently conclude that taxpayers are responsible for the timely payment of the taxes due on their properties. Governing bodies have the authority to impose penalty and interest on delinquent taxes. To the extent, however, that such penalty and interest is calculated on a part of the payment that later is determined not to have been owed, such amounts should be refunded with interest.

1 Assume from the facts presented that there is no ordinance regarding the payment of interest on the overpayment of taxes.


5 See id. at 980-82 (amending and reenacting, among others, §§ 58.1-3916, 58.1-3918, 58.1-3981).

6 See § 1-12(A) (requiring that laws enacted at regular session of General Assembly take effect on July 1 following adjournment of session).

7 See also § 58.1-3984 (allowing aggrieved taxpayer or commissioner of revenue to apply to appropriate circuit court for correction of erroneous assessment); § 58.1-3987 (mandating interest on court-ordered refund of taxes).


9 See Prillaman v. Commonwealth, 199 Va. 401, 405-06, 100 S.E.2d 4, 7-8 (1957); 1996 Op. Va. Att’y Gen. 134, 135 (statutes relating to same subject should be considered in pari materia).


12 Id.


You inquire regarding the term "satellite facilities" as it is used in Chapter 29 of Title 59.1, §§ 59.1-364 through 59.1-405 of the Code of Virginia ("Chapter 29").

A referendum on the question whether pari-mutuel wagering should be permitted at satellite facilities must be presented to the qualified voters of a county or city. Clearly, voter approval of pari-mutuel wagering on live horse racing at a licensed racetrack constitutes voter approval of pari-mutuel wagering on simulcast horse racing at that racetrack. I am, however, of the opinion that voter approval permitting pari-mutuel wagering at a licensed racetrack only does not constitute voter approval of pari-mutuel wagering at satellite facilities.

The statutory provisions governing horse racing and pari-mutuel wagering in the Commonwealth are contained in Chapter 29. Section 59.1-365 defines terms that are used in Chapter 29. The term "satellite facility" is defined to mean "all areas of the property at which simulcast horse racing is received for the purposes of pari-mutuel wagering, and any additional areas designated by the Commission." The term "simulcast horse racing" is defined as the simultaneous transmission of the audio or video portion, or both, of horse races from a licensed horse racetrack or satellite facility to another licensed horse racetrack or satellite facility, regardless of state of licensure, whether such races originate within the Commonwealth or any other jurisdiction, by satellite communication devices, television cables, telev-
phone lines, or any other means for the purposes of conducting pari-mutuel wagering.\textsuperscript{11}

The definition of "simulcast horse racing" clearly permits the receipt by a "satellite facility" of the audio and/or video transmission of horse races.\textsuperscript{2}

"The Virginia Racing Commission is vested with control of all horse racing with pari-mutuel wagering in the Commonwealth, with plenary power to prescribe regulations and conditions under which such racing and wagering shall be conducted."\textsuperscript{3} Furthermore, "[t]he conduct of any horse racing with pari-mutuel wagering participation in such racing or wagering ... is a privilege which may be granted or denied by the Commission."\textsuperscript{4} The Commission has "all powers and duties necessary to carry out the provisions of [Chapter 29] and to exercise the control of horse racing as set forth in § 59.1-364."\textsuperscript{5} "If the language of a statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it."\textsuperscript{6} It is unnecessary to resort to any rules of statutory construction when the language of a statute is unambiguous.\textsuperscript{7} In those situations, the statute's plain meaning and intent govern.

The Commission has authority to grant an initial license "to construct, establish, operate or own a ... satellite facility" only after voter approval of a referendum held in the county or city in which such satellite facility is to be located.\textsuperscript{8} Section 59.1-391 sets out the requirements for the filing of a petition requesting that a local referendum be held to decide the question of pari-mutuel wagering in accordance with Chapter 29. The petition must be signed by five percent of the qualified voters and filed with the circuit court of the county or city where the racetrack is to be located.\textsuperscript{9} Voter approval, therefore, is required for operation of a satellite facility.

Section 59.1-369(4) provides the only limitation placed on the Commission relating to licensure of satellite facilities:

The Commission shall promulgate regulations and conditions under which simulcast horse racing shall be conducted at a licensed horse racetrack or satellite facility in the Commonwealth and all such other regulations it deems necessary and appropriate to effect the purposes of [Chapter 29]. Such regulations shall include provisions that all simulcast horse racing must comply with the Interstate Horse Racing Act of 1978 (15 U.S.C. § 3001 et seq.) and shall require the holder of an unlimited license to schedule not less than 150 live racing days in the Commonwealth each calendar year; however, the
Commission shall have the authority to alter the required number of live racing days during the first five years of operation based on what the Commission deems to be in the best interest of the Virginia horse industry. Such regulations shall authorize up to six satellite facilities and restrict majority ownership of satellite facilities to an entity licensed by the Commission which owns a horse racetrack in the Commonwealth. Nothing in this subdivision shall be deemed to preclude private local ownership or participation in any satellite facility. Wagering on simulcast horse racing shall take place only at a licensed horse racetrack or satellite facility. [Emphasis added.]

"[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction." Statutes should not be construed to frustrate their purpose. In addition, the use of the word "shall" in a statute generally implies that its terms are intended to be mandatory, rather than permissive or directive. Finally, when a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute.

The plain language of § 59.1-369(4) requires the Virginia Racing Commission to adopt regulations authorizing a licensee to own or operate "up to six satellite facilities." The plain language does not require that a racetrack be in existence and operating in order for a satellite facility to offer simulcast horse racing. Consequently, I am required to conclude that should the Commission issue a license to operate a racetrack and/or a satellite facility, the clear definition of the term "simulcast horse racing" permits the licensee to operate a satellite facility on a daily basis pursuant to the terms of the license.

The clear and unambiguous words of a statute must be accorded their plain meaning. Words in a statute are to be given their common meaning unless a contrary legislative intent is manifest. The Virginia Racing Commission, therefore, clearly has been given the sole authority by the General Assembly to promulgate regulations and conditions for the operation of a satellite facility in the Commonwealth.

As noted earlier, a referendum on the question whether pari-mutuel wagering should be permitted at satellite facilities must be presented to the qualified voters of a county or city. Clearly, voter approval of pari-mutuel wagering on live horse racing at a licensed racetrack constitutes voter approval of pari-mutuel wagering on simulcast horse racing at that licensed racetrack. I am, however, of the opinion that voter approval permitting pari-mutuel wagering
at a licensed racetrack only does not constitute voter approval of pari-mutuel wagering at satellite facilities.

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1Section 59.1-365.
2Id.
3Section 59.1-364(A).
4Section 59.1-364(B).
5Section 59.1-366.
8Section 59.1-391.
9Section 59.1-391(1).
14"Licensee" includes any person holding an owner's, operator's or limited license under §§ 59.1-375 through 59.1-386 of [Chapter 29]. The licensee under a limited license shall not be deemed an owner for the purposes of owning or operating a satellite facility." Section 59.1-365.

TRADE AND COMMERCE: HORSE RACING AND PARI-MUTUEL WAGERING.

No requirement that licensed racetrack be in existence and operating before licensee may open satellite facility to transmit simulcast horse racing. Virginia Racing Commission has sole authority to promulgate regulations and conditions for operation of racetrack and satellite facility in Commonwealth; is appropriate state agency to determine whether construction of racetrack must be completed before satellite facility may be opened.

THE HONORABLE ROBERT G. MARSHALL
MEMBER, HOUSE OF DELEGATES
FEBRUARY 11, 2000

You ask whether Colonial Downs Holdings, Inc., or the Virginia Turf Club, Inc., may open an "off-track betting parlor" for wagering on simulcast horse
racing transmitted from locations outside the Commonwealth before construction is completed of a racetrack to conduct live racing. You ask whether such would constitute a satellite betting facility that would require voter approval in a separate referendum. I can find no statutory definition of the term "off-track betting parlor." For the purposes of this opinion, therefore, I shall refer to the term "satellite facility" as that term is defined in § 59.1-365 of the Code of Virginia. You advise that, in 1994, the voters in Prince William County approved a referendum to permit pari-mutuel wagering in the county at a licensed racetrack in accordance with Chapter 29 of Title 59.1, §§ 59.1-364 through 59.1-405 ("Chapter 29").

The statutory provisions governing horse racing and pari-mutuel wagering in the Commonwealth are contained in Chapter 29. Section 59.1-365 defines terms that are used in Chapter 29. The term "simulcast horse racing" is defined as

the simultaneous transmission of the audio or video portion, or both, of horse races from a licensed horse racetrack or satellite facility to another licensed horse racetrack or satellite facility, regardless of state of licensure, whether such races originate within the Commonwealth or any other jurisdiction, by satellite communication devices, television cables, telephone lines, or any other means for the purposes of conducting pari-mutuel wagering.

The definition of "simulcast horse racing" clearly permits the receipt by a "licensed horse racetrack or satellite facility" of the audio and/or video transmission of horse races.

The power to control and regulate horse racing with pari-mutuel wagering in Virginia is vested in the Virginia Racing Commission. The Commission has "all powers and duties necessary to carry out the provisions of [Chapter 29] and to exercise the control of horse racing as set forth in § 59.1-364." If 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.

Section 59.1-369(4) provides the only limitation placed on the Commission relating to licensure:
The Commission shall promulgate regulations and conditions under which simulcast horse racing shall be conducted at a licensed horse racetrack or satellite facility in the Commonwealth and all such other regulations it deems necessary and appropriate to effect the purposes of [Chapter 29]. Such regulations shall include provisions that all simulcast horse racing must comply with the Interstate Horse Racing Act of 1978 (15 U.S.C. § 3001 et seq.) and shall require the holder of an unlimited license to schedule not less than 150 live racing days in the Commonwealth each calendar year; however, the Commission shall have the authority to alter the required number of live racing days during the first five years of operation based on what the Commission deems to be in the best interest of the Virginia horse industry. Such regulations shall authorize up to six satellite facilities and restrict majority ownership of satellite facilities to an entity licensed by the Commission which owns a horse racetrack in the Commonwealth. Nothing in this subdivision shall be deemed to preclude private local ownership or participation in any satellite facility. Wagering on simulcast horse racing shall take place only at a licensed horse racetrack or satellite facility. [Emphasis added.]

"[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction." Statutes should not be construed to frustrate their purpose. In addition, the use of the word "shall" in a statute generally implies that its terms are intended to be mandatory, rather than permissive or directive. Finally, when a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute.

The plain language of § 59.1-369(4) requires the Commission to adopt regulations authorizing a licensee to own or operate “up to six satellite facilities.” The plain language does not require that a racetrack be in existence and operating in order for a satellite facility to offer simulcast horse racing. Consequently, I am required to conclude that should the Virginia Racing Commission issue a license to operate a racetrack and a satellite facility, the clear definition of the term “simulcast horse racing” would permit the licensee to operate a daily satellite facility.
A fundamental principle of statutory construction is that the clear and unambiguous words of a statute must be accorded their plain meaning.¹⁴ "In determining legislative intent from the statutory language, words should be given their ordinary meaning."¹⁵ Indeed, words in a statute are to be given their common meaning unless a contrary legislative intent is manifest.¹⁶ The Commission, therefore, has clearly been given the sole authority to promulgate regulations and conditions for the operation of a racetrack and a satellite facility in the Commonwealth.¹⁷

For many years, in rendering official opinions pursuant to § 2.1-118, the Attorney General has declined to render such opinions when the request (1) does not involve a question of law, (2) requires the interpretation of a matter reserved to another entity, (3) involves a matter currently in litigation, or (4) involves a matter of purely local concern or procedure.¹⁸ The Commission is the agency in the Commonwealth authorized to determine whether construction of a racetrack must be completed before a satellite facility may be operated.

Because § 59.1-365 provides no definition of the term "off-track betting parlor," I have referred to such facility in this opinion according to the definition provided for "satellite facility."¹⁹ Under the definition of the term "simulcast horse racing," I note that the audio and/or visual transmission of horse races may be received at either "another licensed horse racetrack or satellite facility."²⁰ I also note that the General Assembly does not require that a licensed horse racetrack be operating before a satellite facility may be opened.

¹You report that the results of the votes on the question of pari-mutuel wagering were 32,333 to 22,254.

²"Satellite facility" means all areas of the property at which simulcast horse racing is received for the purposes of pari-mutuel wagering, and any additional areas designated by the Virginia Racing Commission. Section 59.1-365.

³Section 59.1-365.

⁴Id. (emphasis added).

⁵See § 59.1-364(A).

⁶Section 59.1-369.


You inquire regarding applications submitted by Colonial Downs Holdings, Inc. ("Colonial Downs") and the Virginia Turf Club, Inc. ("Turf Club") to the Virginia Racing Commission ("Commission") for licenses to operate racetracks and simulcast racing facilities in the Town of Dumfries and in western Prince William County.

You relate that the Turf Club proposes establishment of a 2,000-seat grandstand and a 90,000-square-foot clubhouse in western Prince William County to conduct three days of live racing per week and seven days of simulcast racing. Parking for 1,393 automobiles will be available. Colonial Downs proposes a racetrack in Dumfries to conduct live racing 20 days a year and simulcast off-track betting 365 days a year.
You advise that, in 1994, the voters in Prince William County approved a referendum to permit pari-mutuel wagering in the county at a licensed racetrack in accordance with Chapter 29 of Title 59.1, §§ 59.1-364 through 59.1-405 of the Code of Virginia (“Chapter 29”). Finally, you advise that the Commission views voter approval for pari-mutuel wagering at a licensed racetrack also as voter approval of satellite wagering from other tracks.

You first ask whether voter approval of a racetrack referendum constitutes voter approval of off-track betting facilities.

The Commission has authority to grant an initial license “to construct, establish, operate or own a racetrack or satellite facility” only after voter approval of a referendum held in the county or city in which such track or satellite facility is to be located.\(^2\) Section 59.1-391 sets out the statutory requirements for the filing of a petition requesting a local referendum to be held to decide the question of pari-mutuel wagering in accordance with Chapter 29. The petition must be signed by five percent of the qualified voters and filed with the circuit court of the county or city where the racetrack is to be located.\(^3\) Voter approval, therefore, is required for operation of both a licensed racetrack and satellite facilities.

Because § 59.1-365 provides no definition of the term “off-track betting facility,” I have referred to such facility in this opinion according to the definition provided for “satellite facility.”\(^4\) Under the definition of the term “simulcast horse racing,” I note that the audio and/or visual transmission of horse races may be received at either “another licensed horse racetrack or satellite facility.”\(^5\)

It is my opinion that the language of § 59.1-391 is clear and unambiguous. A referendum on the question whether pari-mutuel wagering should be permitted at a licensed racetrack and/or satellite facilities must be presented to the qualified voters of a county or city. Clearly, voter approval of pari-mutuel wagering on live horse racing at a licensed racetrack constitutes voter approval of pari-mutuel wagering on simulcast horse racing at that licensed racetrack. I am, however, of the opinion that voter approval of pari-mutuel wagering at a licensed racetrack does not constitute voter approval of pari-mutuel wagering at satellite facilities.

You next ask whether § 59.1-369 precludes the Turf Club from being licensed to operate a daily broadcast\(^6\) wagering facility in western Prince William County. You believe that the Commission has issued a license solely to Colonial Downs to operate a track and satellite facility. No information regarding the issuance of such a license by the Commission to any facility has been provided.
Therefore, for the purposes of this opinion, I shall assume that the Commission has awarded Colonial Downs a license to operate a racetrack and a simulcast facility.

The statutory provisions governing horse racing and pari-mutuel wagering in the Commonwealth are contained in Chapter 29. Section 59.1-365 defines terms that are used in Chapter 29. The term "simulcast horse racing" is defined as

[t]he simultaneous transmission of the audio or video portion, or both, of horse races from a licensed horse racetrack or satellite facility\(^7\) to another licensed horse racetrack or satellite facility, regardless of state of licensure, whether such races originate within the Commonwealth or any other jurisdiction, by satellite communication devices, television cables, telephone lines, or any other means for the purposes of conducting pari-mutuel wagering.\(^8\)

Section 59.1-369 sets forth the powers and duties of the Commission. The Commission has "all powers and duties necessary to carry out the provisions of [Chapter 29] and to exercise the control of horse racing as set forth in § 59.1-364."\(^9\) "If the language of a statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it."\(^10\) It is unnecessary to resort to any rules of statutory construction when the language of a statute is unambiguous.\(^11\) In those situations, the statute's plain meaning and intent govern.

The powers and duties of the Commission clearly are not limited to those set out in § 59.1-369. In addition, the definition of "simulcast horse racing" clearly permits the receipt by a "licensed horse racetrack or satellite facility" of the audio and/or video transmission of horse races.\(^12\)

No provision in Chapter 29 prevents the Commission from issuing more than one license for the ownership and operation of a racetrack in the Commonwealth. Section 59.1-369(4) provides the only limitation placed on the Commission relating to licensure:

The Commission shall promulgate regulations and conditions under which simulcast horse racing shall be conducted at a licensed horse racetrack or satellite facility in the Commonwealth and all such other regulations it deems necessary and appropriate to effect the purposes of [Chapter 29]. Such regulations shall include provisions that all simulcast horse racing
must comply with the Interstate Horse Racing Act of 1978 (15 U.S.C. § 3001 et seq.) and shall require the holder of an unlimited license to schedule not less than 150 live racing days in the Commonwealth each calendar year; however, the Commission shall have the authority to alter the required number of live racing days during the first five years of operation based on what the Commission deems to be in the best interest of the Virginia horse industry. Such regulations shall authorize up to six satellite facilities and restrict majority ownership of satellite facilities to an entity licensed by the Commission which owns a horse racetrack in the Commonwealth. Nothing in this subdivision shall be deemed to preclude private local ownership or participation in any satellite facility. Wagering on simulcast horse racing shall take place only at a licensed horse racetrack or satellite facility. [Emphasis added.]

"[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction."\textsuperscript{13} Statutes should not be construed to frustrate their purpose.\textsuperscript{14} In addition, the use of the word "shall" in a statute generally implies that its terms are intended to be mandatory, rather than permissive or directive.\textsuperscript{15} Finally, when a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute.\textsuperscript{16}

I can find no provision in Chapter 29 that limits the Commission to issuing only one license for the ownership and operation of a racetrack in the Commonwealth. In addition, the plain language of § 59.1-369(4) requires the Commission to adopt regulations authorizing a licensee\textsuperscript{17} to own or operate "up to six satellite facilities." Consequently, I must conclude that should the Commission not issue a license to the Turf Club for the operation of a racetrack in western Prince William County, the Turf Club would be precluded from operating a daily satellite facility at the racetrack. In the event the Commission does issue such a license to the Turf Club, however, the clear definition of the term "simulcast horse racing" would permit the Turf Club to operate a daily simulcast facility at the racetrack.

Your final inquiry is whether Colonial Downs may be allowed to schedule a 20-day racing program in view of the 150-day racing requirement contained in § 59.1-369.

Section 59.1-369(4) provides that regulations promulgated by the Commission
shall require the holder of an unlimited license to schedule not less than 150 live racing days in the Commonwealth each calendar year; however, the Commission shall have the authority to alter the required number of live racing days during the first five years of operation based on what the Commission deems to be in the best interest of the Virginia horse industry.

A fundamental principle of statutory construction is that the clear and unambiguous words of a statute must be accorded their plain meaning.18 "In determining legislative intent from the statutory language, words should be given their ordinary meaning."19 Indeed, words in a statute are to be given their common meaning unless a contrary legislative intent is manifest.20 The Commission, therefore, has clearly been given the sole authority to allow a 20-day live racing program during the first five years of operation of a racetrack, provided the licensee has been issued an unlimited license by the Commission.

For many years, in rendering official opinions pursuant to § 2.1-118, the Attorney General has declined to render such opinions when the request (1) does not involve a question of law, (2) requires the interpretation of a matter reserved to another entity, (3) involves a matter currently in litigation, or (4) involves a matter of purely local concern or procedure.21 The Commission is the agency in the Commonwealth authorized to determine whether a 20-day racing program at Dumfries is allowable under the 150-day racing requirement of § 59.1-369(4). Consequently, I must respectfully decline to render an opinion whether a 20-day racing program by Colonial Downs is permitted under the 150-day racing requirement contained in § 59.1-369. I am of the opinion that the Commission is the appropriate agency to determine whether Colonial Downs may schedule a 20-day racing program in accordance with the requirements of § 59.1-369(4).22

1You report that the results were 32,333 votes for the question and 22,254 votes against the question.
2Section 59.1-391.
3Section 59.1-391(1).
4See infra note 7.
5Section 59.1-365.
6I assume by your use of the term “broadcast” that you mean “simulcast,” which is the term used in Chapter 29.
7"Satellite facility" means all areas of the property at which simulcast horse racing is received for the purposes of pari-mutuel wagering, and any additional areas designated by the Commission."
Section 59.1-365.

"Section 59.1-369.


"Section 59.1-365 (emphasis added).


17 "Licensee" includes any person holding an owner’s, operator’s or limited license under §§ 59.1-375 through 59.1-386 of [Chapter 29.] The licensee under a limited license shall not be deemed an owner for the purposes of owning or operating a satellite facility.” Section 59.1-365.


22 It is an elementary rule of statutory interpretation that the “construction given to a statute by public officials charged with its enforcement is entitled to great weight … and in doubtful cases will be regarded as decisive.” Bed Company v. Corporation Commission, 205 Va. 272, 275, 136 S.E.2d 900, 902 (1964) (citing Commonwealth v. Appal. El. Power Co., 193 Va. 37, 45, 68 S.E.2d 122, 127 (1951)).

TRADE AND COMMERCE: TRANSACTING BUSINESS UNDER ASSUMED NAME.

CORPORATIONS: VIRGINIA STOCK CORPORATION ACT — VIRGINIA NONSTOCK CORPORATION ACT.

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

Foreign business trusts are recognized in Commonwealth; may file fictitious name certificate in Virginia. No requirement that foreign business trust obtain certificate of authority or certificate of registration from State Corporation Commission before filing fictitious name certificate. Statutory agent for foreign business trust filing such certificate with circuit court clerk is resident practicing attorney appointed to receive legal process and enter appearance in Virginia courts.

THE HONORABLE JOHN T. FREY
CLERK, CIRCUIT COURT OF FAIRFAX COUNTY
JUNE 12, 2000
You ask several questions regarding a foreign business trust that desires to file a fictitious name certificate in your office. You first ask whether the Commonwealth recognizes foreign business trusts. If so, you next ask whether a foreign business trust may file a fictitious name certificate in the clerk's office of the courts of record in this Commonwealth. If so, you then ask whether a foreign business trust must obtain a certificate of registration or a certificate of authority from the State Corporation Commission before filing the fictitious name certificate. Finally, you request the identification of the statutory agent for foreign business trusts in the Commonwealth.

You report that you have received a fictitious name certificate titled "Assumed Name Certificate from the Provident Auto Leasing Company" for filing in your office. Provident Auto Leasing Company is a Delaware business trust. You advise that the fictitious name certificate contains no date for either a certificate of registration or a certificate of authority to transact business in the Commonwealth, nor is either certificate attached. You interpret § 59.1-69 of the Code of Virginia to require a copy of the certificate of registration or authority to transact business. You also advise that the fictitious name certificate does not contain the name and address of the registered agent. You interpret § 59.1-74 to imply that the certificate contain the name and address of the registered agent because the clerk must index the name of the statutory agent.

You report that you have declined to record the certificate. Provident Auto Leasing contends that it is exempt from the above requirements because it is not a corporation, limited liability company, partnership or limited partnership. Provident Auto Leasing further contends that no Virginia statute requires that a registered agent be appointed in order to register a foreign business trust with the State Corporation Commission. Finally, Provident Auto Leasing advises that it does not, nor will it in the future, have a place of business in Fairfax County.

Section 1-13.19 defines the word "person," as it is applied generally in the construction of the Virginia Code and all statutes, to include "any individual, corporation, partnership, association, company, business, trust, joint venture or other legal entity." (Emphasis added.) The use of the word "shall" in a statute generally implies that its terms are intended to be mandatory, rather than permissive or directive. In addition, stock corporations and nonstock corporations are two distinct entities in Virginia, organized for different purposes and subject to different statutes. A Virginia stock corporation is organized pursuant to the Virginia Stock Corporation Act, §§ 13.1-601 through
13.1-800. A Virginia nonstock corporation is organized pursuant to the Virginia Nonstock Corporation Act, §§ 13.1-801 through 13.1-980. Each act defines the terms used therein. Both acts define the term "entity" to include "business trust." I, therefore, conclude that the Commonwealth does, in fact, recognize foreign business trusts.

You next ask whether a foreign business trust may file a fictitious name certificate in the Commonwealth.

Chapter 5 of Title 59.1, §§ 59.1-69 through 59.1-76, contains the statutory requirements for transacting business in the Commonwealth under an assumed name. "The object of [Chapter 5] is to protect the public by giving information as to the person with which it deals and to afford it protection against possible fraud and deceit." Section 59.1-69(A) prohibits any "person" from conducting or transacting business in the Commonwealth "under any assumed or fictitious name unless such person" files a fictitious name certificate. A rule of statutory construction provides that where the language of a statute is clear and unambiguous, effect must be given to its plain and ordinary meaning. Consequently, I am of the opinion that a foreign business trust, as a "person" within the meaning of § 59.1-69(A), may file a fictitious name certificate in the Commonwealth.

You next ask whether a foreign business trust must obtain a certificate of registration or a certificate of authority from the State Corporation Commission before filing the fictitious name certificate.

In determining whether a foreign entity is "doing business" in Virginia for regulatory purposes, courts within the Commonwealth generally require a "stronger showing of in-State activities." For these purposes under Virginia law, the term "doing business" does not mean "a performance of a single disconnected business act"; it means a "progression, continuity, or sustained activity." Sections 13.1-757(A) and 13.1-919(A) require that a foreign corporation obtain a "certificate of authority from the [State Corporation] Commission" before it may "transact business in this Commonwealth." Certificates of authority must also be obtained by foreign professional corporations, foreign limited liability companies, and foreign professional limited liability companies. Certificates of registration must be obtained from the State Corporation Commission by professional corporations, Virginia limited liability companies, and foreign professional limited liability companies.
The statutory definition of the terms “foreign corporation” and “foreign limited liability company” in §§ 13.1-603 and 13.1-803 do not include business trusts and foreign business trusts. Because a foreign business trust is not included within such definitions of business entities required to obtain either a certificate of authority or certificate of registration, I conclude that a foreign business trust is not required to obtain a certificate of authority before filing a fictitious name certificate.

Finally, you request the identification of the statutory agent for foreign business trusts filing fictitious name certificates in the Commonwealth. Section 59.1-74 requires the clerk of the court with whom the fictitious name certificate is filed to “keep a register in which shall be entered in alphabetical order the name under which every such business is conducted, the name of the statutory agent, and the names of every person owning the same.” You advise that Provident Auto Leasing Company is not a corporation, limited liability company, partnership or limited partnership. Consequently, there is no Virginia statute pertaining to the registration of a foreign business trust with the State Corporation Commission which requires the appointment of a registered agent. In addition, you indicate that § 59.1-69 contains no special requirements with respect to foreign business trusts. Further, the statute contains no requirement to list a registered agent before a fictitious name certificate may be filed.

The General Assembly has not defined the term “statutory agent” as it appears in § 59.1-74. The traditional function of a statutory agent, however, is to accept service of legal process on behalf of nonresidents of the Commonwealth.

When a foreign [business] engages in the privilege of doing business in Virginia, it enjoys the benefits and protection of the laws of this Commonwealth. It thereby subjects itself to the jurisdiction of the courts of this State for the purpose of litigating liabilities created during its stay here.

In the context of Chapter 5 of Title 59.1, § 59.1-71 addresses the function of accepting service of legal process. “Persons” who must file a fictitious name certificate are required to appoint a “practicing attorney-at-law residing in the Commonwealth as its attorney or agent” to receive legal process and enter an appearance in the courts of the Commonwealth. Such appointment must be evidenced by a “written power of attorney,” and a copy of the “power of attorney, together with an acknowledgment of acceptance” by the attorney,
are required to be “recorded in the clerk's office in which deeds are recorded, of the county or city wherein the place of business is located.”

A rule of statutory construction requires that “every part of a statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary.” I have concluded that a foreign business trust is a “person” as that term is used in Chapter 5 of Title 59.1. Section 59.1-74 requires the clerk with whom the fictitious name certificate is recorded to keep a register in which the name of the statutory agent is entered. It is my opinion that the statutory agent for a foreign business trust filing a fictitious name certificate in the clerk's office where deeds are recorded is the practicing attorney identified for the purposes set forth in § 59.1-71.

1See supra note 1.
5See supra note 1.
9Section 13.1-544.2.
10Section 13.1-1057(C).
11Section 13.1-1105.
12Section 13.1-549.2.
13Section 13.1-1053.
14Section 13.1-1105(B).
16I note that certificates of registration are issued by the State Corporation Commission only to Virginia professional corporations and foreign limited liability companies. See §§ 13.1-549.2, 13.1-1053. I note that certificates of registration are issued by the State Corporation Commission
only to Virginia professional corporations and foreign limited liability companies. See §§ 13.1-549.2, 13.1-1053.

17 See § 8.01-306 (service of process against unincorporated association, order, or common carriers); § 8.01-308 (service of process against nonresident motor vehicle operator); § 8.01-309 (service of process against nonresident operator or owner of aircraft); § 8.01-312 (effect of service of process on statutory agent and duties of such agent); § 8.01-313 (specific address for mailing of process by statutory agent); § 8.01-326.1 (service of process or notice on statutory agent and mailing of same by statutory agent to defendant with certificate of compliance filed with court).


19 Section 59.1-71.

20 Id.

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