Opinions

of the

Attorney General

and

Report

to the

Governor of Virginia

2005

Commonwealth of Virginia
Office of the Attorney General
at Richmond

THE 2005

REPORT OF THE ATTORNEY GENERAL

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CONTENTS

PAGE

LETTER OF TRANSMITTAL v

PERSONNEL OF THE OFFICE xxix

ATTORNEYS GENERAL OF VIRGINIA xxxviii

CASES xli

DECIDED IN THE SUPREME COURT OF VIRGINIA xliii

PENDING IN THE SUPREME COURT OF VIRGINIA xlix

PENDING AND DECIDED IN THE SUPREME COURT OF THE UNITED STATES lii

OPINIONS 1

NAME INDEX 169

STATUTORY AND CONSTITUTIONAL PROVISIONS AND RULES OF COURT 173

ACTS OF ASSEMBLY 175

CODE OF VIRGINIA 176

CONSTITUTION OF VIRGINIA 186

VIRGINIA RULES ANNOTATED 187

SUBJECT INDEX 189

Letter of Transmittal

May 1, 2006

The Honorable Timothy M. Kaine
Governor of Virginia

Dear Governor Kaine:

I have the honor to present to you the *Report of the Attorney General* for calendar year 2005. This report reflects the 2005 tenures of Attorneys General Jerry W. Kilgore and Judith Williams Jagdmann. This Office, through its dedicated public servants, represented the Commonwealth in thousands of legal disputes in state and federal courts, including habeas corpus actions, criminal appeals, and civil suits involving many facets of state government.

During the period covered by this report, the Office of the Attorney General issued forty-seven official opinions. The issues addressed in the opinions contained in this report represent a variety of legal issues encountered throughout the Commonwealth and its local governments. These issues include the application of the Dillon Rule to local government powers, the Virginia Public Procurement Act, The Virginia Freedom of Information Act, and free speech rights in public schools.

Many constitutional officers and local government attorneys sought legal advice on numerous issues facing their local governments. These opinions represent an interpretation of state and federal law and the efforts of this Office to ensure that all citizens are treated fairly and in accordance with the rule of law.

The work of the lawyers and staff of the Office of the Attorney General is such that the citizens of this Commonwealth may be proud of the accomplishments of its public servants. It is with pleasure that I present some of the accomplishments of this Office during the past year.

2005 LEGISLATIVE ACCOMPLISHMENTS

During the 2005 Session of the General Assembly, the Office of the Attorney General worked to make Virginia a better place to live and work. In particular, the General Assembly overwhelmingly adopted the comprehensive legislative package presented by former Attorney General Jerry Kilgore. This legislative package included measures to continue to fight gang violence, to provide relief to small businesses from overburdening regulations, to protect consumers from a new fraud known as “phishing,” to address the growing epidemic of methamphetamine, and to address weaknesses in Virginia’s death penalty statute.

The General Assembly overwhelming passed a comprehensive anti-gang package recommended by the Attorney General's Task Force on Gang Violence, which establishes Gang Free School Zones and provides for enhanced penalties when gang-related activities occur on school grounds. The legislation also treats gangs as a public nuisance that can be enjoined and abated. A number of crimes, defined as predicate criminal acts as related to gang activity, now include assault by mob, reckless handling of a firearm, shooting from a vehicle, and possession of a firearm on school property. Finally, the legislation includes defense attorneys among those who may not disclose the residential address, telephone number, and place of employment of a victim or witness upon the request of the victim or witness.

Legislation recommended by the Attorney General's Task Force on Regulatory Reform and Economic Development also was enacted to address overreaching regulations. The bill creates the Small Business Regulatory Flexibility Act, which mandates that any proposed regulations must include a description of the effect of the regulation on small businesses and directs state agencies to consider less burdensome requirements on small businesses before enacting any new regulations. Also, the Act requires agencies to review their regulations periodically to determine whether they should be continued, amended, or repealed. The periodic review minimizes the economic effect on small businesses, and it gives small businesses the right to judicial review of agency compliance with these requirements.

Additional economic development legislation addresses the needs of economically distressed areas of the Commonwealth by requiring state agencies to implement economic development strategic plans for such distressed areas. The strategic plan implemented by the Virginia Economic Development Partnership Authority and other state agencies must, at a minimum, address education opportunities; comprehensive workforce development programs; infrastructure, including capital for water and sewer upgrading, primary and secondary roads, and telecommunications; recreational and cultural enhancement and related quality of life measures; agribusiness incentives to promote the use of new technologies to access new market opportunities; and a revolving loan fund or loan guarantee program to help start or expand entrepreneurial activities, especially small business activities in rural communities.

To curb the manufacture of the illegal narcotic methamphetamine, the General Assembly approved legislation prepared by the Office of the Attorney General that strengthens laws against the production of methamphetamine by increasing the minimum penalty, from 5 to 10 years, for manufacturing methamphetamine and imposing enhanced punishment for a second offense. Additionally, the legislation criminalizes those who manufacture or attempt to manufacture methamphetamine in the presence of a child. It creates a best practices protocol to be used by law

enforcement and emergency response agencies when cleaning up "meth" production. It further creates a protocol for the retention and handling of by-products of such production. Finally, the legislation prohibits the possession of two or more precursor ingredients with the intent to manufacture methamphetamine.

To address certain loopholes in Virginia's death penalty statute, the Office proposed a number of changes, including authority for the Commonwealth to appeal the dismissal of a warrant or any applicable charge or count on speedy trial or double jeopardy grounds. The legislation clarifies defense objections requirements.

In an effort to protect consumers from the dangers of "phishing" or "spoofing," a fraud scheme that uses e-mails to trick recipients into providing financial information to online thieves, the Office introduced legislation that makes it a Class 6 felony to fraudulently obtain, record, or access from a computer such identifying information as: (i) social security number; (ii) bank account numbers; (iii) credit or debit card numbers; or (iv) any other personal information. The legislation further enhances the crime to a Class 5 felony for those who sell or distribute such information or use it to commit another crime.

CIVIL DIVISION

The Civil Litigation Division represents the interests of the Commonwealth and its agencies, institutions, and officials in civil law suits. These civil actions include tort, construction, employment, workers' compensation, and civil rights claims, as well as constitutional challenges to statutes passed by the General Assembly. In addition, the Division pursues civil enforcement actions pursuant to Virginia's consumer protection and antitrust laws, represents the interests of the citizens of the Commonwealth with regard to the conduct of charities, and serves as Consumer Counsel in regulated utilities related matters, including cases pending before the State Corporation Commission. Finally, the Division represents the Commonwealth's interests in real estate transactions, from utility and open space easements to major purchases and sales, and provides legal advice to the agencies and institutions of state government on risk management, employment, insurance, utilities, and real estate issues.

Trial Section

The Trial Section defends lawsuits involving a variety of legal issues, including civil rights, contracts, torts, denial of due process, defamation, employment law, election law, Freedom of Information Act challenges, contested workers' compensation claims, and constitutional challenges to state statutes. It also provides advice to state agencies and institutions threatened with litigation or concerned with limiting the risk of future litigation.

During 2005, the Section handled 547 new matters in addition to continued cases. The Section provides legal advice to, and defends suits brought against, state courts and judges, the Virginia State Bar, the Board of Bar Examiners, State Board of Elections, Department of Human Resource Management, Human Rights Counsel, Advisory Council for the Commonwealth of Virginia Campaign, and the Office of Commonwealth Preparedness. Attorneys in the Trial Section were presenters at the annual Virginia Bar Association employment law conference and provided training on employment law and Fair Labor Standards Act issues to the Virginia State Police and the Supreme Court of Virginia. Extensive assistance was provided to the State Board of Elections concerning compliance with the Help America Vote Act, the Department of Motor Vehicles' compliance with the National Voter Registration Act (Motor Voter Act), and the general election recounts for numerous local, General Assembly, and statewide races.

The Trial Section successfully defended a challenge to the constitutionality of § 24.2-530, which allows any registered voter to vote in the primary election of any one party, regardless of political affiliation. The Section successfully defended two civil actions filed by convicted violent sex offenders challenging Virginia's sex offender registry. Two suits, one challenging a judge's decision to ban cameras from his courtroom during a murder trial and the other challenging a judge's direction that the media not publish the names of two juveniles charged with illegally manufacturing explosives, were among the many cases won on behalf of public officials in 2005.

Finally, the Trial Section consulted closely with the Governor and members of Virginia's Congressional delegation concerning available recourse from decisions of the federal Base Relocation and Closure Commission affecting Virginia bases.

Real Estate, Land Use and Construction Section

The Real Estate, Land Use and Construction Section handles transactional matters, construction claims, and construction litigation for state agencies and institutions. In 2005, the Section provided legal support to 280 new real estate transactions with a total value of more than $335 million. The Section handled 41 new construction claims and construction litigation cases with a total value of more than $27 million. This figure is a 33% increase in the volume of new claims and litigation. A total of 194 matters were closed during 2005. Of these, more than half were opened in previous years, leaving an active caseload for 2006 of more than 200 cases. Twenty-seven active construction claims against the Commonwealth were resolved during 2005. These claims for $7,332,500 were resolved for $1,811,650 or 25% of the claimed amount.

The Real Estate, Land Use and Construction Section worked with the Department of Transportation (VDOT) and Fairfax County to finalize two agreements necessary to facilitate the development of VDOT's Camp 30 property, together

with adjacent property owned by Fairfax County, for a Public Safety Operations Center and a new VDOT Northern Virginia District Office. It also assisted the Frontier Culture Museum with leases to enable the commercial development of a large tract of its property that fronts on a major highway in Staunton for the benefit of the Museum. When the United States conveyed twenty acres of its property at Hunter Holmes McGuire VA Medical Center to the Virginia Department of Veterans Services (DVS), for development of a veterans' care center, the Section negotiated the various easements necessary for the project. In August, Senators Warner and Allen announced that the U.S. Department of Veterans Affairs awarded a $14,749,800 grant for construction of Virginia's Sitter-Barfoot Veterans Care Center and the groundbreaking was held on November 1, 2005.

The Section worked with Dominion Resources to complete the Department of Conservation and Recreation's acquisition of 1100 acres of undeveloped land along the Potomac River in Stafford County, known as the Widewater properties, for use as a state park. The transfer concluded four years of negotiations concerning legal and land use issues regarding the proposed development. The Commonwealth also reacquired property formerly leased to a private property manager in Richmond's Old City Hall building, a National Historic Landmark. The acquisition required detailed agreements that included provisions for protecting historic preservation interests accommodated by the former lessee. The Section also assisted James Madison University with the acquisition of the Kyger Funeral Home and Rockingham Memorial Hospital Complex in Harrisonburg. Both properties are adjacent to JMU's main campus and are critical to its expansion.

Antitrust and Consumer Litigation Section

The Antitrust and Consumer Litigation Section obtained several significant results in the antitrust, consumer protection and charitable oversight areas. Among these was the recovery of $550,000 on behalf of 1800 Virginians who overpaid for the drug Cardizem® CD and its generic equivalents between 1998 and 2004. This distribution resulted from a 2003 settlement of a multi-state antitrust case against two pharmaceutical companies, Aventis and Andrx, alleging that a pharmaceutical company acquired by Aventis paid Andrx not to market a generic version of Cardizem® CD. The resulting delay in the availability of the generic meant that consumers could purchase only the higher priced brand name version of the drug. Similarly, Virginia and forty-six other states settled antitrust allegations against GlaxoSmithKline concerning its arthritis drug Relafen®. Virginia recovered $201,000 on behalf of several state agencies overcharged as the result of GlaxoSmithKline's anticompetitive activity.

In the area of charitable organization oversight, the Antitrust and Consumer Section reviewed seven proposed transfers of hospital assets from not-for-profit entities to for-profit entities. The review ensured that benefits enjoyed by the not-for-profits by virtue of their charitable purposes were preserved to benefit the citizens of their service areas. As a result of successful litigation, the Northern Virginia Health Foundation, Inc., a nonprofit charitable health foundation, was created to receive more than $40 million in recovered charitable assets. The Foundation will promote and support improved health for the people formerly served by Jefferson Memorial Hospital in Northern Virginia, including the provision of primary health care services to uninsured, low-income Virginians.

On the consumer protection front, the Section initiated Virginia's first prosecution under the Virginia Post-Disaster Anti-Price Gouging Act in response to increased prices for gasoline after Hurricane Katrina. Also, the first enforcement action brought under Virginia's "Do Not Call" law was concluded in 2005. The Section joined forty-eight other states in reaching a settlement with State Farm Mutual Automobile Insurance Company relating to State Farm's inability to determine whether a "branded" title was obtained for certain vehicles previously declared a total loss. More than $500,000 was recovered for Virginia consumers harmed by State Farm's conduct. Virginia also joined with other states in agreements with tobacco retailers to implement voluntary policies and practices to reduce the availability of tobacco to minors. The Section also protected Virginia consumers from the misrepresentations of a New Jersey provider of long distance floral services which indicated by false telephone directory listings that it was a local Virginia florist. The company settled the threatened enforcement of the Virginia Consumer Protection Act by paying $10,000, which will support future consumer protection efforts, and agreed to revise its directory listings to avoid such misrepresentation. The Section also participated in the multi-state settlement of complaints against Blockbuster, Inc., for its misleading "No More Late Fees" promotions and an agreement with Western Union Financial Services, Inc., to educate consumers and discourage fraud-induced transfers using Western Union's wire services. Under the agreement, Western Union agreed to publish prominent warnings of scams on their "send" forms, pay $8.1 million in peer-counseling programs overseen by the AARP Foundation, reimburse transfer fees for consumers who report fraud prior to pick-up, and take measures to train employees about fraud issues.

Insurance and Utilities Regulatory Section

The Office's Insurance and Utilities Regulatory Section serves as Consumer Counsel to represent the interests of Virginia's citizens as consumers of services and products of regulated utilities such as gas and electric companies. This includes

active participation in proceedings before the State Corporation Commission (SCC) and federal regulatory agencies, such as the Federal Energy Regulatory Commission (FERC), as well as involvement in the legislative process.

In 2005, the Office became a voting member of PJM Interconnection, LLC, a regional transmission organization (RTO) that oversees the electric transmission facilities of Virginia's major electric utilities and coordinates the dispatch of power from Virginia and other power plants in the region. The Office participated in a variety of PJM stakeholder proceedings and voted on significant matters brought before the PJM members committee. Of particular significance, Virginia opposed a regional capacity market proposal that may expose Virginia consumers to billions of dollars in new costs annually. We continue to participate in the work of exploring alternatives to this proposal as the matter moves from the PJM stakeholder process to formal proceedings before FERC.

The Section participated in Dominion Virginia Power's application to FERC to join PJM. In that context, and because of ongoing uncertainty permitted by the decision and its likely impact on future retail rates in Virginia, the Section is challenging FERC's decision not to rule on the propriety of certain accounting treatment of $280 million in RTO costs that were at issue. The Section represented the interests of customers of Delmarva Power & Light in the negotiation of a stipulation for submission in a FERC proceeding to ensure independent oversight of competitive wholesale power bidding by the utility's generation affiliate. In the related retail rate proceeding before the State Corporation Commission, the Section successfully argued for the disallowance of certain costs that resulted in savings to customers.

The Insurance and Utilities Regulatory Section assisted the Office's Environmental Unit in representing the Department of Environmental Quality before FERC and the U.S. Department of Energy in a case of first impression. The case involved the environmental protection duties of the Commonwealth on behalf of citizens of Alexandria regarding a power plant there which serves consumers in the District of Columbia. The Section continued its participation in matters concerning restructuring of the electric utility industry, including an annual presentation to the General Assembly's Commission on Electric Utility Restructuring on the status of Virginia's electric utilities' stranded cost recoveries and exposure. The Office continued representing consumers' interests in various rulemakings and other proceedings that the SCC conducted pursuant to the Restructuring Act. Previous successful efforts in support of legislation freezing Dominion Virginia Power's "fuel factor" resulted in savings during 2005 to Virginia consumers of approximately $660 million in a time of rapidly escalating energy prices.

The Section was active in several telecommunications matters before the SCC. In Verizon's application for approval to merge with MCI, the Section supported the SCC's authority to impose conditions on the merger to ensure adequate service

to the public and reasonable rates following the merger. Other telecommunications cases in which the Office intervened on behalf of consumers included Commission rulemakings on service quality standards and rules governing when a customer's service may be disconnected. The service quality case included the promulgation of a Telecommunications Bill of Rights.

In insurance matters, the Section was again active in the National Council on Compensation Insurance annual workers' compensation rate case at the SCC where the rates for coal mine classes have received particular attention. Our efforts to recognize favorable claims experience of former self-insured mines led to a compromise among the parties, which resulted in a seven percent decrease in the lost cost multiplier component of rates in the voluntary market for the surface and underground coal classes and a twenty percent decrease in the assigned risk market for those classes.

HEALTH, EDUCATION AND SOCIAL SERVICES DIVISION

The attorneys in the Division of Health, Education and Social Services provide advice to public colleges and universities of Virginia and to the agencies charged with protecting the health of all Virginians and providing essential services for those least able to help themselves. The Division also protects the rights of taxpayers by ensuring the proper use of state and federal funds in health and social services programs, provides advice to members of the General Assembly on issues of health, education, social services, child support, and mental health, and represents the children of Virginia by vigorously enforcing child support payments.

Education Section

The Education section provides guidance that contributes to quality education for students from kindergarten through college. For K-12, this guidance often directly impacts local schools as they implement the Standards of Learning and Standards of Quality, provide access to technology for disadvantaged students, maintain discipline and safety on school grounds, comply with federal education programs, and improve school facilities. Virginia's fourteen colleges and universities and twenty-three community colleges are self-contained communities with the full range of legal needs: campus safety and security; admission and educational quality issues; personnel issues; contracts; procurement; financing; and the proper relationships between these institutions and the Commonwealth.

Education attorneys provided direction in implementing the Virginia Higher Education Restructuring Act, which involved identifying potential legal problems in volumes of text contained in management agreements between the Commonwealth and three individual colleges and universities (University of Virginia, Virginia Tech, and William and Mary). The Section analyzed complex institutional policies to

achieve compliance with a myriad of state statutes. The governing boards for the three participating schools view this initiative for enhanced authority as essential to sustain excellence and national ranking. The resulting autonomy, however, creates uncertainty regarding the continued application of the federal immunity doctrine, which historically has been limited to state agencies and universities directly controlled by a state.

In a related issue, the Section has a heightened role in advising state colleges and universities to increase oversight of affiliated private foundations that support our universities. This relationship produces a host of legal issues regarding gift, estate, and tax matters. Proper management and oversight is critical to maintain the integrity of Virginia's colleges and universities.

Education attorneys evaluated various institutional responses to racial incidents and sexual assaults, including proposed disciplinary policies, new sexual assault procedures, a central monitoring committee to oversee reports of bias, and vigorous prosecution of perpetrators of racial assaults.

Mental Health and Health Services Section

Advice provided by the Mental Health and Health Services Section affects the daily lives and health of thousands of Virginians. The Section provided advice to the Office of Emergency Preparedness and Response within the Department of Health (VDH), the Pandemic Flu Advisory Group, and the Virginia Hospital and Health Care Association. This involvement led to the development of protocols to respond effectively to and contain any flu epidemic. The Section assisted VDH in developing guidelines for the use of isolation and quarantine, and the Virginia Supreme Court in developing rules for expedited appeals in isolation and quarantine cases. Additionally, the Section reviewed the Mass Fatalities Task Force Report of the Secure Virginia Panel for legislative and other legal recommendations. Attorneys in the Section provided ongoing advice and presentations on liability issues for the volunteer medical reserve corps.

The Office worked closely with the Chief Medical Examiner of Virginia to establish a memorandum of understanding between the Virginia and Maryland medical examiners' offices regarding investigation of deaths and preservation of evidence in deaths occurring in close proximity to the mutual border along the Potomac River.

The Section advised the Department of Mental Health, Mental Retardation and Substance Abuse Services (DMHMRSAS) on the content of its emergency opioid (methadone) treatment regulations that were developed as a result of the 2005 General Assembly session moratorium on the establishment of any new facilities until the Department could establish "need" criteria through regulation.

The Section provided assistance to the Secretary of Health and Human Resources and DMHMRSAS in preparing the General Assembly mandated study of requirements for consideration in determining whether to accept proposals from private contractors under the Public-Private Education Facilities and Infrastructure Act (PPEA) to construct and operate state mental health facilities. Attorneys in the Section reviewed and assisted in the negotiation of two comprehensive agreements for DMHMRSAS under the PPEA to construct a new sexually violent predator facility in Nottoway County and a new geriatric building to replace the Hancock Geriatric Treatment Center at Eastern State Hospital. The Section assisted Woodrow Wilson Rehabilitation Center and several of the DMHMRSAS facilities in reviewing, revising and negotiating construction or renovation projects under the new Energy and Operational Efficiency Performance-Based Contracting Act.

Social Services Section

The Social Services Section undertakes the complex and time-consuming responsibility for issues related to Medicaid reimbursement. The Department of Medical Assistance Services reimburses more than 44,000 providers for thousands of services to ensure that low-income Virginians receive proper health care.

Section 63.2-1715 exempts certain child day programs from licensure by the Department of Social Services (DSS). One of those exemptions is known as the "come and go" exemption, which exempts facilities that have a policy where "children are free to enter and leave the premises without permission or supervision." A number of programs have used the "come and go" exemption to avoid licensure, even when enrolling children as young as five years old. The Section assisted DSS in filing for injunctive relief against such programs for operating without a license. In addition, this Section assisted the General Assembly in clarifying the "come and go" exemption.

Child Support Enforcement Section

The Section for Child Support Enforcement enjoyed one of its most successful years in protecting the children of the Commonwealth. Attorneys in the Section participated in 114,723 hearings resulting in $8,827,877 in lump sum and purge amounts collected, a 3.3% increase over 2004. Additionally, non-custodial parents who did not comply with the law were sent to jail for a total of 647,363 days, which is a 1.2% increase from last year.

SEXUALLY VIOLENT PREDATOR, TOBACCO, ALCOHOL AND GAMING DIVISION

The Sexually Violent Predator, Tobacco, Alcohol, and Gaming Division provides comprehensive legal services in a number of diverse areas. Attorneys in the Division provide counsel to: (1) all gaming agencies, including the Virginia

Lottery, the Racing Commission, and the Department of Charitable Gaming; (2) the Workers' Compensation Commission; (3) the agencies funded by the proceeds from the Tobacco Master Settlement Agreement (MSA), the Tobacco Indemnification and Community Revitalization Commission, and the Tobacco Settlement Foundation; (4) the Department of Alcoholic Beverage Control; (5) the Commonwealth Health Research Board; and (6) the Virginia Birth-Related Neurological Injury Program. The Division also represents the Commonwealth in the civil commitment of sexually violent predators. The Division enforces and supports the MSA and related statutory requirements and litigates on behalf of the Division's client agencies. Although the subject matter covered by the Division is broad, the tasks are connected by common bonds. The work of the Division generally involves assisting agencies that produce substantial revenues for the Commonwealth. The Division works to assure continuation of needed revenues and to provide counsel and guidance on matters that are the subject of significant public interest and scrutiny.

Civil Commitment of Sexually Violent Predators Unit

The Civil Commitment of Sexually Violent Predators Act was funded in 2003, and the Unit has reviewed seventy cases since the inception of the Act. During 2005, the Unit filed thirteen petitions. Cases that concluded in 2005 resulted in fifteen persons being declared "sexually violent predators." Of those, eleven were civilly committed and four were conditionally released.

Sexually violent predators who are civilly committed are entitled to an annual review hearing for the first five years and biannually thereafter. In 2005, attorneys in the Unit represented the Commonwealth at two annual hearings. In each case, the court concluded that the person was a sexually violent predator.

Thirteen petitions for appeal have been filed in the civil commitment cases. Two of the appeals were filed by the Office, and the remaining eleven appeals were filed by sexually violent predators who were civilly committed.

Virginia Birth-Related Neurological Injury Compensation Representation

The Division handled sixteen new petitions, one refiled petition, and concluded six cases previously filed for benefits under the Virginia Birth-Related Neurological Injury Compensation Act. Of those cases, the Birth Injury Program accepted nine petitions for benefits without a hearing. There were seven petitions still pending at the end of year and the one refiled petition was dismissed by the Workers' Compensation Commission. The Workers' Compensation Commission ordered that each of the nine children be admitted into the Program.

The Division provided general counsel assistance to the Program that involved legal advice, legal research, monthly meetings, advice and research on property issues, and outside correspondence on behalf of the Program.

The Division handled eleven Program appeals in 2005. Two appeals are still pending before the full Commission, three are pending before the Court of Appeals of Virginia and one was dismissed by the Court of Appeals.

Tobacco

The Tobacco Unit continued to administer and enforce the Master Settlement Agreement, the landmark settlement that the Commonwealth and other states entered into with leading tobacco product manufacturers in 1998. In April, the Commonwealth received $128,888,847 in payments from participating manufacturers. The Unit diligently continued to enforce the sections that apply to nonparticipating manufacturers and filed thirty-one lawsuits alleging violations of the Virginia Tobacco Escrow Statute. The Unit reached settlements with numerous other companies. The Tobacco Unit obtained judgments in sixteen cases totaling $14,747,035 in penalties and escrow obligations, three cases were resolved without further litigation, and four remain pending. The Unit continued to maintain the Virginia Tobacco Directory, which lists tobacco product manufacturers that have been certified as compliant with Virginia law, together with their brand families. During the past year, the Unit certified 69 tobacco product manufacturers and 365 brand families for listing on the Virginia Tobacco Directory. Finally, the Tobacco Unit continued to monitor the administration of the National Tobacco Growers Settlement Trust (Phase II Agreement), and to provide legal advice and representation to the Virginia Tobacco Indemnification and Community Revitalization Commission.

Alcohol Beverage Control

The Section represented the ABC Board in thirteen cases. Additionally, the Section monitored three appeals, provided agency advice on a variety of topics, and responded to citizen inquiries.

PUBLIC SAFETY AND ENFORCEMENT DIVISION

The Public Safety and Enforcement Division is comprised of the Corrections Litigation, Criminal Litigation, and Special Prosecutions Sections. The Division handles a wide range of criminal and related legal matters. Each Section represents state agencies, handles litigation, and performs critical functions related to public safety and enforcement actions.

The Corrections Litigation Section handles federal and state court litigation where adult and juvenile prisoners raise challenges related to: (1) conditions of their confinement; (2) calculation of their terms of imprisonment; and (3) parole process. The Section provides advice on a daily basis to the Departments of Corrections, Juvenile Justice, Correctional Education, and Correctional Enterprises. Further, the Section provides legal counsel to the boards of these various agencies. The breadth of advice ranges from daily operational issues to contract and lease reviews, legislative

and regulatory matters, and relations with other state, federal, and local offices (including, the United States Department of Justice and the Environmental Protection Agency). The Section frequently fields advice inquiries from local governmental officials. Finally, the Section provides guidance to state officials regarding prisoner transfers associated with criminal charges in other jurisdictions and interstate and international extraditions.

The Criminal Litigation Section handles an array of post-conviction matters in which state prisoners challenge their convictions. This litigation includes all awarded criminal appeals, state and federal habeas corpus proceedings, petitions for writs of innocence, and other extraordinary writs. The Section's Capital Litigation Unit also defends against appellate and collateral challenges to all capital murder convictions and sentences of death. In addition, lawyers in the Section review wiretap applications and provide informal advice and assistance to local prosecutors. Finally, the Section represents the Capitol Police, the Indigent Defense Commission, state magistrates, and the Commonwealth's Attorneys' Services Council.

The Special Prosecutions Section is comprised of four units - Environmental, Health Professions, Organized Crime, and Medicaid Fraud Control. The Environmental Unit represents the agencies of the Natural Resources Secretariat and certain related agencies. The services to these agencies include providing legal advice to their respective boards. Attorneys in the Environmental Unit also handle litigation and the review of regulations, contracts, and proposed legislation. Further, the Unit's environmental prosecutor assists local Commonwealth's Attorneys in handling criminal cases under the environmental statutes. The Health Professions Unit evaluates and presents cases of violations of state laws and regulations on behalf of the Commonwealth at administrative proceedings before the various boards of the Virginia Department of Health Professions. These proceedings often result in findings of violations with penalties ranging from simple monetary fines to revocation of professional licensure. The Organized Crime Unit assists in the investigation of state and federal criminal matters, ranging from public corruption to financial crimes. Prosecutors within the Unit handle criminal cases in state and federal courts on behalf of the Attorney General and at the request of local Commonwealth's Attorneys or United States Attorneys. Additionally, the Unit provides legal advice and representation on criminal matters to the Virginia Departments of State Police, Military Affairs, and Criminal Justice Services, which includes the Department of Forensic Science. The Unit primarily is responsible for the Anti-Gang initiatives. The Medicaid Fraud Control Unit is mandated to investigate fraud and abuse committed by providers under Virginia's Medicaid Program and to recover monies illegally obtained by them during the course of such activity. This Unit's criminal and civil investigations regularly result in the criminal prosecution and conviction of health care providers and the recovery of millions of dollars for the Virginia Medicaid

Program through enforcement actions initiated in state and federal court. The newest feature of this Unit is the *Qui Tam* Squad, designed to handle certain civil cases. Finally, the Section provides legal advice to Virginia's Fair Housing Board and files suits for alleged discriminatory housing practices based on disability, familial status, or race.

Correctional Litigation Section

In addition to providing advice to various boards and departments, the Correctional Litigation Section handled 299 Section 1983 cases, 11 employee grievances, 247 habeas corpus cases, 474 mandamus petitions, 75 inmate tort claims, and 15 warrants in debts.

Special Prosecutions Section

The Special Prosecutions Section is comprised of four distinct units, Medicaid Fraud Control, Environmental, Organized Crime/Financial Crime Intelligence Center, and Health Professions/Fair Housing. These units handled numerous legal responsibilities.

Medicaid Fraud Control Unit

The Medicaid Fraud Control Unit (MFCU) investigated and prosecuted many major fraud cases throughout Virginia. The Unit hired and trained eight additional employees and created a new Civil Investigation Squad. MFCU's caseload included the convictions of eleven health care providers and the recovery of more than $10.5 million for the Virginia Medicaid program. This recovery exceeds the forecast by the Unit to the General Assembly when it established the Unit's budget.

One significant joint investigation involved MFCU, the FBI and the United States Attorney's Office for the Eastern District of Virginia where a healthcare service provider fraudulently billed the Virginia Medicaid program for home healthcare services allegedly provided to Medicaid recipients from January 2002 through January 2005. A search warrant revealed 133.8 grams of marijuana, 483.8 grams of cocaine, cash, and a handgun. The owner of the service pled guilty and was sentenced to seventy-one months in prison for healthcare fraud and possession with intent to distribute cocaine. He also was ordered to reimburse the Virginia Medicaid program $2.5 million.

Another joint investigation resulted in the conviction of a Medicaid provider that allegedly provided intensive in-home therapy to at-risk juveniles. The owner of the company fraudulently obtained approximately $1 million from the Virginia Medicaid program by billing for services not rendered or billing for services that did not meet the criteria for intensive in-home therapy, e.g., taking recipients on shopping trips or out for dinner. The company also employed a number of "counselors" who were not qualified to provide intensive in-home therapy. The owner pled guilty and was sentenced to eighteen months incarceration for health care fraud. He also was ordered to reimburse $1 million to the Virginia Medicaid program.

MFCU continued its participation in the cooperative effort between federal and state authorities to protect the Medicare/Medicaid programs from fraud committed by healthcare providers conducting business across the United States. The Medicaid Fraud Control Units of all affected states are notified about ongoing investigations when the Department of Justice (DOJ) contacts the National Association of Medicaid Fraud Control Units (NAMFCU) and requests the assistance of the state MFCU's. All negotiations and recoveries are allocated based upon assessment of actual damages incurred by each state. A NAMFCU settlement team, with DOJ, negotiates the best settlement possible with damages and penalties to cover state Medicaid losses. The MFCU assisted NAMFCU with five global settlements last year and recovered nearly $5.5 million for the Virginia Medicaid program.

MFCU continued to work with the United States Attorneys in Virginia in the Affirmative Civil Enforcement ("ACE") program, pursuing providers through the federal False Claims Act. The ACE program has been a great recovery tool for MFCU. Since its inception, the ACE program has resulted in the recovery of millions of dollars for the Virginia Medicaid Program. Over the past several years ACE program attorneys and MFCU have focused their efforts on the investigation of nursing homes failing to provide quality care for residents. When neglect is discovered, the amount of Medicaid funds paid to the nursing home for the neglected residents is considered falsely obtained and, therefore, an overpayment. The ACE program provides for the structuring of agreements whereby a provider allocates money to a special fund that would otherwise constitute fines paid to the government with assurances that the money will be used for programs, equipment, and personnel directed toward the improvement of patient care. The initial agreement is followed by a second agreement to ensure future compliance through the implementation of a federal monitoring program. In 2005, two ACE cases resulted in civil overpayments totaling nearly $1.3 million.

In a proactive effort to combat fraud in the Virginia Medicaid program, the MFCU recently formed a Civil Investigation Squad consisting of three attorneys, one investigator, and one program coordinator. The purpose of this team is to coordinate the Office's civil enforcement of Medicaid fraud by handling Virginia Fraud Against Taxpayer's Act and federal *Qui tam* cases alleging fraud in the Virginia Medicaid program and ACE program activities. This Squad will work within the Commonwealth, with other states, NAMFCU, and DOJ to recover monies fraudulently billed to Virginia.

Environmental Unit

The Environmental Unit represents the agencies of the Secretary of Natural Resources in addition to agencies outside the Secretariat. The Unit provides legal advice to the agencies and their respective boards. Those services include litigation,

regulation and legislative review, transactional work, personnel issues, and related matters. The Unit's environmental prosecutor assists local Commonwealth's Attorneys in handling criminal cases under the environmental statutes.

The Unit continued to lead two coalitions of states in intervening in the Court of Appeals for the District of Columbia to assist the EPA in defending its New Source Review regulations under the Clean Air Act. The negotiation of a consent decree with the EPA and Maryland to cover the Mirant plant in Alexandria was ongoing, along with related involvement in Mirant's Texas bankruptcy and proceedings before FERC and the Department of Energy related to air quality issues by the plant. On behalf of the Department of Health, the Unit successfully defended a federal court challenge to a recently enacted statute regulating the conduct of nudist camps for juveniles. Appeals challenging permits issued to the City of Newport News for the King William Reservoir project were successfully defended. The extensive litigation over the Page County landfill successfully was concluded. In addition, the prosecutor obtained several convictions for violations of laws applicable to the handling and transfer of medical waste.

The Unit defended a number of appeals of decisions by client agencies. The Unit handled approximately 238 new cases filed before the Gas and Oil Board. These included creation and pooling of gas units, approval of exceptions, establishment of field rules and requests for disbursement. During 2005, the total deposits of moneys escrowed by the Gas and Oil Board for ultimate distribution exceeded $12 million.

Organized Crime Unit/Financial Crime Intelligence Center

The Organized Crime Unit covers a wide range of criminal investigations and prosecutions and other noncriminal enforcement matters on behalf of the Attorney General. In addition to handling investigations and prosecutions under state law, the Unit includes a special prosecutor assigned to Project Exile and a special prosecutor assigned to prosecute gang-related crimes in state and federal court in Northern Virginia. The Unit is responsible for providing legal advice and representation on criminal matters to the Department of State Police, as well as a host of regulatory and administrative matters to the Department of Criminal Justice Services, the Department of Forensic Science, and the Department of Military Affairs. Finally, the Unit handles administrative prosecutions before the ABC Board on behalf of the ABC Bureau of Law Enforcement Operations.

The Financial Crime Intelligence Center continued to provide extensive assistance to ongoing local and federal criminal investigations in the Commonwealth. The investigations included violations of state and federal law related to underground financial institutions, money laundering, and drug distribution. The Center supported prosecutions on those charges and assisted in identifying and recovering millions of dollars through criminal and civil forfeiture proceedings.

In 2005, the Unit prosecuted numerous cases in state and federal court ranging from grand larceny of state funds by public employees, to murder. Four cases of particular interest involved insurance fraud, murder while engaged in drug trafficking, a large identity theft ring, and gang-related crime.

The Unit, working with the FBI and the United States Attorney's Office, prosecuted two executives of a former Virginia professional malpractice insurer. After being taken into receivership by the State Corporation Commission, it was determined that the insolvency of the company, currently estimated to be in excess of $450 million with more than 40,000 insureds, had been concealed for years by top management. The company's former president and vice president pled guilty and were sentenced for conspiracy to commit insurance fraud and mail fraud. The president was sentenced to twelve and one-half years, and the vice president was sentenced to five years in prison. Both were ordered to make full restitution to victims.

The Unit, working with local and federal law enforcement and the United States Attorney's Office, prosecuted a capital murder case in which persons involved in drug trafficking conspired to lure a drug dealer to an apartment where they robbed him of his drugs. Two of the defendants then bound the victim with duct tape and drove him in the trunk of their car to another location where he later died after being beaten, doused with gasoline, and set on fire. The defendants were found guilty in a jury trial and sentenced to life in prison for murder while engaged in drug trafficking, conspiracy to use/carry a firearm, and possession of a firearm in furtherance of drug trafficking. The case was adopted by the United States Attorney's Office under the Project Safe Neighborhoods/Project Exile Program. That program is aimed at reducing violent crimes in and around the Richmond Metropolitan area, particularly those involving illegally obtained firearms.

The Unit, working with the Metro-Richmond Fraud and Identity Theft Task Force and the United States Attorney's Office, successfully prosecuted a multi-jurisdictional case in the United States District Court in Richmond. The case involved fourteen individuals who were convicted of a scheme in which they opened nine different bank accounts in six different financial institutions for the sole purpose of negotiating in excess of $180,000 in worthless or stolen checks. The convictions were the area's first under the newly enhanced federal identity theft statute. Finally, the Unit aided in the prosecution of two cases in the United States District Court in Alexandria in which MS-13 gang members were convicted of murder in aid of racketeering. Other gang-related crimes have been investigated and indicted and are awaiting prosecution in federal courts.

Health Professions Unit/Fair Housing Unit

The Health Professions Unit primarily prosecutes cases before the various health regulatory boards under the Department of Health Professions, including the

Boards of Medicine, Nursing, Pharmacy, and Dentistry. The Unit provides a focused and effective administrative prosecution of cases involving violations of health care-related licensing laws and regulations.

The Unit participated in numerous Department cases, including a case against a physician from the Tidewater area for over-prescribing controlled substances to twenty-nine individuals, nine of whom died. The physician was summarily suspended based on the death of a patient during the course of the initial investigation, reflecting continued danger to the public. His license was suspended indefinitely, and he is not eligible to apply for reinstatement for at least eighteen months.

Other important cases involve the prosecutions of two gastroenterologists. The Board of Medicine summarily suspended one gastroenterologist because his continued practice constituted a substantial danger to the public health or safety. The standard of care case against the other gastroenterologist involved allegations of negligent conduct in three surgical procedures that resulted in multiple complications in all three patients and the death of two of the patients.

A case before the Board of Nursing involved a nurse midwife who possessed unauthorized controlled substances and was practicing without a supervising physician. The unauthorized practice was discovered as a result of an attempted home birth for a post-term mother that resulted in the death of the child. The Board revoked her license to practice as a nurse practitioner.

The Unit also filed two lawsuits for violations of Virginia's Fair Housing Law. The lawsuits allege discriminatory housing practices based on the complainant's sex, race, familial status, national origin, and disability. In one case, the Unit filed suit on behalf of an African-American woman and a non-profit housing organization that were the target of discriminatory statements by a Chesterfield resident. The plaintiffs later intervened seeking substantial damages. After liability was determined, the plaintiffs requested the Office to nonsuit its action. The Commonwealth, therefore, settled with the defendant requiring that he (1) be enjoined from future violations of the Fair Housing Law; and (2) receive a minimum of three hours of education and training on the Fair Housing Law. The court noted that the Commonwealth "took decisive steps to stop" unlawful discriminatory housing practices and awarded damages to the plaintiffs consistent with the amounts sought in the Commonwealth's motion for judgment.

TECHNOLOGY AND TRANSPORTATION DIVISION

The Technology and Transportation Division is comprised of three Sections. The Civil Technology Section represents the Virginia Information Technologies Agency and other communications agencies that provide information technology resources, oversight, and guidance necessary for government operations and programs. The Section also provides advice to the Commonwealth's central procurement agencies. The Computer Crime unit is a specially trained and equipped

group of prosecutors and investigators skilled in computer, communications, and Internet technologies. The Unit investigates and prosecutes illegal activities, such as spam and identity theft, with an emphasis on the protection of children that may be targeted by predators on the Internet. The Transportation Section represents the Departments of Transportation, Rail and Public Transportation, Aviation, and Motor Vehicles, as well as the Virginia Port Authority and Motor Vehicle Dealer Board. The Section provides advice to these agencies on all matters relating to transportation within the Commonwealth. The agencies represented by the Section directly affect the economic health and quality of life of the Commonwealth's citizens by promoting the mobility of people and goods on the roads, in the water, and in the air.

Civil Technology Section

The Civil Technology Section provides the legal support and representation needed by Commonwealth agencies and institutions to implement their technology-related needs. The Section provides extensive legal support to the Virginia Information Technologies Agency, including negotiating and awarding its Interim Comprehensive Infrastructure Agreement with Northrop Grumman Information Technologies. Additionally, the Section assisted the Governor's office with the negotiation and award of the Enterprise Applications Master Services Agreement with CGI-AMS. The Section assisted many other agencies with contract performance problems and contractual claims; technology acquisitions; licensing of Commonwealth data and software to third parties; intellectual property claims and agreements; Internet-related concerns, such as cybersquatting and electronic contracting; the review, drafting, and negotiation of contracts; and settlement of claims. The Section helped numerous agencies structure procurement transactions to avoid challenges. Two procurement cases against the Department General Services' Division of Purchases and Supply were appealed to the Procurement Appeals Board. The Section successfully defended the cases. Finally, the Civil Technology Section provided well-received procurement training sessions at the Department of General Services' 2005 Public Procurement Forum.

Computer Crime Unit

The Computer Crime Unit spearheads Virginia's computer-related criminal law enforcement. The Attorney General has concurrent and original jurisdiction to investigate and prosecute crimes committed by means of computer, including the exploitation of children and identity theft. The Unit continued to travel throughout the state to investigate and prosecute computer crime cases, including Alleghany, Campbell, Loudoun and Mathews Counties and Bristol, Jonesville, Newport News, Portsmouth, and Richmond. All of the attorneys within the Unit are cross-designated as Special Assistant United States Attorneys and have prosecuted cases in federal courts.

The Computer Crime Unit continued as an active member of the Virginia Cyber Crime Strike Force, dedicating two full-time investigators and providing three prosecutors to pursue the resulting cases. This partnership between federal, state, and local law enforcement was created to coordinate the prosecution of Internet crime and provide Virginia with a centralized location to report Internet-related crimes. The Strike Force handles crimes committed via computer systems, including computer intrusion/hacking, Internet crimes against children, Internet fraud, computer or Internet-related extortion, cyber-stalking, phishing, and identity theft.

In addition to investigating and prosecuting computer crime throughout the Commonwealth, the Unit is a clearinghouse for information concerning criminal and civil misuse of computers and the Internet. Unit members are often asked to give presentations or to make media appearances to inform the public about the increase in identity theft and the use of the computers and the Internet by sexual predators to prey upon children. The Computer Crime Unit's Safety Net presentation continues to be in high demand among school and parent groups across the Commonwealth. This past year, the Unit presented the program to schools in Albemarle, Chesterfield, and Henrico Counties and Charlottesville, Petersburg, Portsmouth, Staunton, and Richmond.

In the past year, the Unit has received numerous inquiries from schools, parents, regulators, and the media regarding social-networking websites. As a result, the Unit recently has created a presentation for parents and educators on the topic. These sites, created for adults to post online diaries and their most personal thoughts, increasingly are used by children who often are unaware that pedophiles and other online predators lurk behind the illusory anonymity of the Internet.

The Computer Crime Unit works to assist the growing number of Virginians who are victims of identity theft. Upon learning that several data security breaches occurred with companies such as ChoicePoint, Lexis/Nexis, DSW, and Mastercard, often before the breaches became public knowledge, the Unit demanded that the companies disclose information about Virginia residents whose information was compromised. Attorney General Jagdmann wrote letters to hundreds of potential victims around the Commonwealth alerting them to the breaches and providing information about the Identity Theft guide and the Identity Theft Passport program. Additionally, information was posted on the Attorney General's website for Virginians who were concerned about being possible victims.

The Unit continued to present identity theft institutes across the state. Members of the Unit trained law enforcement officers in Scott and Tazewell Counties and Newport News and Norfolk on the changes in the law regarding identity theft. In addition, the Unit presented identity theft seminars for congressional staff and CIA agents in Washington, D.C. The Identity Theft Passport program continues to be very successful with more than 100 passports issued.

Transportation Section

The Transportation Section represents state agencies and boards within the Transportation Secretariat, including the Departments of Transportation, Motor Vehicles, Aviation, and Rail and Public Transportation, as well as the Virginia Port Authority, the Motor Vehicle Dealer Board, the Transportation Safety Board, and the Department of Motor Vehicles Medical Advisory Board. The Department of Transportation continues to occupy a majority of the Section's time. During 2005, the Section achieved the first successful recovery of funds under the Virginia Fraud Against Taxpayers Act. Also, several legal issues and litigation resulted from the construction of the Woodrow Wilson Bridge. The Commonwealth's commitment to the Public/Private Transportation Act of 1995 saw the Section's continued involvement with the comprehensive agreement between the Virginia Department of Rail and Public Transportation and Dulles Transit Partners, LLC, to design and construct the Dulles Corridor Rapid Transit project. Additionally, the Section participated in negotiations for improvements to the Interstate 81 Corridor and construction of high occupancy toll lanes along I-495 in Northern Virginia.

In 2005, attorneys in the Section advised and represented their client agencies and handled many issues, including: driver licensing; motor vehicle registration and titling; licensing and disciplining of automobile dealers and sales persons; driving schools regulated by the Department of Motor Vehicles; automobile manufacturer and dealer disputes; motor fuel taxes and vehicle sales taxes; employment matters; design-build contracts for major projects; homeland security issues; bid protests; disadvantaged business enterprise hearings; inverse condemnation matters; procurement disputes; and outdoor advertising and logos. Attorneys in the Section met with the newly created Rail Advisory Board as it organized, deliberated, and made significant and far-reaching recommendations regarding rail enhancement projects to the Commonwealth Transportation Board and the Director of the Department of Rail and Public Transportation.

COMMERCE AND FINANCE DIVISION

The attorneys in the Division of Commerce and Finance provide advice to agencies and boards reporting to the Secretaries of Commerce and Finance in the Commonwealth. These agencies include the Virginia Department of Taxation, the Virginia Department of the Treasury, the Virginia Economic Development Partnership, and the Virginia Employment Commission. The Division also represents numerous state agencies and boards charged with administrative and regulatory responsibility for the Commonwealth's economic and fiscal policies and the issuance of the Commonwealth's bonds and other obligations, which included $3.7 billion of new debt.

The Commerce and Finance Division represented the Tobacco Settlement Financing Corporation in the issuance of tax-exempt bonds secured by a portion of the payments received from the MSA. This sophisticated transaction provided the Virginia Tobacco Indemnification and Community Revitalization Commission with $448.3 million of which $389.8 million is held in an endowment to support technology and economic development projects in the Commonwealth's tobacco region. The Division routinely provides guidance regarding legal limitations associated with the use of tax-exempt bond proceeds.

Certain non-taxable entities have marketed conservation easement tax credits to individual Virginia taxpayers as membership interests. The individual taxpayers then claimed the purchased tax credits on their Virginia income tax returns. The Department of Taxation initiated an investigation into the appraised value of the conservation easement that formed the basis for the credits. The Department conducted three additional appraisals and determined that the value of the easement provided by the taxpayer was substantially overstated by several million dollars. The Department adjusted the credit amounts and issued notice of assessments to the members that claimed the credit on their Virginia income tax returns. The Commerce and Finance Division cooperatively worked with the Department and outside counsel to defend the members' challenge to the assessments. This complex tax litigation likely is the first of many enforcement efforts for abuse of conservation credits.

The Division continued to represent the charitable interests in a court challenge to a testamentary gift filed by an heir at law. The testator left her residual estate as a charitable gift to combat several chronic diseases and afflictions. One of her heirs challenged the residuary clause of the will on the grounds that it was too indefinite to pass any interest to any particular charitable entity. Therefore, she argued that the residual estate should pass to the heirs. The court found the residual clause to be valid and ordered the residual estate, estimated at $1.5 million, to be distributed equally among seven nationally recognized charities.

DIVISION OF DEBT COLLECTION

The mission of the Division of Debt Collection is to provide appropriate, cost effective, professional debt collection services for state agencies. The attorneys and staff of the Division protect Virginia taxpayers by ensuring accountability for the Commonwealth's receivables. The attorneys of the Division also provide advice on collection and bankruptcy issues to state agencies. In 2005, the Division partnered on a trial basis with the Tobacco Unit to enforce its judgments against cigarette manufacturers. To date, the Division has collected more than $77,000 and is expanding its efforts in this area. In fiscal year 2005, the Division collected total revenues of $10,273,300.

CONCLUSION

It has been my honor to begin my service to the people of the Commonwealth as Attorney General. The experience, professionalism, and hard work of the attorneys and staff of this Office are exceptional. It is not possible to detail all their accomplishments in this report. The names of these dedicated professionals are listed on the following pages. The citizens of this Commonwealth are well-served by their commendable efforts.

I look forward to the challenges of serving the Commonwealth during 2006.

With kindest regards, I am

Very truly yours,

Robert F. McDonnell
Attorney General

PERSONNEL OF THE OFFICE[1]

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[1]This list includes all persons employed and compensated, on a full-time basis, by the Office of the Attorney General during calendar year 2005, as provided by the Office's Division of Administration. The most recent title is used for each employee whose position changed during the year.

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Tricia M. Smyth	Legal Secretary
Cheryl L. Snyder	Legal Secretary
Kimberly F. Steinhoff	Exec. Asst. to Attorney General & Chief Deputy
Gwenn A. Talbot	Office Services Floater
Katherine E. Terry	Community Outreach Coordinator
James M. Trussell	Regional Support Systems Engineer
Patricia L. Tyler	Legal Assistant Senior
Corrine Vaughan	Victim Notification Program DirectorzAssistant
Zella L. Waggoner	Claims Representative
Esther M. Welch	Project Coordinator/Gang Reduction Program
Christopher B. West	Legal Assistant
Nanora W. Westbrook	Receptionist
Samuel M. Wharton III	Special Counsel Administrator
Amy R. Wight	Legal Secretary Senior
Kimberly Wilborn	Legal Secretary
Tameka S. Winston	Legal Secretary
Amanda C. Wood	Grant Administrator/Fiscal Support Tech.
Brenda K. Wright	Legal Secretary
Michael J. Wyatt	Investigator
Abigail T. Yawn	Legal Secretary

Attorneys General of Virginia from 1776 to 2006

Edmund Randolph	1776–1786
James Innes	1786–1796
Robert Brooke	1796–1799
Philip Norborne Nicholas	1799–1819
John Robertson	1819–1834
Sidney S. Baxter	1834–1852
Willis P. Bocock	1852–1857
John Randolph Tucker	1857–1865
Thomas Russell Bowden	1865–1869
Charles Whittlesey (military appointee)	1869–1870
James C. Taylor	1870–1874
Raleigh T. Daniel	1874–1877
James G. Field	1877–1882
Frank S. Blair	1882–1886
Rufus A. Ayers	1886–1890
R. Taylor Scott	1890–1897
R. Carter Scott	1897–1898
A.J. Montague	1898–1902
William A. Anderson	1902–1910
Samuel W. Williams	1910–1914
John Garland Pollard	1914–1918
J.D. Hank Jr.[1]	1918–1918
John R. Saunders	1918–1934
Abram P. Staples[2]	1934–1947
Harvey B. Apperson[3]	1947–1948
J. Lindsay Almond Jr.[4]	1948–1957
Kenneth C. Patty[5]	1957–1958

[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.

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

A.S. Harrison Jr. 1958–1961
Frederick T. Gray[6] 1961–1962
Robert Y. Button 1962–1970
Andrew P. Miller 1970–1977
Anthony F. Troy[7] 1977–1978
John Marshall Coleman 1978–1982
Gerald L. Baliles 1982–1985
William G. Broaddus[8] 1985–1986
Mary Sue Terry 1986–1993
Stephen D. Rosenthal[9] 1993–1994
James S. Gilmore III 1994–1997
Richard Cullen[10] 1997–1998
Mark L. Earley 1998–2001
Randolph A. Beales[11] 2001–2002
Jerry W. Kilgore 2002–2005
Judith Williams Jagdmann[12] 2005–2005
Robert F. McDonnell 2006-

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

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

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

[9]The Honorable Stephen D. Rosenthal was elected Attorney General by the General Assembly on January 29, 1993, to fill the unexpired term of the Honorable Mary Sue Terry upon her resignation on January 28, 1993, and served until noon, January 15, 1994.

[10]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.

[11]The Honorable Randolph A. Beales was elected Attorney General by the General Assembly on July 10, 2001, and was sworn into office on July 11, 2001, to fill the unexpired term of the Honorable Mark L. Earley upon his resignation on June 4, 2001, and served until January 12, 2002.

[12]The Honorable Judith Williams Jagdmann was elected Attorney General by the General Assembly on January 27, 2005, and was sworn into office on February 1, 2005, to fill the unexpired term of the Honorable Jerry W. Kilgore upon his resignation on February 1, 2005.

Cases

in the

Supreme Courts

of

Virginia

and

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 § 2.2-516 of the *Code of Virginia*.

Cases Decided in the Supreme Court of Virginia

Anthony v. Va. State Bar. Affirming three-judge panel's public reprimand and disciplinary ruling that derogatory statement concerning the qualifications or integrity of a judge, made by a lawyer with knowing falsity or with reckless disregard of its truth or falsity, violates Rule 8.2 of the Rules of Professional Conduct and does not qualify as constitutionally protected speech.

Barrett v. Va. State Bar. Affirming in part and reversing in part ruling of Disciplinary Board suspending attorney's license to practice law for a period of three years based upon violations of several provisions of the Virginia Rules of Professional Conduct, and remanding for reconsideration any sanction to be imposed for the violation findings that were upheld.

Brown v. Va. State Bar. Reversing Disciplinary Board's one-year suspension of attorney's license to practice law and remanding case for further proceedings before a three-judge panel as the Virginia State Bar submitted to the jurisdiction of a three-judge panel when it stipulated an attorney's demand to have the matter heard before that tribunal was timely.

Burns v. Warden. Granting habeas corpus petition challenging conviction for capital murder and sentence of death.

Carter v. Commonwealth. Affirming Court of Appeals decision holding that a defendant need not have the present ability to inflict harm in order to be convicted of an assault and, therefore, defendants wielding toy guns can face prosecution.

Cartwright v. Commonwealth Trans. Comm'r. Reversing trial court decision that petitioner alleging violation of Virginia Freedom of Information Act must show lack of an adequate remedy at law to be entitled to mandamus relief.

Charles v. Commonwealth. Reversing Court of Appeals decision holding that the defendant's five-month participation in detention center incarceration program constituted "incarceration" for which defendant was entitled to receive credit when probation for possession of heroin with intent to distribute was revoked.

Coles v. Commonwealth. Affirming Court of Appeals decision holding the evidence was sufficient to support the conviction for attempted capital murder of a police officer where defendant claimed he merely was trying to escape.

Collins v. Commonwealth. Affirming defendant's suspended sentence revocation and holding that the trial court correctly revoked a defendant's suspended sentence after he committed a second offense while free on bond pending appeal of the original conviction; second offense violated the condition of good behavior to which the suspension of the sentence and probation imposed for the prior offense were subject.

Colosi v. Director. Refusing plaintiff's habeas corpus appeal alleging ineffective assistance of counsel, *Brady* violations, and that his attorney had a conflict of interest.

Commonwealth v. Allen. Affirming the trial court ruling that the Commonwealth had not met its burden of proof and its rejection of Commonwealth's assertion that defense expert was not qualified and used an improper standard in his testimony.

Commonwealth v. Hilliard. Reversing Court of Appeals application of legal standard for determining at what point a suspect invokes right to counsel; upholding Court of Appeals judgment reversing murder conviction because confession improperly admitted under correct standard.

Commonwealth v. Hudgins. Reversing Court of Appeals decision and reinstating defendant's conviction of grand larceny. Grand larceny is not a lesser included offense of robbery, and the value element in grand larceny does not solely determine the degree of punishment.

Commonwealth Trans. Comm'r v. Glass. Affirming in part and reversing in part the trial court decision allowing landowner to claim damages to additional parcels of land beyond that actually affected by a highway project because no "unity of use" was demonstrated by the landowner.

Correll v. Commonwealth. Affirming Court of Appeals decision that defendant knowingly and willingly failed to provide medical treatment to her incapacitated mother in violation of § 18.2-369.

Crutchfield v. State Water Control Bd. Affirming Court of Appeals decision upholding the issuance of a Virginia Pollutant Discharge Elimination System permit for the operation of Hanover County's Topotomy Wastewater Treatment Plant as appellants had not indicated how the case presented a question of significant precedential value warranting review.

Davenport v. Little-Bowser. Reversing and remanding trial court decision declaring that Virginia must issue a birth certificate listing same-sex parents.

Emmett v. Warden. Denying habeas corpus petition challenging conviction for capital murder and sentence of death.

Farnsworth v. Commonwealth. Affirming Court of Appeals decision holding prior West Virginia felony conviction is a predicate felony for purposes of § 18.2-308.2 in spite of West Virginia's restoration of defendant's civil rights.

Garraghty v. Va. Ret. Sys. Refusing the petition for review filed by a former Department of Corrections warden seeking an enhanced retirement benefits computation.

Gray v. Warden. Affirming trial court dismissal of habeas corpus petition alleging ineffective assistance of counsel.

Green v. Warden. Denying habeas corpus petition challenging conviction for capital murder and sentence of death.

Herrity v. Commonwealth. Refusing petition for appeal in dismissed case attempting to prevent the building of a proposed metro rail system to Dulles International Airport.

Hinton v. Commonwealth. Affirming Court of Appeals decision holding that a flare gun was a firearm in conviction for possession of a firearm by a felon.

Hix v. Commonwealth. Affirming Court of Appeals decision that impossibility is not a valid defense in situations where a police officer, posing as a minor, is solicited over the Internet by a defendant to perform illicit sexual acts.

Hughes v. Commonwealth. Affirming Court of Appeals decision upholding convictions of misdemeanor assault and battery by mob and three counts of malicious wounding by a mob for each defendant. Finding that the Commonwealth's evidence established that the appellants formed a mob with the intent to commit bodily injury, and that the trial court properly denied an instruction of self-defense because there was no evidence to suggest that the appellants injured their victims in self-defense.

In re Grayson & Kubli, P.C. Refusing petition for writ of mandamus to require circuit court judge to enter a default judgment.

In re Hannett. Filing amicus curiae brief in case regarding authority of circuit court to appoint an acting Commonwealth's attorney. Holding that circuit court has such authority.

In re Stanley. Refusing petition for mandamus and prohibition against judges and others to prevent ongoing prosecution of a matter.

In re Taylor. Refusing petition for a writ of prohibition seeking an order preventing judge from issuing a decree of distribution of corporate assets and for a writ of mandamus directing judge to empanel a grand jury to review alleged criminal activity and a civil jury to address other issues related to the underlying equity suit.

In re Whitfield. Dismissing actual innocence petition of a prisoner challenging several sexual assault convictions on the ground that he had been paroled shortly before filing his petitions and thus was not "incarcerated" as required by § 19.2-327.3(A).

Jackson v. Director. Reversing trial court ruling denying habeas relief and remanding case for a new trial based on trial counsel's failure to object to defendant being tried in a prison jumpsuit.

Jackson v. Warden. Denying habeas corpus petition challenging conviction for capital murder and sentence of death.

Johnson v. Commonwealth. Commuting sentence of death from trial court to life imprisonment on remand from United States Supreme Court.

Mattaponi Indian Tribe v. Commonwealth. Affirming Court of Appeals decision upholding issuance of permit to the City of Newport News for construction of the King William Reservoir. Mattaponi Indian Tribe could not assert the invalid 1677 Treaty between the King of England and the tribe as a basis for challenging the permit, which merely certifies that the reservoir will comply with State Water Control Law. Dismissing Tribe's appeal of the permit.

McAlevy v. Commonwealth. Affirming defendant's larceny conviction, holding that the defendant was criminally responsible for grand larceny because the asportation of property was completed by an innocent third party acting under the defendant's direction.

McCloud v. Commonwealth. Holding it was not error to consider certain of McCloud's institutional convictions as being relevant and material to his likelihood of reoffending in the future. Holding also that it was not error to refuse to permit introduction of all eighty-two of his institutional convictions; that there was no less restrictive alternative to placing him in involuntary civil commitment; and that the burden was upon McCloud to go forward with the evidence and present a conditional release plan to counter the Commonwealth's evidence seeking to place him in involuntary civil commitment.

Medlin v. Director. Dismissing petitioner's numerous habeas claims challenging convictions for robbery, forgery, grand larceny, attempted grand larceny, and uttering.

Mills v. Va. Polytech. Inst. & State Univ. Refusing petition for appeal of former manager of WVTF radio station in Roanoke who was removed as station manager after he attempted to cancel the Metropolitan Opera's live Saturday afternoon presentations.

Morris v. Commonwealth. Affirming Court of Appeals decision upholding defendant's convictions. Holding that a flare gun was a firearm within the meaning of § 18.2-308.2; brandishing is not limited to waving a weapon, but includes exhibiting or exposing a weapon in an aggressive manner.

Morrisette v. Warden. Granting habeas corpus petition challenging conviction for capital murder and sentence of death.

Moses v. Commonwealth. Affirming Court of Appeals *en banc* decision holding that plaintiff's actions during two separate incidents rose to the level of indecent exposure even though he did not expose the flesh of his penis.

Muhammad v. Commonwealth. Affirming convictions for capital murder and sentences of death.

Palmer v. Commonwealth. Reversing Court of Appeals decision and holding that Commonwealth failed to prove the predicate felony beyond a reasonable doubt with only a petition and a disposition for a juvenile charged with violating § 18.2-308.2.

Park v. Commonwealth. Affirming Court of Appeals decision that trial court had authority to suspend execution of defendant's sentence for longer than the statutory maximum sentence and to place defendant on supervised probation for twenty years.

Parker v. Commonwealth. Affirming decision of Court of Appeals sustaining defendant's conviction of using house as a "food manufacturing plant."

Powell v. Warden. Denying habeas corpus petition challenging conviction for capital murder and sentence of death.

Robinson v. Dingman. Refusing petition for writ of prohibition to prevent hearing before the State Bar Disciplinary Board on the ground that the attorney filed a demand for a three-judge court.

Shivaee v. Commonwealth. Holding that the Virginia Sexually Violent Predators Act is constitutional, is not void for vagueness, and does not violate either Ex Post Facto or Double Jeopardy Clauses of U. S. Constitution. The evidentiary standard of clear and convincing evidence is constitutional, and there was sufficient evidence to find that appellant was a sexually violent predator.

Suiters v. Donley. Denying petition for appeal of trial court decision that the residual clause of the will at issue is valid. Ordering that the residual estate, estimated at $1.5 million, be distributed equally among seven nationally-recognized 501(c)(3) organizations.

Townes v. Commonwealth. Holding that plaintiff could not be committed under the Sexually Violent Predator Act because he was not currently serving his predicate sentence at the time the proceedings were commenced against him.

Townsend v. Commonwealth. Affirming Court of Appeals decision that trial court did not err in finding three prospective jurors were impartial. Clarifying recent decisions disqualifying jurors on grounds that "public confidence" in the court system would be undermined if jurors in their situations were allowed to sit, and further holding that the "public confidence" rationale must be argued in the trial court and cannot be raised for the first time on appeal.

Viney v. Commonwealth. Affirming Court of Appeals finding that the defendant's eye movement, in conjunction with the purposeful movement of his shorts to expose his penis, was a sufficient gesture to show his lascivious intent and support an indecent liberties with a child conviction.

West v. Commonwealth. Affirming Court of Appeals decision upholding the defendant's convictions for aggravated involuntary manslaughter, involuntary manslaughter, and driving while under the influence against his evidentiary and double jeopardy claims.

Widdifield v. Commonwealth. Dismissing appeal of Court of Appeals ruling upholding failure of trial court to credit time spent at local jail as a condition of suspended sentence when it later revoked suspension.

Williams v. Commonwealth. Affirming Court of Appeals decision upholding the defendant's sentences for convictions of possession of a firearm after being convicted of a violent felony and knowing receipt or purchase of a stolen firearm.

Wolfe v. Warden. Denying habeas corpus petition challenging conviction for capital murder and sentence of death.

Yarbrough v. Warden. Denying habeas corpus petition challenging conviction for capital murder and sentence of death.

Zaleski v. Judicial Inquiry & Review Comm'n. Reversing trial court ruling that under Virginia Freedom of Information Act, the Commission must produce any informal ethics advice given to a judge presiding over a trial of a defendant charged with

probation violation when the judge had served as the Commonwealth's attorney during the original prosecution of the defendant.

Cases Pending in the Supreme Court of Virginia

Atkins v. Commonwealth. Appealing trial court decision on mental retardation relating to conviction for capital murder and sentence of death.

Boynton v. Kilgore. Appealing trial court decision that the Virginia Personnel Act does not cover twelve former employees of the Office of the Attorney General and qualifies them for benefits under the Workforce Transition Act of 1995 when they involuntarily were separated from service due to budget constraints.

Brown v. Commonwealth. Pending petition for rehearing seeking revision of a footnote. The Court originally found that the police lacked probable cause for the warrantless arrest and reversed the convictions for possession of cocaine and possession of heroin.

Commonwealth Trans. Comm'r v. Windsor Indus., Inc. Appealing the interpretation and application of § 33.1-90(A), which provides that real property acquired by the Commissioner that is not used within a certain time period must be conveyed back to the landowner at the price for which it was sold.

Elliott v. Warden. Petitioning for a writ of habeas corpus case challenging conviction for capital murder and sentence of death.

Foster v. Commonwealth. Appealing Court of Appeals decision that five-year statute of limitations for petit larceny applied to bad check offense.

Gregory v. Commonwealth. Appealing an unpublished Court of Appeals decision affirming jury's conviction of defendant of the second-degree murder of a Virginia State Trooper; in addition, he pleaded guilty to possession of heroin, cocaine and marijuana with intent to distribute. The defendant contends the search warrant so lacked indicia of probable cause that reliance upon it was unreasonable.

In re Perino. Petitioning for a writ of prohibition seeking to preclude judge from hearing a motion for sanctions after he suspended a nonsuit order in case.

In re Pinkard. Appealing three-judge court's two-year suspension of attorney's license to practice law for submitting inflated fee requests to the court.

Jackson v. Warden. Petitioning for a writ of habeas corpus case challenging conviction for capital murder and sentence of death.

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

Lewis v. Warden. Petitioning for a writ of habeas corpus case challenging conviction for capital murder and sentence of death.

Lynch v. Commonwealth. Appealing Court of Appeals decision affirming trial court convictions of murder, burglary, robbery, and firearms charges.

Moore v. Commonwealth. Appealing Court of Appeals *en banc* affirmation of conviction for possession of cocaine with intent to distribute and finding that trial court did not err in denying defendant's motion to suppress the evidence arrest, which plaintiff alleged was invalid and that the exclusionary rule should have been invoked.

Norbrega v. Commonwealth. Appealing Court of Appeals decision that trial court properly denied appointment of a psychological expert to examine the victim of the rapes and that the evidence was sufficient to prove defendant's rapes of his daughter.

Ohin v. Commonwealth. Appealing Court of Appeals decision upholding defendant's conviction of possession of a concealed weapon by a convicted felon over whether the knife in defendant's possession, which the defendant contends was a pocketknife, is a prohibited weapon.

Orndorff v. Commonwealth. Appealing Court of Appeals *en banc* decision that defendant's claim of newly discovered evidence of her mental condition (Dissociative Identity Disorder) entitled her to new trial properly was rejected because the evidence could have been discovered before trial and would not have changed the outcome of her trial.

Pollack v. Va. State Bar. Appealing three-judge panel's two-year suspension of attorney's license to practice law finding the attorney guilty of twenty-one out of twenty-two disciplinary rule violations brought against him by the Bar.

Roe v. Commonwealth. Appealing Court of Appeals decision that an order entered upon the Commonwealth's request for a dismissal subsequently was determined to constitute a *nolle prosequi*.

Root v. Director. Appealing trial court dismissal of defendant's petition for writ of habeas corpus attacking his conviction of possession of a firearm after having been convicted of a felony, alleging juror misconduct, insufficient evidence, and numerous allegations of ineffective assistance of counsel.

Shelton v. Director. Alleging defendant's right to a fair trial was violated because a juror failed to disclose that she was his son's teacher and that she had pre-judged his guilt. Defendant was convicted for distribution of and possession with intent to distribute oxycodone in doses significantly higher than any previously reported in the Commonwealth.

Spencer v. Commonwealth. Appealing Court of Appeals decision upholding defendant's reckless driving conviction on the issues of the sufficiency of the evidence and whether the case is appealable to the Supreme Court, based on the fact that the defendant's entire jail sentence was suspended.

State Water Control Bd. v. Chesapeake Bay Found. Challenging whether the amendment to § 62.1-44.15:5 of the State Water Control Law authorizes representational standing to appeal permit and enforcement decisions by the State Water Control Board. A Court of Appeals panel ruled that by amending § 62.1-44.15:5 to authorize Article III standing, the General Assembly implied authorized representational standing. Petition for appeal denied on procedural grounds, petition for rehearing pending.

Stevens v. Commonwealth. Appealing Court of Appeals *en banc* decision that defendant was not entitled to dismissal of his prosecution for involuntary manslaughter while intoxicated because the officer failed to comply with provisions of the implied consent law and that the evidence was sufficient to his guilt of that offense.

Va. Polytechnic Inst. & State Univ. v. Interactive Return Serv., Inc. Appealing trial court decision concerning the scope of the Virginia Debt Set-Off Act.

Washington v. Commonwealth. Appealing Court of Appeals *en banc* decision that the Commonwealth properly presented evidence of defendant's prior violent convictions in the guilt phase of his trial for third time violent offense.

White v. Commonwealth. Appealing Court of Appeals *en banc* decision affirming defendant's convictions for first degree murder and assault and battery of a law enforcement officer on the issue of whether the trial court properly granted the Commonwealth's motion in limine to exclude the defendant's proffered insanity defense.

Wilson v. Commonwealth. Appealing Court of Appeals *en banc* decision affirming the defendant's four convictions for drug-related offenses on the issues of the sufficiency of the evidence of the defendant's constructive possession of marijuana and cocaine, the trial judge's denial of a recusal motion, and the judge's denial of an oral plea "agreement" tendered just as the trial was about to begin.

Winston v. Warden. Petitioning for a writ of habeas corpus challenging conviction for capital murder and sentence of death.

Workman v. Commonwealth. Pending disposition of defendant's petition for appeal from Court of Appeals decision affirming his conviction for voluntary manslaughter as the defendant, who was an off-duty DEA agent at the time of the shooting, argues that the Court gave erroneous jury instructions and that the Commonwealth violated its obligations under *Brady v. Maryland*.

Cases in the Supreme Court of the United States

Bailey v. Director. Petition for certiorari, seeking review of Supreme Court of Virginia decision upholding conviction for possession of firearm by convicted felon, denied.

Bell v. Warden. Petition for certiorari, seeking review of Supreme Court of Virginia decision denying writ of habeas corpus challenging conviction for capital murder and sentence of death, denied.

Bustillo v. Johnson. Petition for certiorari, seeking review of the application of the Vienna Convention on Consular Relations as applied to state habeas corpus proceedings, pending.

Cent. Va. Cmty. Coll. v. Katz. Brief on the Merits, whether Congress may use the Article I Bankruptcy Clause to abrogate sovereign immunity, pending.

Cutter v. Wilkinson. Filing amicus curiae brief on the merits challenging the constitutionality of the Religious Land Use and Institutionalized Persons Act, pending.

Draughn v. Director. Petition for certiorari, seeking review of Fourth Circuit decision reversing United States District Court decision granting plaintiff habeas relief, denied.

Green v. Warden. Petition for certiorari, seeking review of Supreme Court of Virginia decision denying writ of habeas corpus challenging conviction for capital murder and sentence of death, denied.

Hall v. Virginia. Petition for certiorari, seeking review of Fourth Circuit decision declaring that Virginia's congressional redistricting plan is constitutional, denied.

In re Rodriguez. Petition for temporary restraining order/injunction and writ of mandamus against Virginia state and federal judges, pending.

Kreiger v. Virginia. Petition for certiorari, seeking review of Supreme Court of Virginia decision declaring that there is no right to counsel in civil contempt proceedings where there is a possibility of imprisonment, denied.

Litman v. George Mason Univ. Petition for certiorari, seeking review of Fourth Circuit decision declaring that the private right of action to enforce Title IX extends to retaliation claims, denied.

Lovitt v. Director. Petition for certiorari, seeking review of Fourth Circuit decision affirming denial of writ of habeas corpus challenging conviction for capital murder and sentence of death, denied.

Madison v. Riter. Petition for certiorari, seeking review of Fourth Circuit decision declaring that the Religious Land Use and Institutionalized Persons Act is constitutional, denied.

Moore v. Commonwealth. Petition for certiorari, seeking review of Supreme Court of Virginia decision affirming convictions for attempted maiming, attempted robbery, use of a firearm, and conspiracy, denied.

Morrisette v. Warden. Petition for certiorari, seeking review of Supreme Court of Virginia decision granting writ of habeas corpus challenging conviction for capital murder and sentence of death, pending.

Pappas v. Va. State Bar. Petition for certiorari, seeking review of Supreme Court of Virginia decision upholding six-month suspension of attorney's license to practice law imposed by the Disciplinary Board for representing a driver charged with DUI while also representing the passenger injured in the accident, pending.

Pilli v. Va. State Bar. Petition for certiorari, seeking review of Virginia Supreme Court affirmation of the State Bar Disciplinary Board's ninety-day suspension of attorney's license to practice law in Virginia, denied.

Richmond Med. Ctr. for Women v. Herring. Petition for certiorari, seeking review of Fourth Circuit decision declaring that Virginia's ban on partial birth infanticide is unconstitutional, pending.

Schaeffer ex rel. Schaeffer v. Weast. Filing amicus curiae brief in support of petition and on the merits challenging the allocation of the burden of proof in an IDEA administrative hearing, pending.

Schwartz v. Commonwealth. Petition for certiorari, seeking review of Supreme Court of Virginia decision on direct appeal challenging conviction of murder, conspiracy to commit murder, and solicitation of a felony, pending.

Smith v. Director. Petition for certiorari, seeking review of Fourth Circuit denial of habeas corpus petition, denied.

Spencer v. Easter. Petition for certiorari, seeking review of Fourth Circuit decision declaring that a prisoner failed to state a claim under the Americans with Disabilities Act, denied.

Va. Dep't of State Police v. Washington Post. Petition for certiorari, seeking review of Fourth Circuit decision declaring that there is a First Amendment presumptive right of access to sealed court documents that are part of an on-going criminal investigation, denied.

Warden v. Morrisette. Petition for certiorari, seeking review of Supreme Court of Virginia decision granting writ of habeas corpus challenging conviction for capital murder and sentence of death, pending.

Williams v. Commonwealth. Petition for certiorari, seeking review of Supreme Court of Virginia decision affirming five robbery convictions, denied.

Winston v. Commonwealth. Petition for certiorari, seeking review of Supreme Court of Virginia decision affirming conviction for capital murder and sentence of death, denied.

Wolfe v. Warden. Petition for certiorari, seeking review of Supreme Court of Virginia decision denying writ of habeas corpus challenging conviction for capital murder and sentence of death, denied.

Yamaha Motor Corp., U.S.A. v. Jim's Motorcycle, Inc. Petition for certiorari, seeking review of Fourth Circuit decision declaring that Virginia statute allowing motorcycle dealers to protest manufacturer's decision to create another dealership is unconstitutional, denied.

Official Opinions

of

Attorneys General Jerry W. Kilgore and Judith Williams Jagdmann

Section 2.2-505 of the *Code of Virginia* authorizes the Attorney General to render official written advisory opinions 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 opinion number preceding the opinion first appears. Cite an opinion in this report as follows: 2005 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 LEXISNEXIS, beginning with opinions issued in July 1958; and on WESTLAW, beginning with opinions issued in 1976. The following CD-ROM products contain opinions of the Attorney General: Michie's Law on Disc for Virginia, including opinions from July 1980; CaseFinder, including opinions from July 1967; and Virginia Reporter & West's® Virginia Code, including opinions from July 1976.

OP. NO. 05-029

ADMINISTRATION OF GOVERNMENT: STATE AND LOCAL GOVERNMENT CONFLICT OF INTERESTS ACT — VIRGINIA PUBLIC PROCUREMENT ACT – ETHICS IN PUBLIC CONTRACTING — STATE OFFICERS AND EMPLOYEES – GENERAL PROVISIONS.

No violation of Conflict Act or Procurement Act for member of health regulatory board to vote for his board to contract with organization that administers licensure examinations; no violation to vote for board to become member of such organization, provided any reimbursement of allowable expenses to board member is consistent with Conflict Act. Violation of Conflict Act and Procurement Act for board member to vote to contract with or to join organization where there is existing arrangement that organization will employ board member subsequent to his board service or for board member to accept payment of monies in excess of allowable per diem payments and travel reimbursement allowances.

THE HONORABLE ROBERT A. NEBIKER
DIRECTOR, DEPARTMENT OF HEALTH PROFESSIONS
JUNE 21, 2005

ISSUES PRESENTED

You ask whether it would be a violation of the State and Local Government Conflict of Interests Act, §§ 2.2-3100 through 2.2-3131 (the "Conflict Act"), or the Virginia Public Procurement Act, §§ 2.2-4300 through 2.2-4377 (the "Procurement Act"), for members of health regulatory boards to vote to contract with or join an organization in the business of administering licensure examinations where the Department of Health Professions reimburses the board members for per diem and expenses as allowable under state law and travel regulations. You next ask whether it would be a violation for board members to vote to contract with or join an organization that extends an offer of employment as a paid examiner to members once they leave their respective board or provides payment to the board member in excess of the allowable per diem payments and travel expense reimbursement.

RESPONSE

It is my opinion that it is not a violation of the Conflict Act or the Procurement Act for a board member to vote to authorize his board to contract with an organization in the business of administering licensure examinations or become a member of such organization, provided that reimbursement of allowable expenses incurred by board members while performing examination related services is consistent with § 2.2-3103(1) of the Conflict Act. It is further my opinion, however, that a board member who votes to approve a contract or to join an organization where, at the time of the vote, there is an existing arrangement concerning prospective employment of such board member after departure from his board or who accepts the payment of monies from an organization in excess of allowable per diem payments and travel reimbursement allowances would violate § 2.2-3103(1), (3), (5)-(6), § 2.2-3106(A), and § 2.2-3112(A)(1) of the Conflict Act as well as § 2.2-4369(3)-(4) of the Procurement Act.

BACKGROUND

You state that most examinations used by health regulatory boards to determine the competency of candidates for licensure are developed and administered by national

or regional organizations. You note that a candidate who achieves a passing score on an examination is accepted as meeting one of the criteria established in law or regulation for either licensure or certification. Additionally, you relate that boards have the duty and responsibility to ensure that candidates are appropriately examined, and they routinely vote to accept examination results from a national or regional testing agency by either joining the organization or entering into a contract with the organization.[1]

You relate that organizations providing testing services generally receive compensation from fees collected directly from candidates or from billing the board. When a board member participates in examination development or serves as an examiner, that board member is entitled to be reimbursed by the Department for per diem payments pursuant to § 2.2-2813(B)[2] and travel expenses as allowable under state law and travel regulations. In some cases, you note that such organizations may offer to pay members or staff the cost of travel and expenses in excess of allowable reimbursement. In other cases, an organization may, as a matter of its organizational bylaws, extend an offer of future employment, such as employment as a paid examiner, to members once they leave the board in question.

APPLICABLE LAW AND DISCUSSION

In enacting the Conflict Act, the General Assembly recognizes that our system of government is dependent in part upon its citizens maintaining the highest trust in their public officers and employees. The purpose of the Act is to assure the citizens of the Commonwealth that the judgment of public officers and employees will not be compromised by inappropriate conflicts.[3] The Act provides minimum rules of ethical conduct for state government officers and employees and contains three general types of restrictions and prohibitions: (1) it details certain types of conduct that are improper for such officers and employees;[4] (2) it restricts the personal interest such officers and employees may have in certain contracts with their own or other governmental agencies;[5] and (3) it restricts the participation of such officers and employees in transactions of their governmental agencies in which they have a personal interest.[6]

The Conflict Act applies to state and local government officers and employees.[7] As a member of a health regulatory board you are an "officer"[8] of a state "governmental agency,"[9] subject to the Conflict Act's prohibitions and restrictions. When the subject matter of a state officer's outside business interest is closely related to the officer's official responsibilities, this Office previously has warned the officer to be alert to potential violations of the Act.[10] Such violations may arise from either the use of confidential information obtained in the officer's official capacity[11] or because some outside employment opportunity has been offered in an attempt to influence the officer's official actions.[12]

You ask whether it would be a violation of the Conflict Act or the Procurement Act for members of health regulatory boards to vote to contract with or join an organization in the business of administering licensure examinations where the

Department of Health Professions reimburses the board members for per diem and expenses as allowable under state law and travel regulations. It is my opinion that such facts do not describe conduct in violation of the Conflict Act as it appears that the board members would not be performing acts that would constitute "prohibited conduct" pursuant to § 2.2-3103.[13] Similarly, you do not present any facts that would demonstrate that board members would have a "personal interest in a contract"[14] or a "personal interest in a transaction"[15] as defined in § 2.2-3101. Reimbursement, however, of allowable expenses incurred by board members while performing examination related services must be limited to the per diem payments established by §§ 2.2-2104 and 2.2-2813(B) and to the travel expenses allowable under state law and travel regulations.[16] Additionally, the vote of a board member to enter into a contractual relationship with a licensure examination organization would not violate the Procurement Act provided the amount of the reimbursement remains within the allowable state guidelines, and there is no arrangement concerning prospective employment with a bidder, offeror, or contractor that would constitute a violation of § 2.2-4369.[17]

You next ask whether it would be a violation for board members to vote to contract with or join an organization that extends them an offer of paid employment as an examiner once they leave their respective board or that provides payment to such members in excess of the allowable per diem rates and travel expenses. When the subject matter of a board member's future employment and compensation is closely related to the board member's official responsibilities, as in this factual situation, there is, at the very least, the appearance of a violation of the Conflict Act. Prior opinions have held that the Conflict Act restricts the private financial activities of officers of state governmental agencies when there is a close relationship between the officers' private financial activities and their official duties.[18] Section 2.2-3103 provides that no state officer or employee shall:

> 1. Solicit or accept money or other thing of value for services performed within the scope of his official duties, except the compensation, expenses or other remuneration paid by the agency of which he is an officer or employee. This prohibition shall not apply to the acceptance of special benefits that may be authorized by law;
>
> ….
>
> 3. Offer or accept any money or other thing of value for or in consideration of the use of his public position to obtain a contract for any person or business with any governmental or advisory agency;
>
> ….
>
> 5. Accept any money, loan, gift, favor, service, or business or professional opportunity that reasonably tends to influence him in the performance of his official duties.…; [or]

> 6. Accept any business or professional opportunity when he knows that there is a reasonable likelihood that the opportunity is being afforded him to influence him in the performance of his official duties[.]

Section 2.2-3103(1) prohibits a board member from accepting money or reimbursement for expenses for services he may perform for the testing agency under the contract in excess of the compensation and expenses paid by the board. In addition, a board member may not accept any money or reimbursement for expenses under § 2.2-3103(3) in exchange for his vote to award a contract to a testing agency that provides such benefits. Further, it may reasonably be inferred that a board member's acceptance of an employment opportunity may tend to influence him in the performance of his official duties under § 2.2-3103(5). Finally, although you present no information that the inclusion of an employment opportunity for participating boards members or payment of costs and travel expenses in excess of allowable state rates has been offered to influence such board members to vote to join or contract with that organization, it presents at least the appearance of impropriety. Additionally, if a board member knows, or reasonably should know, that the employment opportunity is being offered to influence him, it would constitute a violation of § 2.2-3103(6).

Section 2.2-3106(A) provides that "[n]o officer or employee of any governmental agency of state government … shall have a personal interest in a contract with the governmental agency of which he is an officer or employee, other than his own contract of employment." Section 2.2-3112(A)(1) further requires an officer of a state governmental agency to "disqualify himself from participating in the transaction if (i) the transaction has application solely to property or a business … in which he has a personal interest … or (ii) he is unable to participate pursuant to subdivision 2, 3 or 4."[19] Personal interest includes "salary, other compensation, fringe benefits, or benefits from the use of property, or any combination thereof, … that exceeds, or may reasonably be anticipated to exceed, $10,000 annually."[20] Personal interest in a transaction includes a personal interest of an officer in any matter considered by his agency when the officer may realize a reasonably foreseeable direct or indirect benefit as a result of the agency's action.[21] In the facts you present, where there is an offer of employment or payment of costs and expenses in excess of the allowable state reimbursement rates, or a combination of both, which exceeds or may be reasonably anticipated to exceed $10,000 annually, board members would have a personal interest in such a contract and could not vote to enter into that contract without violating the Conflict Act. From the facts you present, the availability of future employment where a board member's personal interest may be anticipated to exceed $10,000 annually is a reasonably foreseeable direct benefit;[22] and, as a result, such a board member's vote would violate §§ 2.2-3106(A) and 2.2-3112(A)(1) of the Conflict Act.

Lastly, Article 6 of the Procurement Act,[23] specifically, § 2.2-4369, prohibits a public employee, in this case a health regulatory board member, having official responsibility for a procurement transaction from participating in that transaction on behalf of

the public body when he has a pecuniary interest in the procurement transaction, or knows that he is negotiating, or has an arrangement concerning prospective employment with a bidder, offeror, or contractor.[24] Thus, a board member who votes to award a contract to a business organization when he knows that he may receive payment from the contractor in excess of Department per diem payments and travel expense reimbursement allowances or have an arrangement concerning prospective employment as an examiner would violate the Procurement Act.

CONCLUSION

Accordingly, it is my opinion that it is not a violation of the Conflict Act or the Procurement Act for a board member to vote to authorize his board to contract with an organization in the business of administering licensure examinations or become a member of such organization, provided that reimbursement of allowable expenses incurred by board members while performing examination related services is consistent with § 2.2-3103(1) of the Conflict Act. It is further my opinion, however, that a board member who votes to approve a contract or to join an organization where, at the time of the vote, there is an existing arrangement concerning prospective employment of such board member after departure from his board or who accepts the payment of monies from an organization in excess of allowable per diem payments and travel reimbursement allowances would violate § 2.2-3103(1), (3), (5)-(6), § 2.2-3106(A), and § 2.2-3112(A)(1) of the Conflict Act as well as § 2.2-4369(3)-(4) of the Procurement Act.

[1]I note that § 54.1-2400(2) provides, among the general powers and duties of a health regulatory board, the duty "[t]o examine or cause to be examined applicants for certification or licensure." In my view, a health regulatory board has the implied power to make arrangements to examine applicants for licensure. When a statute is silent on the method by which a regulatory power is to be exercised, any reasonable method not in conflict with the Constitution or statutes of the Commonwealth may be selected. *See* 1992 Op. Va. Att'y Gen. 53, 56.

[2]Section 2.2-2813(B) provides in pertinent part that "[s]ubject to the provisions of subsections C and D, members of boards, commissions, committees, councils and other collegial bodies, who are appointed at the state level, shall be compensated at the rate of $50 per day, unless a different rate of compensation is specified by statute for such members, plus expenses for each day or portion thereof in which the member is engaged in the business of that body."

[3]*See* § 2.2-3100 (LexisNexis Supp. 2004).

[4]*See* § 2.2-3103 (LexisNexis Repl. Vol. 2001).

[5]*See* § 2.2-3106(A), (B) (LexisNexis Supp. 2004).

[6]*See* § 2.2-3112(A)(1) (LexisNexis Supp. 2004).

[7]"[F]or the purpose of establishing a single body of law applicable to all state and local government officers and employees on the subject of conflict of interests, the General Assembly enacts [the] State and Local Government Conflict of Interests Act so that the standards of conduct for such officers and employees may be uniform throughout the Commonwealth." Section 2.2-3100.

[8]"*'Officer'* means any person appointed or elected to any governmental or advisory agency … whether or not he receives compensation or other emolument of office." Section 2.2-3101 (LexisNexis Supp. 2004).

[9]"*'Governmental agency'* means each component part of the legislative, executive or judicial branches of state and local government, including each office, department, authority, post, commission, committee, and each institution or board created by law to exercise some regulatory or sovereign power or duty as distinguished from purely advisory powers or duties." *Id.*

[10]*See* COI Adv. Op. No. 90-A16 (1990) (noting that § 2.1-639.4(4), predecessor to § 2.2-3103(4), prohibits state officer from using confidential information acquired by reason of public position and which is not available to public).

[11]*Id.*

[12]*See* COI Adv. Op.: No. 9-A19 (1989) (concluding that § 2.1-639.4(5), predecessor to § 2.2-3103(5), prohibits member of Advisory Commission on Mapping, Surveying, and Land Information Systems from offering consulting services similar to those provided by agency advised by Commission); No. 8-A24 (1988) (concluding that private radon testing services performed by radiation specialist in Department of Health may potentially violate Act).

[13]Section 2.2-3103 sets out generally prohibited and unlawful conduct applicable to state and local government officers and employees. *See infra*, pp. 5-6.

[14]"*'Personal interest in a contract'* means a personal interest that an officer … 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 that is a party to the contract." Section 2.2-3101. "Personal interest" includes "salary, other compensation, fringe benefits, or benefits from the use of property, or any combination thereof, … that exceeds, or may reasonably be anticipated to exceed, $10,000 annually." *Id.*

[15]"*'Personal interest in a transaction'* means a personal interest of an officer … has in any matter considered by his agency. Such personal interest exists when an officer … or a member of his immediate family has a personal interest in property or a business or governmental agency, or represents or provides services to any individual or business and such property, business or represented or served individual or business (i) is the subject of the transaction or (ii) may realize a reasonably foreseeable direct or indirect benefit or detriment as a result of the action of the agency considering the transaction." *Id*.

[16]Reimbursement in excess of statutory per diem would be considered accepting money or other thing of value for services performed. *See* § 2.2-3103(1).

[17]Section 2.2-4369 provides in pertinent part that "[e]xcept as may be specifically allowed by subdivisions A 2, 3 and 4 of § 2.2-3112, no public employee having official responsibility for a procurement transaction shall participate in that transaction on behalf of the public body when the employee knows that:
"….
"3. The employee … has a pecuniary interest arising from the procurement transaction; or
"4. The employee … is negotiating, or has an arrangement concerning, prospective employment with a bidder, offeror or contractor."

For purposes of Article 6 of the Procurement Act, § 2.2-4368 defines "public employee" to mean "any person employed by a public body, including elected officials or appointed members of governing bodies." Section 2.2-3112(A)(2)-(4) permits an officer to participate in a transaction: (a) if he is a member of a business, profession, occupation, or group of three or more persons who are affected by the transaction; (b) when a party to the transaction is a client of his firm and he does not personally represent or provide services to the client; or (c) if the transaction affects the public generally. The officer must comply with any declaration requirements. *See* § 2.2-3112(A)(2)-(3).

[18]*See* AG COI:00-A06 (2000) (concluding that it is not conflict of interest for environmental health manager employed by state Health Department to teach course for regional health environment association).

[19]*See supra* note 15.

[20]Section 2.2-3100.

[21]*See id.*

[22]Prior opinions of this Office have distinguished what constitutes a reasonably foreseeable direct or indirect benefit. *See, e.g.*, COI Adv. Op.: No. 02-A02 (2002) (concluding that membership on Virginia Racing Commission and votes thereon do not constitute direct or indirect benefit even though he is also member of Virginia Thoroughbred Association); No. 90-A7 (1990) (concluding that reasonably foreseeable direct or indirect benefit to personal interest from rezoning of tract of land is too remote to establish personal interest in transaction)); No. 9-A06 (1989) (concluding that reasonably foreseeable direct or

indirect benefit to business from potential hiring of business by prospective client is too remote to establish "personal interest in a transaction"). You relate that in some cases, organizations will extend offers of future employment to board members. Where the organization's bylaws specifically provide for, and in fact, contemplate future employment of former board members, it is my opinion that such a provision constitutes a reasonably foreseeable direct benefit.

[23] *See* §§ 2.2-4367 to 2.2-4377 (LexisNexis Repl. Vol. 2001 & Supp. 2004) (Ethics in Public Contracting). The provisions of Article 6 "supplement, but shall not supercede, other provisions of law including, but not limited to, the [Conflict Act]." Section 2.2-4367 (LexisNexis Rep. Vol. 2001). The provisions of Article 6 also "apply notwithstanding the fact that the conduct described may not constitute a violation of the [Conflict Act]." *Id.*

[24] Section 2.2-4370 also prohibits any "public employee or former public employee having official responsibility for procurement transactions [from accepting] employment with any bidder, offeror or contractor with whom [he] dealt in an official capacity concerning procurement transactions for a period of one year from the cessation of employment by the public body unless [he] provides written notification to the public body … prior to commencement of employment by that bidder, offeror or contractor."

OP. NO. 05-040

ADMINISTRATION OF GOVERNMENT: STATE OFFICERS AND EMPLOYEES – GENERAL PROVISIONS.

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

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

MILITARY AND EMERGENCY LAWS: MILITARY LAWS OF VIRGINIA.

Commonwealth's attorney is not required to relinquish his office when involuntarily recalled to active military duty. Commonwealth's attorney has sole discretion to appoint assistant to perform duties of his office during such absence. Should Commonwealth's attorney resign and circuit court appoint acting Commonwealth's attorney, such attorney may act in place of and otherwise perform duties and exercise powers of regular Commonwealth's attorney.

THE HONORABLE GORDON E. HANNETT
FLOYD COUNTY COMMONWEALTH'S ATTORNEY
MAY 5, 2005

ISSUES PRESENTED

You ask whether, as the Commonwealth's Attorney for Floyd County, you are required to relinquish your office when you involuntarily are recalled to active military duty.[1] If not, you ask whether you have the sole discretion to appoint an assistant Commonwealth's attorney to perform your duties during your absence or whether the local governing board or the circuit court may appoint an assistant. Finally, in the event that the circuit court appoints either a Commonwealth's attorney or an assistant to serve in your absence, you ask what effect such an appointment has on your elected position.

RESPONSE

It is my opinion that the Commonwealth's attorney, a local constitutional officer, is not required to relinquish his office when involuntarily recalled to active military duty. Furthermore, it is my opinion that you, as Commonwealth's attorney, have the sole discretion to appoint an assistant Commonwealth's attorney to perform the

duties of your office during your absence. Finally, if you do resign and the circuit court appoints an acting Commonwealth's attorney pursuant to the provisions of § 19.2-156, such acting Commonwealth's attorney may act in place of and otherwise perform the duties and exercise the powers of a regular Commonwealth's attorney.

BACKGROUND

You advise that you were elected Commonwealth's attorney for Floyd County in November 2003. Your term of office will end on December 31, 2007. You also advise that your office does not currently employ an assistant Commonwealth's attorney.

You also advise that in February 2005, your Army Reserve unit was activated for military service in Iraq. The mobilization of the unit is scheduled for May 8, 2005. You relate that you will actively manage your office during the period of your mobilization through use of electronic mail messages and frequent telephone exchanges. To that end, you advise that the State Compensation Board recently has approved your request to fund a part-time, temporary assistant Commonwealth's attorney. Such an assistant will be expected to work up to four days per week in the Commonwealth's attorney's office. You indicate that you have identified an attorney with more than twelve years experience in criminal law. You note, however, that the circuit court has advised that you must either appoint a local criminal defense attorney or the court will appoint one of them.

APPLICABLE LAW AND DISCUSSION

A 2002 opinion of the Attorney General responds to questions regarding a county treasurer who involuntarily is recalled to active military duty.[2] Among other issues, the opinion concludes that the provisions of § 2.2-2802 do not require such a county constitutional officer to relinquish his office when involuntarily recalled to active military duty.[3] The opinion notes that the Supreme Court of Virginia specifically has held that a city councilman, inducted into active military service as an officer of a National Guard unit, does not forfeit his office under the predecessor statute to § 2.2-2802.[4]

A 2004 opinion of the Attorney General responds to questions regarding a member of a board of supervisors, a public officer, who involuntarily is recalled to active military duty.[5] The opinion concludes that a vacancy in that member's office on the board of supervisors does not occur until he provides notice, pursuant to § 2.2-2802 to the body authorized by law to fill vacancies in his office, of his call to active duty. In the absence of the notice specified in § 2.2-2802, a vacancy in the office does not arise, and the body authorized by law to fill vacancies in such office may not appoint a temporary replacement.[6]

Section 2.2-2802, in part, provides:

> No … county … officer … shall forfeit his title to office … or vacate the same by reason of either engaging in the war service of the United States … when called to active duty in the armed

> forces of the United States. Any such officer … who, voluntarily or otherwise, enters upon such war service or is called to service may notify the … body authorized by law to fill vacancies in his office, of such fact, and thereupon be relieved from the duties of his office … during the period of such service. The … body authorized to fill vacancies shall designate some suitable person to perform the duties of such office as acting officer during the period the regular officer is engaged in such service, and during such period the acting officer shall be vested with all the powers, authority, rights and duties of the regular officer for whom he is acting.

"Constitutional officers" are those county and city officers who are elected by the qualified voters, i.e., treasurers, sheriffs, Commonwealth's attorneys, clerks of courts of record, and commissioners of the revenue.[7] Accordingly, the conclusion of the 2002 opinion applies to county constitutional officers who involuntarily are recalled to active military duty.[8] It is my opinion that your involuntary recall to active military duty does not require you to relinquish the office of Commonwealth's Attorney of Floyd County.

Furthermore, in the event that you do not provide the notice specified in § 2.2-2802, a vacancy does not occur in your office.[9] The 2000 Session of the General Assembly changed the process by which vacancies in constitutional offices are filled.[10] Prior to the enactment of § 24.2-228.1, the circuit court of the locality appointed a person to fill the vacancy until a special election was conducted.[11] Section 24.2-228.1(B) authorizes the circuit court to make interim appointments to fill vacancies only where there is no full-time assistant Commonwealth's attorney or where such full-time assistant declines to serve. Accordingly, any such notice under the provisions of § 2.2-2802 must be given to the circuit court, and the circuit court is authorized to make an interim appointment only where there is no full-time assistant Commonwealth's attorney.

A 1998 opinion of the Attorney General notes that § 15.2-1626 authorizes, with the approval of the Compensation Board, every county and city to provide for employing compensated assistants to the Commonwealth's attorney.[12] The opinion specifically notes that § 15.2-1626 also provides that such assistant(s) shall be appointed by the Commonwealth's attorney "for a term coterminous with his own." The Supreme Court of Virginia has commented that, as a general rule, the duties of local constitutional officers and their deputies are regulated and defined by statute.[13] Therefore, as a constitutional officer, the Commonwealth's attorney solely is responsible for employing assistant Commonwealth's attorneys.

In § 19.2-156, the General Assembly permits the circuit court to appoint an acting Commonwealth's attorney in certain situations as follows:

> If it shall be necessary for the [Commonwealth's attorney] of any county or city to absent himself for a prolonged period of

> time from the performance of the duties of his office, then, upon notification by such [Commonwealth's attorney], or by the court on its own motion, and the facts being entered of record, the judge of the circuit court shall appoint an attorney-at-law as acting [Commonwealth's attorney] to serve for such length of time as may be necessary. Such acting [Commonwealth's attorney] shall act in place of and otherwise perform the duties and exercise the powers of such regular [Commonwealth's attorney], and while so acting shall receive the salary and allowance for expenses fixed by the State Compensation Board for such regular [Commonwealth's attorney], who during such length of time shall not receive any such salary or allowance.

"[T]he use of 'shall,' in a statute requiring action by a public official, is directory and not mandatory unless the statute manifests a contrary intent."[14] "A statute directing the mode of proceeding by public officers is to be deemed directory, and a precise compliance is not to be deemed essential to the validity of the proceedings, unless so declared by statute."[15] The General Assembly does not require in clear and unambiguous language that the circuit court appoint an acting Commonwealth's attorney. When the General Assembly intends to enact a mandatory requirement, it knows how to express its intention.[16] I am of the opinion that the use of the term "shall" in § 19.2-156 is not intended as a mandatory requirement for the circuit court to appoint an acting Commonwealth's attorney to serve during the period of your military service. Furthermore, if § 19.2-156 is intended to be mandatory in certain circumstances, it is not mandatory in the situation you describe. Section 2.2-2802 specifically provides that an officer is not required to forfeit his post when called to active duty. Section 2.2-2802 was reenacted by the 2001 Session of the General Assembly.[17] Section 19.2-156 has not been reenacted or amended since 1975.[18] If two statutes are *in pari materia* and have certain irreconcilable provisions, the later enactment amends the earlier statute.[19] Therefore, in any event, you are not required to resign your post and an appointment to replace you, absent your resignation, is not justified.

Further, I am unaware of any statute that prevents you from continuing to oversee and manage your office via use of the Internet, electronic mail, or long distance telephone calls. Accordingly, you may actively manage your office during the period of your mobilization by use of electronic mail messages and frequent telephone exchanges, and you may hire an assistant with twelve years experience in criminal law who will be in the office up to four days per week.

CONCLUSION

Accordingly, it is my opinion that the Commonwealth's attorney, a local constitutional officer, is not required to relinquish his office when involuntarily recalled to active military duty. Furthermore, it is my opinion that you, as Commonwealth's attorney, have the sole discretion to appoint an assistant Commonwealth's attorney to perform the duties of your office during your absence. Finally, if you do resign and the circuit

court appoints an acting Commonwealth's attorney pursuant to the provisions of § 19.2-156, such acting Commonwealth's attorney may act in place of and otherwise perform the duties and exercise the powers of a regular Commonwealth's attorney.

[1]By Executive Order dated September 14, 2001, the President of the United States provided authority to the Secretary of the Department of Defense to order any unit in the Ready Reserve, and any member of the Ready Reserve not assigned to an organized unit, to active duty for not more than 24 consecutive months. *See* Exec. Order No. 13223, 66 Fed. Reg. 48,201 (Sept. 18, 2001), amended by Exec. Order No. 13253, 67 Fed. Reg. 2,791 (Jan 18, 2002), and further amended by Exec. Order No. 13286, 68 Fed. Reg. 10,619 (Mar. 5, 2003).

[2]2002 Op. Va. Att'y Gen. 58.

[3]*Id.* at 59.

[4]City of Lynchburg v. Suttenfield, 177 Va. 212, 13 S.E.2d 323 (1941).

[5]2004 Op. Va. Att'y Gen. 6.

[6]*Id.* at 7.

[7]Va. Const. art. VII, § 4.

[8]*See supra* note 2.

[9]*See supra* note 6 and accompanying text.

[10]*See* 2000 Va. Acts ch. 787, at 1671, 1672; *id.* ch. 1070, at 2615, 2616 (adding § 24.2-228.1).

[11]*Id.* at 1671-72, 2615, respectively (amending and reenacting §§ 24.2-226, 24.2-227 and deleting terms "constitutional office" and "constitutional officers").

[12]1998 Op. Va. Att'y Gen. 65, 65; *see also* Yarbrough v. Commonwealth, 258 Va. 347, 361 n.3, 519 S.E.2d 602, 608 n.3 (1999) (noting that Commonwealth's attorney is constitutional officer and that Compensation Board must authorize employment of assistant Commonwealth's attorney).

[13]*See* Hilton v. Amburgey, 198 Va. 727, 729, 96 S.E.2d 151, 152 (1957); Narrows Grocery Co. v. Bailey, 161 Va. 278, 284, 170 S.E. 730, 732 (1933).

[14]Jamborsky v. Baskins, 247 Va. 506, 511, 442 S.E.2d 636, 638 (1994); *see also* Commonwealth v. Rafferty, 241 Va. 319, 324-25, 402 S.E.2d 17, 20 (1991); Fox v. Custis, 236 Va. 69, 77, 372 S.E.2d 373, 377 (1988); Moore v. Commonwealth, 218 Va. 388, 391-92, 237 S.E.2d 187, 190 (1977); Huffman v. Kite, 198 Va. 196, 202, 93 S.E.2d 328, 332 (1956); Nelms v. Vaughan, 84 Va. 696, 699-700, 5 S.E. 704, 706 (1888).

[15]*Nelms*, 84 Va. at 699, 5 S.E. at 706, *quoted in Rafferty*, 241 Va. at 324, 402 S.E.2d at 20.

[16]*See* Op. Va. Att'y Gen.: 2002 at 233, 237; 1999 at 168, 171; 1998 at 87, 88.

[17]*See* 2001 Va. Acts ch. 844, at 1194 (amending and adding Title 2.2, §§ 2.2-100 through 2.2-5803, and repealing Title 2.1, §§ 2.1-1 through 2.1-817).

[18]*See* 1975 Va. Acts ch. 495, at 847 (amending and adding Title 19.2, §§ 19.2-1 through 19.2-392, and repealing Title 19.1, §§ 19.1-1 through 19.1-400).

[19]*See* 2003 Op. Va. Att'y Gen. 6, 9-10.

OP. NO. 04-087

ADMINISTRATION OF GOVERNMENT: VIRGINIA FREEDOM OF INFORMATION ACT.

Names and identities of individual donors making voluntary donations to sheriff's office may not be kept confidential and must be disclosed to citizens of Commonwealth and Commonwealth's attorney.

THE HONORABLE H. LEE HART
SHERIFF FOR CULPEPER COUNTY
JANUARY 11, 2005

ISSUES PRESENTED

You ask whether the names and identities of individual donors making voluntary donations to the sheriff's office may be kept confidential and not disclosed to the citizens of the Commonwealth and the Commonwealth's attorney.

RESPONSE

It is my opinion that the names and identities of individual donors making voluntary donations to the sheriff's office may not be kept confidential and must be disclosed to the citizens of the Commonwealth and the Commonwealth's attorney.

BACKGROUND

You advise that the sheriffs' offices in the Commonwealth accept donations from citizens and businesses that want to support law enforcement activities. You relate that acceptance of such donations is a common practice among the sheriffs. Further, you relate that the donations have been traditionally used to support special programs and community policing efforts that are not funded by government appropriation. Donations are only accepted when there is no promise or expectation of anything in return being provided to the donor.

You further advise that your office uses the donations to purchase specialized equipment and to support the Citizens Police Academy, the DARE program, and other similar programs that benefit the community. You relate that when you receive donations, the funds are submitted to the finance office of Culpeper County for processing and incorporation in your budget. You further advise that some donors, wishing to remain anonymous, have requested that you keep their names confidential. Such donors have indicated that they do not want to receive solicitations from other organizations and they wish to protect their privacy. You state that you are committed to honoring their request, barring any legal or moral obligation for disclosure.

You advise that the Commonwealth's attorney for Culpeper County has raised a question regarding his responsibility to know the names of each individual that donates to the sheriff's office. You relate that his position is that this information may be exculpatory, and that he is required to know all information in possession of the sheriff's office. You believe that there is no blanket requirement for the Commonwealth's attorney to have this information when it is not expressly related to a specific criminal case.

APPLICABLE LAW AND DISCUSSION

The sheriff is a constitutional officer whose duties "shall be prescribed by general law or special act."[1] While the powers and duties of this constitutional officer are those prescribed by statute,[2] except as limited by law, the constitutional officer is free to discharge his prescribed powers and duties in the manner he deems appropriate.[3]

A 1985 opinion of the Attorney General observes that it is within the inherent authority of a constitutional officer who has substantial discretion in managing his office, to seek and accept funds which enable him to discharge his prescribed duties in those areas within which he has discretion to act.[4] The opinion concludes that a sheriff may raise funds and accept donations for law enforcement operations to be undertaken by his office.[5]

A 1980 opinion of the Attorney General considers whether the financial records pertaining to funds in a special account maintained by the sheriff's office are official records subject to required public disclosure under The Virginia Freedom of Information Act.[6] The funds in the special account are derived from sources such as the sale of calendars and receipts from drink vending machines and are not provided by state or local government appropriations.[7] All of the funds in the special account are used for expenses related to the functions of the sheriff's office.[8] The opinion concludes that the special fund accounts are official records of the sheriff's office subject to the public disclosure requirements of the Act.[9]

The Supreme Court of Virginia recognizes that construction of the Constitution of Virginia and statutes of the Commonwealth by the Attorney General under the provisions of § 2.2-505 "is of the most persuasive character and is entitled to due consideration."[10] The Court also recognizes that "construction of a statute by the Attorney General is persuasive and entitled to considerable weight."[11] The General Assembly "is presumed to have knowledge of the Attorney General's interpretation of statutes, and the General Assembly's failure to make corrective amendments evinces legislative acquiescence in the Attorney General's interpretation."[12] The General Assembly has not taken any corrective action that alters the conclusions of the 1980 and 1985 opinions of the Attorney General. Therefore, the conclusions of these prior opinions govern my response to your inquiry.

Enacted in 1968,[13] The Virginia Freedom of Information Act "ensures the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted."[14] Section 2.2-3700(B) of the Act sets forth the policy of the Commonwealth that "[t]he affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government." Moreover, the Act

> shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government. Any exemption from public access to records … shall be narrowly construed and no record shall be withheld … unless specifically made exempt pursuant to [the Act] or other specific provision of law.[15]

The General Assembly framed The Virginia Freedom of Information Act to be liberally construed, which promotes citizen awareness of the government's activities and allows citizens to witness governmental operations.[16] The purpose of the Act is to promote the public policy of conducting the business of government in the public eye.

A 1976 opinion of the Attorney General observes that under The Freedom of Information Act, records which are kept by the sheriff's office in the transaction of public business would constitute official records, which are subject to disclosure unless specifically exempted by statute.[17] Thus, all official records are subject to disclosure unless they are specifically exempted. The Act does not require that a request for official records be made in writing or mention the Act. I have reviewed the exemptions from production under the Act. I find no express exemption for the information you wish to be kept confidential or one that permits the names of donors to be kept confidential and exempt from public disclosure. The Act specifically requires that exemptions be strictly construed.[18]

The records to which you refer are maintained by you, the sheriff, or the finance office of Culpeper County, which is a public body subject to the disclosure requirements of the Act. The names of the donors are kept by the sheriff's office, which is also a public body subject to the disclosure requirements of the Act. Therefore, I am required to conclude that you must make such records and names available to the Commonwealth's attorney or any citizen who requests them.

CONCLUSION

Accordingly, it is my opinion that the names and identities of individual donors making voluntary donations to the sheriff's office may not be kept confidential and must be disclosed to the citizens of the Commonwealth and the Commonwealth's attorney.

[1] VA. CONST. art. VII, § 4.

[2] *See* Hilton v. Amburgey, 198 Va. 727, 729, 96 S.E.2d 151, 152 (1957); Old v. Commonwealth, 148 Va. 299, 138 S.E. 485 (1927).

[3] *See* 1984-1985 Op. Va. Att'y Gen. 284, 284.

[4] *Id.*

[5] *Id.* at 285.

[6] *See* 1980-1981 Op. Va. Att'y Gen. 392, 393 (interpreting §§ 2.1-341 and 2.1-342, predecessor statutes to §§ 2.2-3701 and 2.2-3704); *see also* 1968 Va. Acts ch. 479, at 690, 690-93 (enacting The Virginia Freedom of Information Act, codified as amended at VA. CODE ANN. tit. 2.2, ch. 37, §§ 2.2-3700 to 2.2-3714 (LexisNexis Repl. Vol. 2001 & Supp. 2004)).

[7] 1980-1981 Op. Va. Att'y Gen., *supra* note 6.

[8] *Id.*

[9] *Id.* at 394.

[10] Barber v. City of Danville, 149 Va. 418, 424, 141 S.E. 126, 127 (1928); *see also* County Bd. v. Brown, 229 Va. 341, 347, 329 S.E.2d 468, 472 (1985); Bd. of Supvrs. v. Marshall, Clerk, 215 Va. 756, 214 S.E.2d 146 (1975).

[11] Andrews v. Shepherd, 201 Va. 412, 415, 111 S.E.2d 279, 282 (1959).

[12] City of Winchester v. Am, Woodmark Corp., 250 Va. 451, 458, 464 S.E.2d 148, 153 (1995).

[13] *See* 1968 Va. Acts, *supra* note 6.

[14] Section 2.2-3700(B) (LexisNexis Supp. 2004).

[15] *Id.*

[16] *See id.*

[17] *See* 1976-1977 Op. Va. Att'y Gen. 250, 252.

[18] *See* § 2.2-3700(B).

OP. NO. 05-045

2005 APPROPRIATION ACT: DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT.

Act requires that existing Artisans Center of Virginia participate in development of Shenandoah Valley regional art center to extent Center is willing to participate.

THE HONORABLE R. STEVEN LANDES
MEMBER, HOUSE OF DELEGATES
JULY 21, 2005

ISSUE PRESENTED

You ask whether Item 112.10(F) of the 2005 Appropriation Act[1] requires that the existing Artisans Center of Virginia participate in the effort to develop a regional artisan center in the Shenandoah Valley Region.

RESPONSE

It is my opinion that Item 112.10(F) of the 2005 Appropriation Act does require that the existing Artisans Center of Virginia participate in the effort to develop a regional artisan center in the Shenandoah Valley Region to the extent the Artisan Center of Virginia, as a private non-profit organization, is willing to participate.

APPLICABLE LAW AND DISCUSSION

You ask whether Item 112.10(F) of the 2005 Appropriation Act requires that the existing Artisans Center of Virginia participate in the effort to develop a regional artisan center in the Shenandoah Valley Region. Item 112.10(F) of the 2005 Appropriation Act provides that:

> *Out of the amounts for Economic and Community Development Services shall be provided $1,000,000 the second year from the general fund to develop a regional artisan center in the Shenandoah Valley Region to serve as tourism destinations and sales venues for artisan products. <u>This project shall be developed in cooperation with the Artisan Center of Virginia</u>. The Director, Department of Planning and Budget, based on the recommendation of the Director, Department of Housing and Community Development (DHCD), is authorized to establish capital projects for this purpose.* [Emphasis added.]

Under the basic principles of statutory construction, the General Assembly's intent must be determined from the words contained in the statute.[2] "When the language of a statute is unambiguous, [one is] bound by the plain meaning of that language and may not assign a construction that amounts to holding that the General Assembly did not mean what it actually said."[3] "Cooperation" means the "[a]ction of co-operating."[4] "Cooperate" means "[t]o act jointly or concurrently toward a common end."[5]

Further, the use of the word "shall" in the statute generally indicates that the procedures are intended to be mandatory.[6] "[T]he primary objective of statutory construction is to ascertain and give effect to legislative intent."[7] In light of the use of the mandatory language "shall" and the plain meaning of the term, cooperation, the General Assembly clearly has expressed the requirement that the existing Artisans Center of Virginia participate in the effort to develop a regional artisan center in the Shenandoah Valley Region.

The requirement, however, that the Artisans Center of Virginia participate is not a requirement that can be imposed upon that organization because it is a private non-profit entity. The Department of Planning and Budget and the Department of Housing and Community Development are government agencies and must seek out the assistance of the Artisans Center of Virginia as required by the budget bill. If, however, the Artisans Center of Virginia refuses to participate, the regional artisan center project may proceed without that participation.

CONCLUSION

Accordingly, it is my opinion that Item 112.10(F) of the 2005 Appropriation Act does require that the existing Artisans Center of Virginia participate in the effort to develop a regional artisan center in the Shenandoah Valley Region to the extent the Artisan Center of Virginia, as a private non-profit organization, is willing to participate.

[1] 2005 Va. Acts ch. 951, *available at* http://leg1.state.va.us/051/bud/budget05.pdf.

[2] Williams v. Commonwealth, 265 Va. 268, 271, 576 S.E.2d 468, 470 (2003).

[3] *Id.*

[4] Black's Law Dictionary 302 (5th ed. 1979).

[5] *Id.*

[6] *See* Andrews v. Shepherd, 201 Va. 412, 414, 111 S.E.2d 279, 281-82 (1959); *see also* 1994 Op. Va. Att'y Gen. 64, 68.

[7] Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983), *quoted in* 2002 Op. Va. Att'y Gen. 233, 236.

OP. NO. 05-049

CIVIL REMEDIES AND PROCEDURE: EVIDENCE – LAWS, PUBLIC RECORDS, AND COPIES OF ORIGINAL RECORDS AS EVIDENCE.

Authenticated copies of judicial records are admissible into evidence; copy of authenticated copy is not sufficient.

THE HONORABLE ROBERT N. JOYCE JR.
COMMONWEALTH'S ATTORNEY FOR ROCKBRIDGE COUNTY & THE CITY OF LEXINGTON
JULY 21, 2005

ISSUE PRESENTED

You ask whether a facsimile copy of a certified copy of a court record may be admitted into evidence under § 8.01-391, which addresses copies of originals as evidence.

RESPONSE

It is my opinion that authenticated copies of judicial records are admissible into evidence; however, a copy of an authenticated copy renders the authentication a copy, and it is not sufficient to establish compliance with § 8.01-391.

BACKGROUND

You present a situation where a Commonwealth's attorney moved to enter into evidence two prior convictions of a defendant charged with felony enhanced petit larceny pursuant to §§ 18.2-96 and 18.2-104. The records of the prior convictions were not certified copies of the original conviction orders, but facsimile copies of the copies that had been properly authenticated as true copies by the clerk of the general district court wherein the convictions arose.

From the facts you present, it appears that the facsimiles displayed a copy of the stamp of certification and signature of the clerk, rather than the original certifications. You relate that the defendant objected to the admission of these documents.

APPLICABLE LAW AND DISCUSSION

The statute that deals with the admission of judicial records as evidence is § 8.01-389(A), which provides that "[t]he records of any judicial proceeding and any other official records of any court of this Commonwealth shall be received as prima facie evidence provided that such records are authenticated and certified by the clerk of the court where preserved to be a true record."[1]

A defendant's objection to the admission of the facsimile copy of an authenticated copy of an order of prior conviction is governed by the terms of § 8.01-391, which provides that:

> C. If any court or clerk's office of a court of this Commonwealth, of another state or country, or of the United States … has copied any record made in the performance of its official duties, such copy shall be admissible into evidence as the original, whether the original is in existence or not, provided that *such copy is authenticated* as a true copy by a clerk or deputy clerk of such court.
>
> ….
>
> F. Copy, as used in this section, shall include photographs, microphotographs, photostats, microfilm, microcard, printouts or other reproductions of electronically stored data, or copies from

> optical disks, electronically transmitted facsimiles, or any other reproduction of an original from a process which forms a durable medium for its recording, storing, and reproducing. [Emphasis added.]

Since, the General Assembly has mandated requirements for authenticating a record, a writing may not be admitted into evidence until these requirements have been met.[2] Nothing in the language of § 8.01-391 suggests that a copy of an authentication is sufficient. The statute sets forth the mediums by which a "copy" may be produced and clearly states that such copy must then be properly "authenticated."

"Generally, the words and phrases used in a statute should be given their ordinary and usually accepted meaning unless a different intention is fairly manifest."[3] The term "authenticate" means "[t]o prove the genuineness of (a thing)" or "[t]o render authoritative or authentic, as by attestation or other legal formality."[4] The term "authentication" means "the act of proving that something (as a document) is true and genuine, esp[ecially] so that it may be admitted as evidence; the condition of being so proved."[5]

"Authentication is merely the process of showing that a document is genuine and that it is what its proponent claims it to be,"[6] and a judicial record may be authenticated by the written certification of the clerk of the court holding the record.[7] Authentication is "a prerequisite to admission of a copy" because, without authentication, "a court presented with a document … would have no means of judging its genuineness."[8]

While it does not appear that a Virginia court has expressly addressed the issue you present, the courts repeatedly have applied a strict compliance standard to the authentication of documents as evidence. For example, the Court of Appeals of Virginia has held that an order purporting to be from the clerk's office was not properly authenticated as required by § 8.01-389(A), and it was inadmissible because the order contained no evidence that the signator was authorized by law to act in the place of the clerk of court.[9] In another case, the Court of Appeals has found that a photocopy of a certificate admitted as evidence that contained a notary public's attestation that did not aver that the notary was the custodian of the original, or that she had the original in her custody, was not a true copy pursuant to § 8.01-391(B).[10] Finally, the Court of Appeals has found that an unauthenticated photocopy of a certificate of laboratory analysis was not admissible because no proof was offered to show that the copy was genuine.[11] While the testifying detective stated that the copy being offered was the same as a copy sent to him by the laboratory, he admitted that he had no personal knowledge of the original certificate, and there was no evidence that either copy was a true replica of the original.[12]

Similarly, the Supreme Court of Virginia has held that documents introduced into evidence were not admissible because they had not been properly authenticated pursuant to the requirements of § 8.01-390[13] where, although the documents bore a

stamp on each page certifying that the page was a true copy, nothing showed that the certifying officer was the documents' custodian.[14]

It would be inconsistent to require that a record be authenticated by the written certification of the clerk of the court holding the record and then allow a copy of a written certification to prove the genuineness of the document. The original physical certifications by the clerk of the court not only serve to verify that the original document is an accurate record of the proceedings, but to verify the accuracy of the copy of that record.

In the case you present, the transmission of the authenticated document via facsimile resulted in the generation of a new copy that is not physically authenticated. A copy of a certification does not enable the court to determine whether the certification itself is authentic and, therefore, whether the copy delivered to the court is an accurate replica of the original. Even if the document bears a copy of the "official stamp" of a clerk's office, the court has no way of determining whether an attestation that is not original was genuinely affixed by the clerk or whether it was altered by means of today's modern technology. Therefore, the requirement of authentication as a condition precedent to admissibility is not satisfied by a copy of an authenticated document. Such a copy does not contain the original certificates of attestation, nor does it provide an evidentiary basis sufficient to support a finding that it is what its proponent claims or came from the source claimed.[15]

As previously noted, Virginia courts have not specifically addressed the issue you present. The Supreme Court of Indiana, however, has decided an analogous issue where the prosecution moved to introduce into evidence copies of various Ohio documents, including an indictment, a judgment, and other writings referring to a conviction in Ohio.[16] The defense objected and asserted that the purported certification merely was a copy; and, therefore, the documents failed to contain an original signature, seal, or certification. The Indiana Supreme Court held that while copies of public records can themselves be admissible if their authentication is properly certified, "the certifications themselves do not constitute public records and photocopies are not acceptable"[17] if a genuine issue is raised as to their authenticity.[18]

Similarly, in another Indiana Supreme Court case, the prosecution moved to introduce into evidence a copy of a judgment and order of probation from a Texas conviction.[19] The defendant objected because the attached certification was a copy that had been produced by a fax machine.[20] The Indiana Supreme Court held that while copies of the documents themselves can be introduced, the certification itself must be an original.[21]

CONCLUSION

Accordingly, it is my opinion that authenticated copies of judicial records are admissible into evidence; however, a copy of an authenticated copy renders the authentication a copy, and it is not sufficient to establish compliance with § 8.01-391.

[1]VA. CODE ANN. § 8.01-389 (LexisNexis Repl. Vol. 2000).

[2]*See* Proctor v. Commonwealth, 14 Va. App. 937, 938, 419 S.E.2d 867, 868 (1992).

[3]Woolfolk v. Commonwealth, 18 Va. App. 840, 847, 447 S.E.2d 530, 534 (1994).

[4]BLACK'S LAW DICTIONARY 142 (8th ed. 2004).

[5]*Id.*

[6]Owens v. Commonwealth, 10 Va. App. 309, 311, 391 S.E.2d 605, 607 (1990).

[7]*Id.* (holding that written attestation by court clerk that document was certified copy of court record was sufficient to "authenticate and certify" document within meaning of § 8.01-389).

[8]Williams v. Commonwealth, 35 Va. App. 545, 554, 546 S.E.2d 735, 740 (2001) (quoting Ingram v. Commonwealth, 1 Va. App. 335, 340, 338 S.E.2d 657, 660 (1986)).

[9]Carroll v. Commonwealth, 10 Va. App. 686, 690-91, 396 S.E.2d 137, 140 (1990). In *Carroll*, the order contained the following: "A COPY TESTE: WALTON F. MITCHELL, JR., CLERK[,] CRAIG COUNTY CIRCUIT COURT[,] BY */s/* Peggy B. Elmore." *Id*. at 689, 396 S.E.2d at 139.

[10]Untiedt v. Commonwealth, 18 Va. App. 836, 839, 447 S.E.2d 537, 538-39 (1994). In *Untiedt*, the photocopy of the certificate was attested by the clerk of the circuit court, was embossed with the notary public seal of "Jodi C. Davis," contained a typewritten statement, "I certify that this is a true copy," and the attestation was signed by Davis as notary public. *Id*. at 837, 447 S.E.2d 538.

[11]*Proctor*, 14 Va. App. at 938-39, 419 S.E.2d at 868 (interpreting filing of evidence under § 19.2-187).

[12]*Id*.

[13]Taylor v. Mar. Overseas Corp., 224 Va. 562, 565-66, 299 S.E.2d 340, 342 (1983). This case was decided under § 8.01-390, which provided that: "'[c]opies of records of this Commonwealth, of another state, of the United States, of another country, or of any political subdivision or agency of the same, other than those located in a clerk's office of a court, shall be received as prima facie evidence provided that such copies are authenticated to be true copies both by the custodian thereof and by the person to whom the custodian reports.'" *Id.* at 564-65, 299 S.E.2d 341 (quoting § 8.01-390). Section 8.01-390 subsequently was revised to require that the copy be authenticated as a true copy "*either* by the custodian of said record ~~and~~ *or* by the person to whom the custodian reports." *See* 2000 Va. Acts ch. 334, at 476, 476 (amending and reenacting § 8.01-390); *see also* § 8.01-390 (LexisNexis Repl. Vol. 2000).

[14]*Taylor*, 224 Va. at 565, 299 S.E.2d at 342. In *Taylor*, the document contained the following: "T. Wood[,] Captain, U.S. Coast Guard[,] Officer in Charge[,] Marine Inspection." *Id.* (alteration in original).

[15]Moreover, while copies of records of convictions are clearly admissible if properly authenticated as to their accuracy by the clerk of the court, the authentications on the orders in question do not constitute "records" in of themselves and cannot be admissible on that basis. The term "records" includes "any memorandum, report, paper, data compilation, or other record in any form, or any combination thereof." Section 8.01-389(D).

[16]Kelly v. State, 561 N.E.2d 771, 774 (Ind. 1990).

[17]*Id.* at 773.

[18]*Id.* at 774. The Indiana Code section under which the *Kelly* case was decided, provides that: "'[t]he records and judicial proceedings of the several courts of record … shall be admitted in the courts within this state as evidence, by attestation or certificate of the clerk or prothonotary, and the seal of the court annexed, together with the seal of the chief justice or one or more of the judges, or the presiding magistrate of any such court, that the person who signed the attestation or certificate was, at the time of subscribing it, the clerk or prothonotary of the court, and that the attestation is in due form of law; and the records and judicial proceedings, authenticated as aforesaid, shall have full faith and credit given to them in any court within this state, as by law or usage they have in the courts whence taken.'" *Id.* at 772-73 (quoting IND. CODE § 34-1-18-7). The court also relied upon Indiana Trial Rule 44, which specified the required manner of proof of an official record and provided in relevant part:
"(A) Authentication.

"(1) Domestic. An official record kept within the United States, or any state, district, commonwealth, territory, or insular possession thereof … when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy. Such publication or copy need not be accompanied by proof that such officer has the custody. Proof that such officer does or does not have custody of the record may be made by the certificate of a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office." *Id.*

[19] Harwood v. State, 582 N.E.2d 359, 360 (Ind. 1991).

[20] *Id.*

[21] *Id.*

OP. NO. 05-056

COMMONWEALTH PUBLIC SAFETY: OVERTIME COMPENSATION FOR LAW ENFORCEMENT, ETC.

Amendments imposed by Chapter 732 OF 2005 Acts of Assembly do not impact Department of State Police or other state law-enforcement agencies; § 9.1-706 continues to preserve sovereign immunity of Commonwealth and its agencies.

COLONEL W. STEVEN FLAHERTY
SUPERINTENDENT, VIRGINIA DEPARTMENT OF STATE POLICE
OCTOBER 19, 2005

ISSUE PRESENTED

You ask whether the changes imposed by Chapter 732 of the 2005 Acts of Assembly impact the Department of State Police and other law-enforcement agencies of the Commonwealth.

RESPONSE

It is my opinion that the amendments imposed by Chapter 732 do not impact the Department of State Police or other state law-enforcement agencies. It is further my opinion that § 9.1-706 continues to preserve the sovereign immunity of the Commonwealth and its agencies.

APPLICABLE LAW AND DISCUSSION

The 2005 Session of the General Assembly enacted Chapter 732, which amended portions of Chapter 7 of Title 9.1, §§ 9.1-700 through 9.1-706.[1] Chapter 7 governs overtime compensation for law-enforcement employees and firefighters, emergency medical technicians, and other fire protection employees. Specifically, Chapter 732 amended §§ 9.1-700 to 9.1-704[2] of Chapter 7; however, it did not amend § 9.1-706, which preserves the sovereign immunity of the Commonwealth and its agencies.

The changes by Chapter 732 to § 9.1-700 include an amended definition for "law-enforcement employee,"[3] while retaining the definition of "employer."[4] According to the definitions, a law-enforcement employee would include an officer employed by the Commonwealth or one of its agencies. An employer, however, must be a

political subdivision of the Commonwealth. While these definitions appear to be conflicting, they may be harmonized in the entire context of Chapter 7.[5] Chapter 7 regulates the behavior of the employer.[6] Before examining whether an individual qualifies as a law-enforcement officer under Chapter 7, the determination should be whether the employer is bound by the requirements. The statutory construction maxim of *expressio unius est exclusion alterius* provides that where a statute speaks in specific terms, an implication arises that the "omitted terms were not intended to be included within the scope of the statute."[7] Section 9.1-700 specifically provides that an employer is "any political subdivision of the Commonwealth, including any county, city, town, authority, or special district." The Commonwealth and its agencies are not included in such definition. One may not "'add language to the statute the General Assembly has not seen fit to include.'"[8] Since the Commonwealth and its agencies, such as the Department of State Police, fall outside of the definition of employer, they cannot be bound by its provisions.

Additionally, § 9.1-706 is not affected by the 2005 amendments, and it continues to provide that the Commonwealth and its agencies are protected by sovereign immunity.[9] Thus, any claim for money damages brought by individuals against the Commonwealth or its agencies without its consent is barred.[10]

CONCLUSION

Accordingly, it is my opinion that the amendments imposed by Chapter 732 do not impact the Department of State Police or other state law-enforcement agencies. It is further my opinion that § 9.1-706 continues to preserve the sovereign immunity of the Commonwealth and its agencies.

[1] *See* 2005 Va. Acts. ch. 732, *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?051+ful+CHAP0732+pdf (amending and reenacting §§ 9.1-700 through 9.1-704).

[2] *Id.*

[3] "'*Law-enforcement employee'* means any person who is responsible for the prevention and detection of crime and the enforcement of the penal, traffic or highway laws of the Commonwealth, other than an employee who is exempt from the overtime provisions of the Fair Labor Standards Act, and who is a full time employee of either (i) a police department or (ii) a sheriff's office that is part of or administered by the Commonwealth or any political subdivision thereof." VA. CODE ANN. § 9.1-700 (LexisNexis Supp. 2005).

[4] "'*Employer'* means any political subdivision of the Commonwealth, including any county, city, town, authority, or special district that employs fire protection employees except any locality with five or fewer paid firefighters that is exempt from overtime rules by 29 U.S.C. § 207 (k)." *Id.*

[5] *See* Branch v. Commonwealth, 14 Va. App. 836, 839, 419 S.E.2d 422, 425 (1992) (noting that Code is one body of law and statute should be interpreted so it harmonizes with other statutes), *quoted in* 2004 Op. Va. Att'y Gen. 68, 70.

[6] Section 9.1-701(A) provides that "[e]mployers shall," § 9.1-702 provides that "[e]mployers may," and § 9.1-704(A) provides that "an employer who violates the provisions of this chapter shall" perform certain functions.

[7] *See* Turner v. Wexler, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992); *see also* Op. Va. Att'y Gen.: 2004 at 51, 52 n.2; 2002 at 34, 36; 1997 at 35, 35; 1994 at 9, 11 (noting that mention of one thing in statute implies exclusion of another).

[8]Jackson v. Fidelity & Deposit Co., 269 Va. 303, 313, 608 S.E.2d 901, 906 (2005) (quoting Holsapple v. Commonwealth, 266 Va. 593, 599, 587 S.E.2d 561, 564-65 (2003), *cert. denied* 125 S. Ct. 164, 2004 U.S. LEXIS 5746 (U.S. Oct. 4, 2004)), *quoted in* Couplin v. Payne, 613 S.E.2d 592, 596, 2005 Va. LEXIS 52, *12 (Va. June 9, 2005).

[9]"The immunity of the Commonwealth and of any 'agency' as defined in § 8.01-195.2 is hereby preserved." Section 9.1-706 (LexisNexis Supp. 2005). Section 8.01-195.2 defines "agency" as "any department, institution, authority, instrumentality, board or other administrative agency of the government of the Commonwealth."

[10]*See generally* Commonwealth v. Luzik, 259 Va. 198, 524 S.E.2d 871 (2000).

OP. NO. 05-022

COMMONWEALTH PUBLIC SAFETY: RETIRED LAW ENFORCEMENT IDENTIFICATION — DEPARTMENT OF CRIMINAL JUSTICE SERVICES – GENERAL PROVISIONS.

Retired law-enforcement officer, whether retired for service or disability, may request photo identification card from employing department or agency; no authority for department or agency to specify type of retirement.

THE HONORABLE ROBIN P. STANAWAY
SHERIFF, GLOUCESTER COUNTY
JUNE 24, 2005

ISSUES PRESENTED

You ask whether a law-enforcement officer that is injured and subsequently disabled in the workplace may compel the employing department or agency to issue a photo identification card indicating that he is a retired law-enforcement officer of that department or agency. You also ask whether, if so, the employing department or agency issuing the photo identification card may indicate on the face of the card that the officer is "disabled."

RESPONSE

It is my opinion that any law-enforcement officer, as defined in § 9.1-101, who retired, whether for service or disability, may request a photo identification card from his department or agency indicating that he is a retired law-enforcement officer. Moreover, it is my opinion that such employing department or agency has no authority to specify the type of retirement for which the photo identification card is issued.

APPLICABLE LAW AND DISCUSSION

Section 9.1-1000 provides that:

> Upon the retirement of a law-enforcement officer, as defined in § 9.1-101, the employing department or agency shall, upon request of the retiree, issue the individual a photo identification card indicating that such individual is a retired law-enforcement officer of that department or agency. Upon request, such a card shall also be issued to any law-enforcement officer who retired before July 1, 2004.

You first ask whether under § 9.1-1000, a law-enforcement officer that is injured and subsequently disabled in the workplace may compel his employing agency to provide the photo identification card. A rule of statutory construction requires that, where no ambiguity exists in a statute, the statute is not to be construed but is to be given effect in accordance with its plain meaning and intent.[1] "It is well established that when the language of a statute is clear and unambiguous, courts must accept its plain meaning and not resort to extrinsic evidence or the rules of construction."[2] Further, I note that use of the word "shall" in a statute ordinarily, but not always, implies that its provisions are mandatory.[3]

Under the plain language of § 9.1-1000, the employing department or agency of a retired law-enforcement officer shall, upon his request, issue a photo identification card indicating that he is a retired law-enforcement officer. The statute makes no distinction regarding retirement for service or retirement for disability. Thus, the plain language of the statute clearly provides that whether a law-enforcement officer is retired[4] for service or disability,[5] he may indeed compel the employing department or agency to issue such photo identification card.

You next inquire whether the department or employing agency, which issues a photo identification for an officer retired for disability, may specify on the face of the identification card that the officer is "disabled." Section 9.1-1000 makes no distinction regarding the photo identification card other than to serve to identify the individual as a retired law-enforcement officer of the issuing department or agency. The statute is silent on any further specifications or distinctions. Additionally, I find no other statute authorizing the issuing department or agency to specify the type of retirement.[6]

CONCLUSION

Accordingly, it is my opinion that any law-enforcement officer, as defined in § 9.1-101, who retired, whether for service or disability, may request a photo identification card from his department or agency indicating that he is a retired law-enforcement officer. Moreover, it is my opinion that such employing department or agency has no authority to specify the type of retirement for which the photo identification card is issued.

[1] *See* Op. Va. Att'y Gen.: 2002 at 140, 140; 1998 at 55, 55.

[2] Norfolk Airport Auth. v. Nordwall, 246 Va. 391, 394, 436 S.E.2d 436, 438 (1993); *see also* Compton v. Commonwealth, 239 Va. 312, 314, 389 S.E.2d 460, 461 (1990); Gonzalez v. Fairfax Hosp. Sys., Inc., 239 Va. 307, 310, 389 S.E.2d 458, 459 (1990); Va. Dept. of Labor v. Westmoreland Coal Co., 233 Va. 97, 99, 353 S.E.2d 758, 760 (1987); Ambrogi v. Koontz, 224 Va. 381, 386, 297 S.E.2d 660, 662 (1982).

[3] *See, e.g.,* Schmidt v. City of Richmond, 206 Va. 211, 217-18, 142 S.E.2d 573, 578 (1965) (noting that statute using "shall" required court to summon nine disinterested freeholders in condemnation case).

[4] It is possible for a law-enforcement officer to be injured and subsequently disabled in the workplace, but not be retired. For example, the officer could be covered under the Virginia Sickness and Disability Program and receiving disability benefits, as opposed to disability retirement benefits, under that program until normal retirement age. *See generally* VA. CODE ANN. tit. 51.1, ch. 11, §§ 51.1-1100 to 51.1-1140 (LexisNexis Repl. Vol. 2002 & Supp. 2004). In that case, § 9.1-1000 would not apply to that individual until actual retirement.

[5]Under certain circumstances specified therein, Title 51.1 provides for a disability retirement benefit separate and apart from a service retirement benefit. *See, e.g.*, §§ 51.1-156, 51.1-209, 51.1-210, 51.1-220, 51.1-308 (LexisNexis Repl. Vol. 2002) (relating to disability retirement). *Cf.* § 51.1-505(A) (LexisNexis Supp. 2004) (relating to annual salary adjustment of employees retired for service or disability for purposes of group life and accidental death and dismemberment insurance), § 51.1-506 (LexisNexis Repl. Vol. 2002) (providing that employees retired for service or disability are not required to contribute to cost of life insurance).

[6]In contrast, however, it does appear that the issuing department or agency could combine the photo identification card addressed in § 9.1-1000 with proof that the retired law-enforcement officer may carry a concealed handgun. *See* VA. CODE ANN. § 18.2-308(B)(7) (LexisNexis Repl. Vol. 2004) (providing that law-enforcement officer, retired from specified agencies in the Commonwealth, who meets certain service-related disability criteria is deemed to have been issued concealed handgun permit provided officer carries proof of consultation with and favorable review of need to carry concealed handgun issued by chief law-enforcement officer of agency from which he retired). Section 18.2-308(B)(7), however, provides no authority to designate an individual as "disabled" on the photo identification card pursuant to § 9.1-1000 or on the written proof of consultation required by § 18.2-308(B)(7).

OP. NO. 05-044

CONSTITUTION OF THE UNITED STATES: AMENDMENT I (FREEDOM OF SPEECH CLAUSE).

CONSTITUTION OF VIRGINIA: BILL OF RIGHTS (FREEDOM OF SPEECH).

Fairfax County Public Schools instruction prohibiting principals and other staff members from speaking at private baccalaureate events as private citizens violates First Amendment rights of free speech.

THE HONORABLE L. SCOTT LINGAMFELTER
MEMBER, HOUSE OF DELEGATES
JULY 11, 2005

ISSUE PRESENTED

You ask whether it is constitutional for Fairfax County Public Schools to instruct principals and other staff members that they may attend, but not speak at baccalaureate events, regardless of whether such events are held on school property or elsewhere.

RESPONSE

It is my opinion that the Fairfax County Public Schools instruction prohibiting principals and other staff members from speaking at private baccalaureate events is constitutionally unwarranted and would be a violation of their First Amendment rights of free speech as private citizens.

BACKGROUND

You enclose with your request a document from the Fairfax County Public Schools entitled "Guidance Regarding Baccalaureates in Schools"[1] ("Fairfax guidance document"), which states that "[p]rincipals and other staff members may not be speakers at a baccalaureate, regardless of whether it is held at the school or elsewhere. If principals and staff wish to attend as individuals, they may do so." A May 18, 2005 memo[2] from the Office of the Superintendent for the Fairfax County Public Schools ("Superintendent memo"), states, in relevant part, the rationale for the ban:

> Under the Constitution of the United States, … Fairfax County Public Schools ha[ve] an obligation to maintain separation

> between church and state. Because teachers and administrators are highly visible representatives of the school, their speaking at a baccalaureate service—which typically includes religious elements—can be misconstrued.

In an apparent response to concerns that a school employee speech ban at baccalaureates raises constitutional problems, the Superintendent memo continues:

> The school division recognizes that, this late in the year, it is difficult for some school communities to change baccalaureate plans and is working on a case by case basis to find workable solutions that will allow teachers to speak as private citizens.

APPLICABLE LAW AND DISCUSSION

1. THE UNITED STATES CONSTITUTION

The First Amendment to the Constitution of the United States provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble[.]" The First Amendment embodies fundamental restraints on the power of government. Under the Fourteenth Amendment, these restraints apply not only to the laws of Congress, but also to the policies, practices and decisions of state and local government,[3] which would include public school officials, administrators and teachers entrusted with our public school system.

2. CONSTITUTION OF VIRGINIA

Article I, § 16 of the Constitution of Virginia also guarantees the free exercise of religion and a corresponding prohibition on state and local government from becoming entangled in religious affairs:

> That religion or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence; and, therefore, all men are equally entitled to the free exercise of religion …. No man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever …, nor shall otherwise suffer on account of his religious opinions or belief; but all men shall be free to profess and by argument to maintain their opinions in matters of religion …. And the General Assembly shall not prescribe any religious test whatever, or confer any peculiar privileges or advantages on any sect or denomination, or pass any law requiring or authorizing any religious society, or the people of any district within this Commonwealth, to levy on themselves or others, any tax for the erection or repair of any house of public worship, or for the support of any church or ministry; but it shall be left free to every person to select his religious instructor, and to make for his support such private contract as he shall please.

3. THE STATE OF THE LAW ON FREEDOM OF RELIGION GENERALLY AND IN THE SCHOOL CONTEXT IN PARTICULAR

It has become mistaken for fact and as a principle of law that the United States Constitution requires the "separation of church and state." Such presumptions are incorrect. The Supreme Court of the United States has clearly stated that there is no constitutional requirement for the "separation of church and state," "[n]or does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility toward any."[4]

Likewise, the popular understanding of the Religion Clause as mandating a "wall of separation" is not a correct constitutional standard. The Supreme Court has observed:

> The Court has sometimes described the Religion Clauses as erecting a "wall" between church and state[.] The concept of a "wall" of separation is a useful figure of speech probably deriving from views of Thomas Jefferson. The metaphor has served as a reminder that the Establishment Clause forbids an established church or anything approaching it. But the metaphor itself is not a wholly accurate description of the practical aspects of the relationship that in fact exists between church and state.[5]

The Court went on to say:

> No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government. "It has never been thought either possible or desirable to enforce a regime of total separation …."[6]

The United States Constitution protects the rights of students to express their religious beliefs on school property just like any other group.[7] Likewise, the Establishment Clause does not prohibit students from organizing a privately sponsored baccalaureate service off school grounds.[8] The Fairfax guidance document[9] acknowledges that such events are wholly voluntary and privately sponsored. Nevertheless, both the Fairfax guidance document and the Superintendent memo[10] bar any school employee from speaking at baccalaureates for fear that any speech by such public employees may be misconstrued. The Fairfax public schools rationale for the ban is, according to the Fairfax guidance document, an attempt "to maintain separation between church and state." As previously noted, reliance on this oft-quoted phrase is not a proper understanding of the freedoms protected by the First Amendment and may lead to an infringement of the constitutional rights of students of faith.[11]

4. PUBLIC EMPLOYMENT CASE LAW

The United States Constitution not only protects freedom of religion, but it also recognizes that religious expression is a form of free speech protected by the First

Amendment. It is important that public bodies, including public schools, not deny students or teachers of their free speech rights under the guise of preventing state endorsement of religion.

The United States Supreme Court and the Fourth Circuit Court of Appeals, in a series of decisions involving the First Amendment rights of public employees, continually have cautioned that public bodies must be careful to distinguish between speech made in one's capacity as a public employee and speech made in the one's capacity as a private citizen.[12]

The Fourth Circuit has denied qualified immunity to an employer who placed conditions on a police officer's return to work that barred the employee from engaging in criticism of the department.[13] The Court held that the conditions were an overly broad prior restraint that infringed on the employee's right to freely speak in his ordinary citizen capacity and that the right to do so was clear and well established in law.[14]

In light of this case law, it is my opinion that the school's blanket prohibition on any speech by school employees at a privately sponsored, voluntarily attended baccalaureate constitutes an overly broad prior restraint on private citizen speech that has yet to occur. Therefore, such prohibition infringes on the liberty of school employees to freely express their sentiments in their capacity as citizens.[15]

In addition, the Virginia State Board of Education has issued *Guidelines Concerning Religious Activity in the Public Schools*[16] ("*VSOE Guidelines*") that directly address the subject of baccalaureates. As the *VSOE Guidelines* point out, no court has ever held that baccalaureates involving minimal involvement of school officials violate the Establishment Clause.[17] The *VSOE Guidelines* state that "[t]eachers and school administrators may attend the baccalaureate in their capacity as private citizens, but should not plan, direct, control or supervise the ceremony."[18] While the *VSOE Guidelines* urge schools and school officials to avoid any administrative oversight of such events, nothing in the guidelines or applicable case law warrants a blanket prohibition on any and all school employee speech while attending such events. Just as the *VSOE Guidelines* recognize that school officials may attend baccalaureates in their private citizen capacities, so too it is incumbent upon schools to recognize that school employees may also speak at baccalaureates in their private citizen capacities. In such cases, the state has no legitimate interest in repressing the speech of private individuals, even if their speech touches upon religious themes.[19]

Fairfax Schools' blanket gag rule on school employee speech at voluntary, privately sponsored baccalaureate events is likely to be held unconstitutional by a court.

CONCLUSION

Accordingly, it is my opinion that the Fairfax County Public Schools instruction prohibiting principals and other staff members from speaking at private baccalaureate events is constitutionally unwarranted and would be a violation of their First Amendment rights of free speech as private citizens.

[1]A copy of the Fairfax guidance document is on file with this Office.

[2]A copy of the Superintendent memo is on file with this Office.

[3]*See* Engel v. Vitale, 370 U.S. 421 (1962); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940).

[4]Lynch v. Donnelly, 465 U.S. 668, 673 (1984).

[5]*Id.* (citations omitted).

[6]*Id.* (quoting Comm. for Pub. Educ. & Religious Liberty v. Nyquist, 413 U.S. 756, 760 (1973)). "Anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause." *Id.* (quoting Zorach v. Clauson, 343 U.S. 306, 314 (1952)). "Indeed, we have observed, such hostility would bring us into 'war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion.'" *Id.* (quoting Ill. *ex rel.* McCollum v. Bd. of Educ., 333 U.S. 203, 211-12 (1948)).

[7]*See* Bd. of Educ. v. Mergens, 496 U.S. 226, 251 (1990) (upholding constitutionality of federal Equal Access Act, allowing use of school by student religious group, and suggesting that school system has burden of correcting any misperceptions of endorsement of religion by school); *see also* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (excluding evangelical group from access to public school property after hours because school's fear of endorsing religion not justified).

[8]Lee v. Weisman, 505 U.S. 577, 629 (1992) (Souter, J., concurring). The United States Supreme Court has prohibited school-sponsored prayer. *See id.* at 586-88 (striking down school-sponsored prayer at high school graduation ceremony).

[9]*See supra* note 1.

[10]*See supra* note 2.

[11]*See supra* notes 5 and 6 and accompanying text.

[12]*Mergens*, 496 U.S. at 250 (noting that "there is a crucial difference between *government* speech endorsing religion which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect") (emphasis in original); Pickering v. Bd. of Educ., 391 U.S. 563 (1968) (holding that schools' termination of public school teacher for writing to newspaper criticizing school board expenditures violates teacher's right to speak as citizen on topic of public concern); *see also* United States v. Nat'l Treasury Employees' Union, 513 U.S. 454 (1995) (holding that federal ethics rule barring certain employees from receiving honoraria unduly infringes upon public employees' First Amendment rights to express themselves as private citizens); Connick v. Myers, 461 U. S. 138 (1983) (upholding termination of district attorney for distributing survey to coworkers because attorney's speech was made in official, not citizen capacity, and concerned job dissatisfaction not matters of public concern); Urofsky v. Gilmore, 216 F.3d 401, 416 (4th Cir. 2000) (holding that Virginia statute prohibiting state employees from using state-owned computers to access sexually explicit material does not infringe on First Amendment rights of state employees; Edwards v. City of Goldsboro, 178 F.3d 231 (4th Cir. 1999) (holding that police officer who offers handgun safety courses in spare time could not be punished for that private activity); Berger v. Battaglia, 779 F.2d 992 (4th Cir. 1985) (holding that police officer who performs Al Jolson tunes in black face could not be punished for his spare time avocation despite community offense).

[13]Mansoor v. Trank, 319 F.3d 133 (4th Cir. 2003).

[14]*Id.* at 137 n.3.

[15]*See* Henrico Prof'l Firefighters Ass'n v. Bd. of Supvrs, 649 F.2d 237, 241 n.5 (1981) (quoting City of Madison v. Wis. Employment Relations Comm'n, 429 U.S. 167, 177 (1976)) ("We note that the Board's practice governs 'speech and conduct in the future … and as such it is the essence of a prior restraint.'") Any policy of prior restraint bears a heavy burden against its constitutional validity. N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971). The statement in the Superintendent memo that Fairfax is working on ways to ensure that teachers may speak in their citizen capacity does not suffice to save an otherwise impermissible prior restraint. *See Mansoor*, 319 F.3d at 138 (holding that oral statements by employer that police officer would retain right to speak as citizen did not overcome unambiguous written plan conditions stating that officer was to refrain from criticizing department).

[16]VA. STATE BD. OF EDUC., GUIDELINES CONCERNING RELIGIOUS ACTIVITY IN THE PUBLIC SCHOOLS (June 22, 1995) [hereinafter VSOE GUIDELINES], *available at* http://www.pen.k12.va.us/VDOE/PC/religion.pdf.

[17]Three federal district courts that have opined on the constitutionality of baccalaureate services have found that such events, if sponsored by private parties, do not run afoul of the establishment clause. *See* Shumway v. Albany County Sch. Dist., 826 F. Supp. 1320 (D. Wyo. 1993); Randall v. Pegan, 765 F. Supp. 793 (W.D.N.Y. 1991); Verbena United Methodist Church v. Chilton County Bd. of Educ., 765 F. Supp. 704 (M.D. Ala 1991).

[18]VSOE GUIDELINES, *supra* note 16, at para. 57.

[19]*See* Wigg v. Sioux Falls Sch. Dist., 382 F.3d 807, 815 (8th Cir. 2004) (holding that school has no valid establishment clause interest to justify restricting teacher's attendance at after school student bible study), *reh'g denied* 2004 U.S. App. LEXIS 20976 (8th Cir. Oct. 7, 2004); Doe v. Sch. Dist., 340 F.3d 605 (8th Cir. 2003) (holding that school board member who is also parent, and who recites Lord's Prayer at son's high school graduation, is engaged in private citizen speech, not state action implicating establishment clause), *reh'g denied* 2003 U.S. App. LEXIS 17038 (8th Cir. Oct. 16, 2003).

OP. NO. 05-028

CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE (UNIFORMITY OF TAXATION) (ASSESSMENTS).

Violation of uniformity of taxation provision of Constitution of Virginia for locality to impose progressive tax rate on residential real estate based upon assessed value.

MR. BERNARD A. PISHKO
CITY ATTORNEY FOR THE CITY OF NORFOLK
AUGUST 1, 2005

ISSUE PRESENTED

You ask whether the imposition of progressive tax rates on residential real estate[1] by a locality, based upon assessed value is proper under the "uniformity" provisions contained in Article X, § 1 of the Constitution of Virginia.

RESPONSE

It is my opinion that the progressive tax rates on residential real estate that you describe violate the Virginia Constitution.

APPLICABLE LAW AND DISCUSSION

You relate that the city of Norfolk is considering adoption of an ordinance imposing progressive real estate tax[2] rates on residential real estate in Norfolk. At issue is whether a progressive tax scheme provides uniformity in property taxation as required by the Virginia Constitution.

Successive Virginia constitutions have contained provisions requiring "uniformity" in property taxation.[3] The Virginia Constitution currently requires uniformity of taxation in Article X, § 1, which provides, in pertinent part, that:

> All property, except as hereinafter provided, shall be taxed. All taxes shall be levied and collected under general laws and *shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, except that the General Assembly*

> *may provide for differences in the rate of taxation* to be imposed upon real estate by a city or town within all or parts of areas added to its territorial limits, or by a new unit of general government, within its area, created by or encompassing two or more, or parts of two or more, existing units of general government. [Emphasis added.]

The Supreme Court of Virginia has held that §§ 1 and 2 of Article X relating to property assessments must be construed together.[4] These sections constitute the twin principles of property taxation in the Commonwealth.[5] In pertinent part, § 2 provides that:

> All assessments of real estate and tangible personal property shall be at their fair market value, to be ascertained as prescribed by law. 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 if it were not so classified, provided the General Assembly shall first determine that classification of such real estate for such purpose is in the public interest for the preservation or conservation of real estate for such uses.

The net result of "these provisions is to distribute the burden of taxation, so far as is practical, evenly and equitably."[6]

The Virginia Supreme Court has also held that "where it is impossible to secure both the standard of the true value and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law."[7] Thus, uniformity is viewed as the paramount objective of the taxation of property.

It is important to note that there are specific exemptions from the provisions contained in §§ 1 and 2 of Article X and in other parts of the Virginia Constitution. For example, § 1 permits the General Assembly to provide for disparate tax rate treatment for certain lands annexed by cities or towns.[8] Section 2 permits the General Assembly to provide tax relief for "real estate devoted to agricultural, horticultural, forest, or open space uses."[9] Moreover, Article X, § 6(b) authorizes the General Assembly to provide for relief from property taxation for certain elderly and disabled individuals.[10]

There is no constitutional or statutory provision permitting localities to afford general real property tax relief to residential real estate owners by graduating their rates of taxation or otherwise. Indeed, § 58.1-3321, the section of Title 58.1 addressing the levy of the local real property tax, generally speaks in terms of only one rate for the locality. This would be consistent with the constitutional requirement of uniformity of taxation on real property and the Virginia Supreme Court's interpretations of that

requirement. It has been said that this is "[b]ecause property can be valued by a relatively accurate and objective means, *ad valorem taxes on it can be levied in terms of a uniform rate which may impose a uniform burden* to the extent that there is a sound standard for appraisal and the appraisal is accurate."[11]

Notwithstanding this, courts have wrestled with the concept of valuation, which is, by their own admission, "not an exact science."[12] As a result,

> [t]he courts, in trying to resolve this problem, while recognizing the general custom of undervaluing property and the difficulty of enforcing the standard of true value, have sought to enforce equality in the burden of taxation by *insisting upon uniformity in the mode of assessment and in the rate of taxation*.[13]

This principle of *one* uniform rate for real estate taxation within a locality has been further confirmed in a case involving the annexation of county lands by a city, where pursuant to the authorizing statute, the city maintained the various different tax rates on the separate parcels annexed for a period of five years.[14] The Virginia Supreme Court upheld these rate differentials, noting that:

> If this [uniformity] section [168] of the Constitution alone could be relied on, the city of Roanoke would have had to levy a tax of $2.50 on all of the land in the annexed areas *because that was the rate that was levied on all the real estate included in the corporate limits of the city of Roanoke prior to and after the annexation* of the area herein concerned. But the Constitution, Art. VIII, § 126, provides for the extension of corporate limits, and Art. XIII, § 169, *specifically permits a reduced rate of taxation* on the lands annexed for a period of time to be fixed by the legislature.[15]
>
> *Article XIII, § 169 of the Constitution provides for a permissible discrimination and permits lack of uniformity of taxation in those cases where lands are annexed to a new taxing jurisdiction*. This provision was intended as a temporary measure to facilitate the transition of the annexation and is for the benefit of the annexed land. The Constitution and statute restrict or limit no further than prohibiting an increase in the tax rate on any given area of land.[16]

Thus, the predecessor section of the current Virginia Constitution, requiring uniformity in property taxation, which virtually was identical,[17] required one, uniform tax rate on all the real property within a jurisdiction, but for the limited constitutional exemption provided for lands annexed by a city or town. Therefore, because there is no constitutional exemption from the uniformity of taxation for a locality to impose a progressive tax rate,[18] a locality must impose a single uniform rate of taxation on residential property within its borders.

CONCLUSION

Accordingly, it is my opinion that the progressive tax rates on residential real estate that you describe violate the Virginia Constitution.

[1]For purposes of this opinion, I assume that the residential real property in question means all of such property generally in the city of Norfolk. I also assume that such property does not include residential real property that may be subject to, and eligible for, a specific exemption for special treatment. *See, e.g.*, VA. CONST. art. X, §§ 1, 2, 6(b).

[2]You indicate that the tax rates would be progressive based on property value.

[3]*See* 2 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA, 1037-40 (1974).

[4]*See, e.g.*, Bd. of Supvrs. v. Leasco Realty, Inc., 221 Va. 158, 166, 267 S.E.2d 608, 613 (1980) (noting that Article X, §§ 1 and 2 must be read and construed together); R. Cross, Inc. v. City of Newport News, 217 Va. 202, 207, 228 S.E.2d 113, 117 (1976) (quoting Skyline Swannanoa, Inc. v. Nelson County, 186 Va. 878, 881, 44 S.E.2d 437, 439 (1947)) (noting that first two sections of Article X must be construed together); Smith v. City of Covington, 205 Va. 104, 108, 135 S.E.2d 220, 222 (1964) (quoting *Skyline Swannanoa*, 186 Va. at 881, 44 S.E.2d at 439) (construing Article XIII, §§ 168 and 169 of 1902 Virginia Constitution, predecessors to Article X, §§ 1 and 2 of 1971 Virginia Constitution); *see also* Tuckahoe Women's Club v. City of Richmond, 199 Va. 734, 738, 101 S.E.2d 571, 574 (1958) (construing Article XIII, §§ 168 and 169); Lehigh Portland Cement Co. v. Commonwealth, 146 Va. 146, 152, 135 S.E. 669, 671 (1926) (construing Article XIII, §§ 168 and 169).

[5]*See R. Cross*, 217 Va. at 207, 228 S.E.2d at 117 (noting that principles of taxation required by Virginia Constitution are fair market value and uniformity clauses of Article X).

[6]*See Skyline Swannanoa*, 186 Va. at 881, 44 S.E.2d at 439 (construing Article XIII, §§ 168 and 169); *see also* S. Ry. Co. v. Commonwealth, 211 Va. 210, 214, 176 S.E.2d 578, 581 (1970).

[7]*See, e.g., Women's Club*, 199 Va. at 738, 101 S.E.2d at 574.

[8]*See* VA. CODE ANN. § 15.2-3534 (LexisNexis Repl. Vol. 2003) (authorizing different tax rates in certain areas consolidated into county or city).

[9]*See* VA. CODE ANN. §§ 58.1-3229 (not set out in Code) through 58.1-3244 (LexisNexis Repl. Vol. 2004) (governing special assessments for land preservation).

[10]*See* §§ 58.1-3210 to 58.1-3218 (LexisNexis Repl. Vol. 2004) (governing exemptions for elderly and handicapped).

[11]HOWARD, *supra* note 3, at 1041 (emphasis added).

[12]*Southern Railway*, 211 Va. at 214, 176 S.E.2d at 580.

[13]*Id.* (emphasis added).

[14]City of Roanoke v. Hill, 193 Va. 643, 70 S.E.2d 270 (1952).

[15]*Id.* at 648-49, 70 S.E.2d at 273 (emphases added).

[16]*Id.* at 650, 70 S.E.2d at 274 (emphasis added).

[17]Section 168 of the 1902 Constitution read, "[a]ll property, except as hereinafter provided, shall be taxed; all taxes, whether state, local, or municipal, shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax."

[18]This conclusion has been confirmed by the Commonwealth's highest court. *See supra* notes 6-7, 14 and accompanying text.

OP. NO. 05-038

CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE (UNIFORMITY OF TAXATION) (ASSESSMENTS).

TAXATION: REAL PROPERTY TAX – BOARDS OF EQUALIZATION — REVIEW OF LOCAL TAXES – CORRECTION OF ASSESSMENTS, REMEDIES AND REFUNDS.

Fact that lands of one or few taxpayers are assessed at differing percentages of fair market value is not, *per se*, violation of legal requirements; redress may be had at locality's board of equalization, from commissioner or revenue, or by judicial appeal. Material, systematic, and intentional discrimination against individual taxpayers or group of taxpayers may violate Virginia and federal constitutional requirements.

THE HONORABLE VINCENT F. CALLAHAN JR.
MEMBER, HOUSE OF DELEGATES
AUGUST 19, 2005

ISSUE PRESENTED

You inquire concerning apparent inconsistent percentages of real property assessments in Fairfax County. You ask whether these assessments meet the applicable legal requirements, particularly the requirement in Article X, § 2 of the Constitution of Virginia that all assessments of real estate be at full fair market value.

RESPONSE

It is my opinion that the fact that the lands of one or a few taxpayers are assessed at differing percentages of fair market value is not, *per se*, a violation of the legal requirements. In such cases, redress may be had at the locality's board of equalization,[1] by bringing the situation to the attention of the local commissioner of the revenue, or by judicial appeal. Where it is shown that a material, systematic, and intentional discrimination has been made against individual taxpayers or a group of taxpayers, it is my opinion that such action may violate Virginia and federal constitutional requirements.

BACKGROUND

You relate that a comparison of seventy-five current Fairfax County residential real estate[2] assessments, which are within the same postal zip code,[3] with their respective 2004 sales prices reveals that the assessments range from 21.19% to 120.5% of their sales prices.

You also provide specific examples: (1) one such property that sold for $1,750,000 on June 11, 2004, currently is assessed at 45.31% of its sales price; and (2) another property that sold for $616,000 on May 3, 2004, currently is assessed at 75.12% of its sale price.

APPLICABLE LAW AND DISCUSSION

In Virginia, the local real property tax is the result of applying the locality's tax rate to the assessment[4] or valuation of the property parcel in question. This valuation is based upon the *appraisal* of the property's fair market value multiplied by the percentage of such fair market value that the locality subjects to its tax rate.[5] This percentage is known as the "assessment ratio."[6] "A system in which assessments are increased in some managerial districts based on reappraisals of those districts in a year when other districts are not reappraised is invalid"[7] under the uniformity requirement of the Constitution of Virginia.

Successive Virginia constitutions have contained provisions requiring "uniformity" in property taxation.[8] The Virginia Constitution currently requires uniformity of taxation in Article X, § 1, which provides, in pertinent part, that:

> All property, except as hereinafter provided, shall be taxed. All taxes shall be levied and collected under general laws and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, except that the General Assembly may provide for differences in the rate of taxation to be imposed upon real estate by a city or town within all or parts of areas added to its territorial limits, or by a new unit of general government, within its area, created by or encompassing two or more, or parts of two or more, existing units of general government. [Emphasis added.]

The Supreme Court of Virginia has held that §§ 1 and 2 of Article X relating to property assessments must be construed together.[9] These sections constitute the twin principles of property taxation in the Commonwealth.[10] In pertinent part, § 2 provides that:

> All assessments of real estate and tangible personal property shall be at their fair market value, to be ascertained as prescribed by law. 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 if it were not so classified, provided the General Assembly shall first determine that classification of such real estate for such purpose is in the public interest for the preservation or conservation of real estate for such uses.

The net result of "these provisions is to distribute the burden of taxation, so far as is practical, evenly and equitably."[11]

The Virginia Supreme Court has also held that "where it is impossible to secure both the standard of the true value and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law."[12] Thus, uniformity is viewed as the paramount objective of the taxation of property.

It is important to note that there are specific exemptions from the provisions contained in §§ 1 and 2 of Article X and in other parts of the Virginia Constitution. For example, § 1 permits the General Assembly to provide for disparate tax rate treatment for certain lands annexed by cities or towns.[13] Section 2 permits the General Assembly to provide tax relief for "real estate devoted to agricultural, horticultural, forest, or open space uses."[14] Moreover, Article X, § 6(b) authorizes the General Assembly to provide for relief from property taxation for certain elderly and disabled individuals.[15]

There is no constitutional or statutory provision that permits localities to afford general real property tax relief to residential real estate owners by arbitrary and disproportionate differences in the percentages of assessment thereon.[16] Indeed, the plain language of § 58.1-3201 requires that the assessment of real estate subject to annual local taxation "shall be made at 100 percent fair market value."[17] This would be consistent with the constitutional requirement of uniformity of taxation on real property and the Virginia Supreme Court's interpretations of that requirement. It has been said that this is "[b]ecause property can be valued by a relatively accurate and objective means, *ad valorem taxes on it can be levied in terms of a uniform rate which may impose a uniform burden* to the extent that there is a sound standard for appraisal and the appraisal is accurate."[18]

Notwithstanding this, courts have wrestled with the concept of valuation, which is, by their own admission, "not an exact science."[19] As a result,

> [t]he courts, in trying to resolve this problem, while recognizing the general custom of undervaluing property and the difficulty of enforcing the standard of true value, have sought to enforce equality in the burden of taxation by *insisting upon uniformity in the mode of assessment and in the rate of taxation*.[20]

Achieving this goal is not an easy process, particularly in a dynamic real estate market. The Virginia Supreme Court has recognized that:

> [T]he statute does not require that, for purposes of making *appraisals* upon which annual *assessments* are made, all parcels within the city or county be visually inspected once each year. As the General Assembly was aware, physically and fiscally, such a requirement would impose an unreasonable, if not impossible, burden upon both the taxing authority and the taxpayer.
>
> Nor is the uniformity mandate of the Constitution, as we have construed it, so broad as to require such annual visual inspection. We recognized in our opinion that 'absolute and constant uniformity may be an unobtainable idea'. The constitutional mandate requires that, in the ascertainment of fair market values and the imposition of assessments upon those values, the taxing authority must implement and administer the annual assessment and equalization system in a manner which avoids all disuniformity reasonably avoidable.[21]

This inexactitude occurs because "[t]here are many factors to be considered in arriving at the fair market value of property,"[22] and no general rule can be prescribed for valuation.[23] These factors are numerous and diverse:

> While size and cost of the property may be factors to be given weight, there are many other factors which tend to increase or

> diminish such value; for instance, the design, style, location, appearance, availability of use, and the economic situation prevailing in its area, as well as other circumstances.[24]

To that end, local tax assessors may employ a number of techniques, which, in lieu of visual or individual inspection, are designed to approximate fair market value. Property owners are "entitled to have the same yardstick which measured the market value of the other properties applied to their property."[25]

Integral to this "yardstick" is the percentage of the property parcel's fair market value that is subject to the locality's tax rate. With respect to land assessments, the locality's board of equalization[26] is given "the especial duty of increasing as well as decreasing assessments, whether specific complaint be laid or not, if in its judgment, the same be necessary to equalize and accomplish the end that the burden of taxation shall rest equally upon all citizens of such county or city."[27] This specifically includes the authority to determine "that the assessment is not uniform in its application."[28] The primary remedy for the taxpayers about whom you inquire may rest with the applicable local board of equalization. It is also possible to seek administrative correction by bringing the situation to the attention of the local commissioner of the revenue, or judicially by application to the courts.[29]

On the other hand, if these situations are symptomatic of a broader, more prevalent situation in the locality, it may be violative of the uniformity requirements of the Virginia Constitution, as well as the Equal Protection Clause of the federal Constitution:

> [T]he fact that the lands of one or a few taxpayers are assessed at fifty per cent of its market value, or at any other assessment below its market value, can furnish no reason for reducing the assessment of other lands to a similar valuation; yet, where it is shown that a material, systematic and intentional discrimination has been made against an applicant for relief, whereby his property has been assessed at 100 per cent of its market value, while other property of a like kind has been assessed at only fifty per cent of its market value, and especially where (as in the instant case) this has been done under the authority and by the direction of the State board having control over such assessments, this is, as stated, in violation of the fourteen amendment of the Constitution of the United States.[30]

Accordingly, if the situation you illustrate applies to only a few or a small group of the locality's residential real estate taxpayers, then the remedy would seem to be through redress at the locality's board of equalization. Where it may be shown that a material, systematic, and intentional discrimination is made against individual taxpayers, or a group of taxpayers, such action may violate Virginia and federal constitutional requirements.[31]

CONCLUSION

Accordingly, it is my opinion that the fact that the lands of one or a few taxpayers are assessed at differing percentages of fair market value is not, *per se*, a violation of the legal requirements. In such cases, redress may be had at the locality's board of equalization,[32] by bringing the situation to the attention of the local commissioner of the revenue, or by judicial appeal. Where it is shown that a material, systematic, and intentional discrimination has been made against individual taxpayers or a group of taxpayers, it is my opinion that such action may violate Virginia and federal constitutional requirements.

[1]I note that the Tax Commissioner shall "[u]pon request by any local governing body, local board of equalization or any ten citizens and taxpayers of the locality, render advisory aid and assistance to such board in the matter of equalizing the assessments of real estate … among property owners of the locality." VA. CODE ANN. § 58.1-202(10) (LexisNexis Supp. 2005).

[2]For purposes of this opinion, I assume that the residential real properties in question are the single-unit primary residences of individuals. I further assume that such properties do not include residential real property that may be subject to, and eligible for, a specific constitutional exemption. *See, e.g.*, VA. CONST. art. X, §§ 1, 2, 6(b).

[3]You do not indicate whether this zip code is completely contained within one of the county's magisterial districts. For purposes of this opinion, I assume that is the case.

[4]There are a number of meanings of the word, "assessment" in Virginia tax law. For example, it can mean the amount of money that a taxpayer is required to pay, or the written notice sent by the taxing authority. *See* Knopp Bros., Inc. v. Dep't of Taxation, 234 Va. 383, 386, 362 S.E.2d 897, 899 (1987) (interpreting "assessment" as used in §§ 58.1-1820(2), 58.1-1825). In the context of real property taxation, assessment may be confused between *appraisal* of the fair market value of the land versus the value actually subjected to the locality's rate of taxation after application of the "assessment ratio." *See infra* text accompanying note 6. *See* Perkins v. County of Albemarle, 214 Va. 240, 244, 198 S.E.2d 626, 629, *modified*, 214 Va. 416, 418, 200 S.E.2d 566, 568 (1973); *see also* 1975-1976 Op. Va. Att'y Gen. 375, 377.

[5]*See* Fray v. County of Culpeper, 212 Va. 148, 149, 183 S.E.2d 175, 176 (1971).

[6]*See, e.g., id.*

[7]18 MICHIE'S JUR. *Taxation* § 16, at 174 (2005).

[8]*See* 2 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA, 1037-40 (1974).

[9]*See, e.g.*, Bd. of Supvrs. v. Leasco Realty, Inc., 221 Va. 158, 166, 267 S.E.2d 608, 613 (1980) (noting that Article X, §§ 1 and 2 must be read and construed together); R. Cross, Inc. v. City of Newport News, 217 Va. 202, 207, 228 S.E.2d 113, 117 (1976) (quoting Skyline Swannanoa, Inc. v. Nelson County, 186 Va. 878, 881, 44 S.E.2d 437, 439 (1947)) (noting that first two sections of Article X must be construed together); Smith v. City of Covington, 205 Va. 104, 108, 135 S.E.2d 220, 222 (1964) (quoting *Skyline Swannanoa*, 186 Va. at 881, 44 S.E.2d at 439) (construing Article XIII, §§ 168 and 169 of 1902 Virginia Constitution, predecessors to Article X, §§ 1 and 2 of 1971 Virginia Constitution); *see also* Tuckahoe Women's Club v. City of Richmond, 199 Va. 734, 738, 101 S.E.2d 571, 574 (1958) (construing Article XIII, §§ 168 and 169); Lehigh Portland Cement Co. v. Commonwealth, 146 Va. 146, 152, 135 S.E. 669, 671 (1926) (construing Article XIII, §§ 168 and 169).

[10]*See R. Cross*, 217 Va. at 207, 228 S.E.2d at 117 (noting that principles of taxation required by Virginia Constitution are fair market value and uniformity clauses of Article X).

[11]*See Skyline Swannanoa*, 186 Va. at 881, 44 S.E.2d at 439 (construing Article XIII, §§ 168 and 169); *see also* S. Ry. Co. v. Commonwealth, 211 Va. 210, 214, 176 S.E.2d 578, 581 (1970).

[12]*See, e.g., Women's Club*, 199 Va. at 738, 101 S.E.2d at 574.

[13]*See* VA. CODE ANN. § 15.2-3534 (LexisNexis Repl. Vol. 2003) (authorizing different tax rates in certain areas consolidated into county or city).

[14]*See* §§ 58.1-3229 (not set out in Code) through 58.1-3244 (LexisNexis Repl. Vol. 2004) (governing special assessments for land preservation).

[15]*See* §§ 58.1-3210 to 58.1-3218 (LexisNexis Repl. Vol. 2004 & Supp. 2005) (governing exemptions for elderly and handicapped).

[16]*See Perkins*, 214 Va. at 418, 200 S.E.2d at 568. *Cf.* 1990 Op. Va. Att'y Gen. 239 (concluding that board of supervisors may not adopt ordinance classifying all private residences in designated area as real estate devoted to agricultural use in order to make property eligible for use value assessment).

[17]Section 58.1-3201 provides that "[a]ll real estate, except that exempted by law, shall be subject to … annual taxation" and be assessed at "100 percent fair market value." "The taxing authority must assess in a manner that avoids 'all disuniformity reasonably avoidable.'" 1990 Op. Va. Att'y Gen., *supra* note 16, at 240 (quoting *Perkins*, 214 Va. at 418, 200 S.E.2d at 568).

[18]HOWARD, *supra* note 8, at 1041 (emphasis added).

[19]*Southern Railway*, 211 Va. at 214, 176 S.E.2d at 580.

[20]*Id.* (emphasis added).

[21]*Perkins*, 214 Va. at 418, 200 S.E.2d at 568 (emphases in original) (interpreting § 58-769.2, predecessor to §§ 58.1-3253, 58.1-3270, relating to reassessments).

[22]*See Smith*, 205 Va. at 108, 135 S.E.2d at 223.

[23]*See Southern Railway*, 211 Va. at 214, 176 S.E.2d at 581.

[24]*Smith*, 205 Va. at 108-09, 135 S.E.2d at 223.

[25]*Id.* at 109, 135 S.E.2d at 223.

[26]*See* §§ 58.1-3370, 58.1-3371, 58.1-3373 (LexisNexis Repl. Vol. 2004).

[27]Section 58.1-3379(A) (LexisNexis Repl. Vol. 2004).

[28]Section 58.1-3379(C).

[29]An application to correct an erroneous real estate assessment "if the error … was made by the commissioner of the revenue … or is due to a factual error" may be filed with the commissioner. *See* § 58.1-3980(A) (LexisNexis Repl. Vol. 2004). An application for the correction of an erroneous assessment may be filed with the circuit court, and the application may allege that "the assessment is not uniform in its application." Section 58.1-3984(A) (LexisNexis Repl. Vol. 2004). Additionally, should the commissioner of revenue be unable to correct an obvious error under § 58.1-3981, he "shall apply to the appropriate court," and "may include a petition for relief for any of several taxpayers." Section 58.1-3984(B). As previously noted, the Tax Commissioner shall "[u]pon request by any local governing body, local board of equalization or any ten citizens and taxpayers of the locality, render advisory aid and assistance to such board in the matter of equalizing the assessments of real estate … among property owners of the locality." Section 58.1-202(10).

[30]*Lehigh Portland*, 146 Va. at 156, 135 S.E. at 672.

[31]*Smith*, 205 Va. at 108, 135 S.E.2d at 223 (quoting *Women's Club*, 199 Va. at 738, 101 S.E.2d at 574) (noting that "'a taxpayer whose property is assessed at its true market value has a right to have the assessment reduced to the percentage of that value at which others are taxed so as to meet the uniformity required by § 168 of the Virginia Constitution as well as by the Equal Protection Clause of the Fourteenth Amendment'").

[32]*See supra* note 1.

OP. NO. 05-061

COUNTIES, CITIES AND TOWNS.

No principle of law prevents or inhibits local government employer from assisting with purchase program offered by Dell, Inc., to local government employees.

THE HONORABLE JOHN M. O'BANNON III M.D.
MEMBER, HOUSE OF DELEGATES
SEPTEMBER 19, 2005

ISSUE PRESENTED

You inquire regarding a government employee purchase program offered by Dell, Inc., which currently is offered to state employees through the Virginia Credit Union. Because few local government employees have access to such a credit union program, Dell seeks to offer this benefit directly through local government employers. You ask whether there is any principle of law that would prevent or inhibit a local government employer from assisting Dell in providing the benefit to its employees.

RESPONSE

It is my opinion that no principle of law prevents or inhibits a local government employer from assisting with such purchase program benefit for its employees.

BACKGROUND

You relate that Dell, Inc., manufactures computers and computer peripherals and exclusively sells these products through online and telephone orders. You state that Dell's employee purchase program allows employees of local government to purchase computers and computer peripherals at significantly discounted prices. Further, you note that in order for employees of local government to access this benefit, the local government must participate in this program by: (1) assisting Dell with direct communications with employees via email; (2) allowing Dell access to government office buildings to communicate to employees about the benefit, usually through the means of a manned kiosk placed in a common area of the building; and, (3) providing space on a part of the local government's web site that is routinely accessed by employees.

You also state that Dell's program is nonexclusive, and it does not prevent or restrict a locality from participating in similar programs offered by other manufacturers or retailers of computers and computer peripherals. Dell does not require local governments to make an express endorsement of its products. Instead, you relate that Dell merely requires the locality to assist in informing its employees of the benefit and the process for obtaining the benefit. Finally, you note that there is no requirement that employees take advantage of the benefit.

APPLICABLE LAW AND DISCUSSION

You ask whether Dell, Inc., may offer its government employment purchase program, which currently is offered through the Virginia Credit Union, through local government employers. I find no specific statute addressing whether public employers may allow Dell to offer such a benefit directly through the local government to its

employees. Thus, the Dillon Rule governs the question you present. Under the Dillon Rule, localities and other political subdivisions have only those powers expressly granted to them by statute and those necessarily implied from their expressly granted powers.[1]

Decisions of the Virginia Supreme Court and prior opinions of this Office recognize that there are occasions when a mechanical application of the Dillon Rule is inappropriate.[2] Title 15.2 is silent on many aspects of the employer/employee relationship in local government. The General Assembly obviously may adopt such legislation as it deems advisable defining or restricting the authority of local governments and other political subdivisions to allow manufacturers, such as Dell, Inc., to offer government employee benefits directly through the local government employer. The Supreme Court has observed, however, that "it would be unrealistic, inefficient, and unnecessary to require the General Assembly to define every aspect of each mechanism available" to a local government to carry out the powers granted to it.[3] In my opinion, the General Assembly's failure to grant specific statutory authority in this instance does not indicate legislative opposition to local authority for that purpose. Instead, it reflects a legislative assumption that such authority is inherent in the employer/employee relationship. Thus, such authority is a necessarily implied power that localities and other political subdivisions already possess.

When a locality exercises an implied power, that exercise must be reasonable and consistent with the legislative intent and may not unduly burden any constitutional rights.[4] In addition, a government employer has a clear interest in limiting the potential disruption in the workplace that could occur if every business enterprise were allowed to conduct advertising in the context of the government's office buildings by means of manned kiosk, websites routinely accessed by employees, and direct communication with local government employees through government email systems.

While there are numerous factors to be considered in determining whether a political subdivision may grant one business enterprise access to its workplace and email system and deny access to another, I find no provision of law that will prevent or inhibit a local government employer from assisting Dell, Inc., in making the benefit available to its employees.

CONCLUSION

Accordingly, it is my opinion that no principle of law prevents or inhibits a local government employer from assisting with such purchase program benefit for its employees.

[1] *See* Commonwealth v. County Bd., 217 Va. 558, 572, 232 S.E.2d 30, 39 (1977).

[2] *See, e.g.*, Nexsen v. Bd. of Supvrs., 142 Va. 313, 318, 128 S.E. 570, 571 (1925); Op. Va. Att'y Gen.: 1994 at 40, 41; 1982-1983 at 151, 152; *see also* Scott v. Sylvester, 220 Va. 182, 257 S.E.2d 774 (1979).

[3] Tidewater Ass'n of Homebldrs. v. City of Va. Beach, 241 Va. 114, 119, 400 S.E.2d 523, 526 (1991).

[4] *Id.*

OP. NO. 04-094

COUNTIES, CITIES AND TOWNS: GENERAL POWERS OF LOCAL GOVERNMENT — POWERS OF CITITES AND TOWNS.

EDUCATION: SYSTEM OF PUBLIC SCHOOLS; GENERAL PROVISIONS.

No authority for municipality, city, or town to enact ordinance imposing civil or criminal penalty against parent for providing false residential information to enroll child in local school system and requiring parent to pay tuition or educational costs for such child. General Assembly may enact such enabling authority for municipality, city, or town. Authority for local school system to adopt policy holding parent liable for tuition or educational costs for nonresident child.

THE HONORABLE M. KIRKLAND COX
MEMBER, HOUSE OF DELEGATES
APRIL 7, 2005

ISSUES PRESENTED

You inquire regarding the authority of a local government or school system to require a parent to reimburse tuition costs expended in educating a student who is not a resident of the school district.[1] First, you inquire whether a locality may enact an ordinance imposing a civil or criminal penalty against a parent enrolling a child in a school system based on false information, which indicates that the parent and student are residents of the school district. Next, you ask whether a locality may enact an ordinance holding a parent liable for tuition costs or the costs of educating a child in such a situation. You next inquire whether, in the absence of statutory authority for such an ordinance, the General Assembly could enact such authority. Finally, you ask whether a school system may adopt a policy that holds a parent liable for tuition costs or the costs of educating a child in such a situation.

RESPONSE

It is my opinion that a locality[2] does not have the authority to enact an ordinance imposing a civil or criminal penalty against a parent enrolling a child based on false information that indicates the parent and child are residents of the local government.[3] It is further my opinion that a locality does not have the authority to enact an ordinance holding a parent liable for the tuition or educational costs in such a situation. The General Assembly may enact such enabling authority if it so chooses. Finally, it is my opinion that a local school system does have the authority to adopt a policy holding a parent liable for the tuition or educational costs in the circumstances you describe.[4]

BACKGROUND

You present a specific fact pattern as the basis for your inquiry. You relate that a parent completed a registration form for his child to attend public school in Colonial Heights. The parent stated in that registration that he and his child are residents of the city of Colonial Heights. The child then attends school in the city for free pursuant to his perceived status as a resident of the city. School authorities later discover that the child was not a resident of the city during the time the child was attending the city's school and was not a resident when the parent completed the registration.

APPLICABLE LAW AND DISCUSSION

A local government and local school board are separate and distinct governmental agencies of the Commonwealth.[5] Although a local school board depends on the local governing body for a significant part of its funding, the local school board "is a separate 'public quasi corporation … that exercise[s] limited powers and functions of a public nature granted to them expressly or by necessary implication [of law], and none other.'"[6] Article VIII, § 1 of the Virginia Constitution requires the General Assembly "to provide for a system of free public elementary and secondary schools," and § 2 directs the General Assembly to "determine the manner in which funds are to be provided for the costs of maintaining" those schools.

"The statutory scheme prescribed by the General Assembly envisions a symbiotic relationship between the school board and the [city], whereby the school board manages and maintains the school system and the [city] provides the requisite local funding."[7] Article VIII, § 7 of the Virginia Constitution clearly vests supervisory authority over local schools in local school boards. Although local governments bear responsibility to provide school funding, the General Assembly has chosen to give the authority to charge tuition for access to public schools under certain circumstances to the local school boards.[8]

For clarity of discussion, I will respond to your last question first and then proceed by answering the remaining questions in order. You ask whether local school boards may enact regulations to hold nonresidents responsible for tuition costs.

Section 22.1-3 states that "[t]he public schools in each school division shall be free to each person of school age who resides within the school division." A 1982 opinion of this Office concludes that § 22.1-3 establishes a legislative presumption that a child residing with a natural parent is entitled to free admission to the schools of that local government in which the natural parent lives.[9] The 1982 opinion further concludes that "residence" for the purpose of free admission to local public schools must be *bona fide* residence and not merely superficial residence solely for the purpose of attending school.[10] Section 22.1-3 further states that "[e]very person of school age shall be deemed to reside in a school division," thereby entitling that child to free access to the division's schools under various enumerated circumstances.[11]

Section 22.1-5(A) provides that "no person may be charged tuition for admission or enrollment in the public schools of the Commonwealth, whether on a full-time or part-time basis, who meets the residency criteria set forth in § 22.1-3." Thus, § 22.1-5(A) implies that a person who does not meet the residency requirement may not necessarily receive free tuition. This fact is confirmed by subsection 2 of § 22.1-5(A), which states that a school board of a school division has the discretion, pursuant to regulations adopted by the school board, to admit and to charge tuition to "[p]ersons of school age who are residents of the Commonwealth but who do not reside within the school division."

It is discretionary, except in limited circumstances,[12] whether a local school board admits nonresident students free of tuition.[13] When a school board of a local school division wishes to require nonresident students to pay tuition as a condition of attending its schools, it may only do so pursuant to regulations it has adopted, and in accordance with § 22.1-5.[14]

You ask whether localities have the authority to impose a civil or criminal penalty against a parent providing false information indicating that the student and parent are residents of the school district. Additionally, you ask whether localities have the authority to require that nonresident students pay tuition as a condition of attending its schools, either by means of a civil or criminal penalty or by means of an ordinance.

Virginia follows the Dillon Rule of strict construction,[15] which "provides that local governing bodies have only those powers that are expressly granted, those that are necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable."[16] A municipality cannot perform any function unless the General Assembly has expressly granted the power to do so.[17] Virginia courts repeatedly have acknowledged this arrangement.[18]

It is necessary, therefore, to review the statutory grants of power to localities to determine whether the General Assembly has granted express authority to localities to enact an ordinance to impose civil or criminal penalties or to enact an ordinance to hold a parent liable for the tuition costs of educating nonresident students. I find no Virginia statute expressly authorizing a locality to enact either of the ordinances about which you inquire.

A review of the statutory grants of power made by the General Assembly to local governments generally,[19] and to cities and towns specifically,[20] reveals that the General Assembly has not granted localities the express power to regulate or supervise school systems. Additionally, the General Assembly has not granted localities the express authority to recoup the cost of educating a child who was not a resident of the school division either by means of a civil or criminal penalty against the child's parent or by ordinance.[21]

Since localities have no express authority, in order to impose such a penalty or enact such an ordinance, a locality must have the implied authority to do so. Questions of implied legislative authority are resolved by analyzing legislative intent.[22] In determining legislative intent, the Supreme Court of Virginia has looked both to legislation adopted and bills rejected by the General Assembly.[23] The Virginia Supreme Court "has consistently refused to imply powers that the General Assembly clearly did not intend to convey."[24] Thus, a locality will not have the power to recover tuition from nonresidents by means of an ordinance unless the General Assembly clearly intends that localities have such power. "'If there is any reasonable doubt whether legislative power exists, that doubt must be resolved against the local governing body.'"[25]

I have reviewed the various statutes that are relevant to the questions you pose and cannot find a source for any express or implied authority from the General Assembly for localities to enact the types of ordinances about which you inquire. Therefore, it is my opinion that localities do not have the authority to enact ordinances imposing a civil or criminal penalty against a parent for providing false residence information or to make a parent liable for the tuition or educational costs in such a situation.

The General Assembly has empowered the governing bodies of localities to adopt ordinances,[26] to impose penalties for violating ordinances,[27] and to levy taxes and assessments.[28] In a number of instances, the General Assembly has granted regulatory power to local governments concurrent with the authority to impose civil or criminal penalties.[29] It has not done so in the context of granting cities regulatory authority over public schools to permit, set, or charge tuition to nonresidents or to impose civil or criminal penalties, and no such authority can reasonably be implied.

To the contrary, the General Assembly specifically has authorized local school boards to set tuition charges in exchange for access to public schools.[30] The grant of this specific authority further demonstrates that local governments do not have the implied authority to decide how and when to hold a parent responsible for the local school division's costs of educating a nonresident student. The General Assembly already has legislated in this field; it has addressed the residency and tuition issues by specific statutes,[31] leaving no room to find any implied authority for a locality to do so. Additionally, the General Assembly has broadly legislated the areas of the source and composition of state and local school funds,[32] leaving no room for any implied power of a locality to enact ordinances which raise school funds by charging nonresidents tuition for attending the locality's public schools.

There are three basic reasons why localities lack authority: (1) the General Assembly has not expressly given localities such authority; (2) no such authority may be reasonably implied; and (3) the General Assembly previously has given statutory authority to local school boards to charge tuition in certain circumstances.[33]

I, therefore, conclude that no authority, express or implied, exists for a city to enact the ordinances about which you inquire. The General Assembly, however, may provide such power if it so chooses.

Finally, you ask whether the General Assembly may enact enabling authority to impose liability on a parent falsely providing information indicating that his nonresident child is a resident student. As previously noted, Virginia follows the Dillon Rule concerning the legislative powers of local governing bodies.[34] Article VII, § 2 of the Virginia Constitution endows the General Assembly with the ultimate authority over "the organization, government, powers … of counties, cities, towns, and regional governments." The General Assembly's authority over local governments includes its ability to provide local governments with "powers of legislation, taxation, and assessment as the General Assembly may determine."[35]

Article VIII, § 2 of the Virginia Constitution charges the General Assembly to "determine the manner in which funds are to be provided for the cost of maintaining an educational program … and shall provide for the apportionment of the cost of such program between the Commonwealth and the local units of government comprising such school divisions."

> While the Constitution of the State provides in mandatory terms that the legislature shall establish and maintain public free schools, there is neither mandate nor inhibition in the provisions, as to the regulations thereof. The legislature, therefore, has the power to enact any legislation in regard to the conduct, control, regulation of the public free schools….[36]

The Constitutionally-created power arrangement between the General Assembly and local governments, along with the General Assembly's broad authority to provide for and regulate a system of public schools, certainly confers on the General Assembly the capacity to enact enabling authority for local government to pass ordinances designed to impose liability on a parent falsely providing information indicating that his nonresident child is a resident student.

CONCLUSION

Accordingly, it is my opinion that a locality[37] does not have the authority to enact an ordinance imposing a civil or criminal penalty against a parent enrolling a child based on false information that indicates the parent and child are residents of the local government.[38] It is further my opinion that a locality does not have the authority to enact an ordinance holding a parent liable for the tuition or educational costs in such a situation. The General Assembly may enact such enabling authority if it so chooses. Finally, it is my opinion that a local school system does have the authority to adopt a policy holding a parent liable for the tuition or educational costs in the circumstances you describe.[39]

[1]Although the facts you present in your opinion request involve the city of Colonial Heights, I will focus my analysis of Virginia law as it relates to municipalities, cities, and towns, instead of the specific location that you provide. I note that many of the legal principles discussed in this opinion also apply to the county form of government.

[2]For purposes of this opinion, the term "locality" collectively refers to municipalities, cities, and towns.

[3]Effective July 1, 2005, a person who knowingly makes a false statement concerning the residency of a child to avoid tuition charges or enrollment in a school outside the attendance zone shall be guilty of a Class 4 misdemeanor. *See* 2005 Va. Acts ch. 178 (adding § 22.1-264.1), *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?051+fuh+ CHAP0178+500093.

[4]The local school board may only do so pursuant to the authority and procedure provided in § 22.1-5 as discussed in this opinion.

[5]Harold v. Bd. of Supvrs., 38 Va. Cir. 467, 472 (1996) (citing Bd. of Supvrs. v. County Sch. Bd., 182 Va. 266, 275, 28 S.E.2d 698, 702 (1944)).

[6]*Id.* (alterations in original) (quoting Kellam v. Sch. Bd., 202 Va. 252, 254, 117 S.E.2d 96, 98 (1960)).

[7]*Id.*

[8]*See* VA. CODE ANN. § 22.1-5 (LexisNexis Supp. 2004).

[9]1982-1983 Op. Va. Att'y Gen. 431, 432.

[10]*Id.*

[11]The only one of these circumstances relevant to this opinion is § 22.1-3(1), which provides that a person of school age is deemed to reside in a school division "[w]hen the person is living with a natural parent, or a parent by legal adoption."

[12]*See* § 22.1-5(B) (requiring local school board to charge for nonresidents who are temporarily living in Commonwealth and are admitted to attend public schools).

[13]*See* § 22.1-5(A); *see also* Op. Va. Att'y Gen.: 1975-1976 at 309 (noting that school board may allow Virginia residents residing outside its jurisdiction to attend school tuition free).

[14]It is doubtful that such regulations, if enacted by a school board, could have a retroactive effect. Laws are presumed to be prospective in their operation and retrospective laws are considered "odious in their nature." Elliott's Ex'r v. Lyell, 7 Va. (3 Call) 268, 282 (1802).

[15]*See* Commonwealth v. County Bd., 217 Va. 558, 573, 232 S.E.2d 30, 40 (1977).

[16]Tabler v. Fairfax County, 221 Va. 200, 202, 269 S.E.2d 358, 359 (1980).

[17]VA. CONST. art. VII, § 3.

[18]*See, e.g.*, *Tabler*, 221 Va. at 200, 269 S.E.2d at 358 (noting that under Dillon Rule, locality must have express authority); Nat'l Realty Corp. v. Va. Beach, 209 Va. 172, 175, 163 S.E.2d 154, 156 (1968) ("The power of a municipality, unlike that of the State legislature, must be exercised pursuant to an express grant."); Lawless v. County of Chesterfield, 21 Va. App. 495, 499, 465 S.E.2d 153, 155 (1995) ("'[T]he Dillon Rule is applicable to determine in the first instance, from express words or by implication, whether a power exists at all. If the power cannot be found, the inquiry is at an end.'") (quoting *County Board*, 217 Va. at 575, 232 S.E.2d at 41).

[19]Sections 15.2-900 through 15.2-975 (LexisNexis Repl. Vol. 2003 & Supp. 2004).

[20]Sections 15.2-1100 through 15.2-1132 (LexisNexis Repl. Vol. 2003 & Supp. 2004).

[21]Effective July 1, 2005, a person who knowingly makes a false statement concerning the residency of a child to avoid tuition charges or enrollment in a school outside the attendance zone shall be guilty of a Class 4 misdemeanor. *See* 2005 Va. Acts, *supra* note 3.

[22]*Tabler*, 221 Va. at 202, 269 S.E.2d at 360.

[23]*Id.*

[24]*Id.*

[25]*Lawless*, 21 Va. App. at 500, 465 S.E.2d at 155 (quoting City of Richmond v. Confrere Club of Richmond, Va., Inc., 239 Va. 77, 79-80, 387 S.E.2d 471, 473 (1990)). *Lawless* was decided under former Title 15.1 governing local government. In 1997, the General Assembly repealed Title 15.1 and recodified it as Title 15.2. See 1997 Va. Acts ch. 587, at 976, 976-1401 (adding Title 15.2, §§ 15.2-100 through 15.2-6321, and repealing Title 15.1, §§ 15.1-1 through 15.1-1705). The Act was made effective as of December 1, 1997. *Id.* cls. 7, 14, at 1401. The legal principles discussed in this opinion are not affected by the recodification.

[26]*See* § 15.2-1425 (LexisNexis Repl. Vol. 2003).

[27]*See* § 15.2-1429 (LexisNexis Repl. Vol. 2003).

[28]*See* § 15.2-1104 (LexisNexis Repl. Vol. 2003) (providing this authority to cities and towns).

[29]*See, e.g.*, VA. CODE ANN. § 15.2-2209 (LexisNexis Repl. Vol. 2003) (granting any locality authority to adopt ordinance that establishes uniform schedule of civil penalties for violations of specified provisions of zoning ordinance); § 15.2-901 (LexisNexis Repl. Vol. 2003) (providing that any locality may by ordinance provide that violations of trash disposal statute shall be subject to civil penalty); § 15.2-730 (LexisNexis Repl. Vol. 2003) (providing that county may adopt ordinance that establishes uniform schedule of civil penalties for violations of specified provisions of zoning ordinances regulating storage of junk and repair of motor vehicles).

[30] *See* § 22.1-5(A), (B), (D); *but see* § 22.1-5(C) (limiting tuition charges to not exceed total per capita cost of education).

[31] *See* § 22.1-3 (residency); § 22.1-5 (tuition).

[32] *See* §§ 22.1-88 through 22.1-124 (LexisNexis Repl. Vol. 2003 & Supp. 2004); *see also* § 22.1-88 (LexisNexis Repl. Vol. 2003) (general composition of school funds); § 22.1-95 (LexisNexis Repl. Vol. 2003) (duty of local government to levy school tax).

[33] *See* § 22.1-5(A), (B), (D).

[34] *See supra* notes 15-16 and accompanying text.

[35] VA. CONST. art. VII, § 2.

[36] Flory v. Smith, 145 Va. 164, 168, 134 S.E. 360, 362 (1926).

[37] *See supra* note 2.

[38] *See supra* note 3.

[39] *See supra* note 4.

OP. NO. 05-046

COUNTIES, CITIES AND TOWNS: GENERAL POWERS OF LOCAL GOVERNMENT – PUBLIC HEALTH AND SAFETY; NUISANCES — GOVERNING BODIES OF LOCALITIES – ORDINANCES AND OTHER ACTIONS BY THE LOCAL GOVERNING BODY.

No requirement for county with county executive form of government to file ordinances with clerk of circuit court; no violation of Constitution of Virginia for failure to file. Citizen must receive notice before such county may remove objects causing nuisance.

THE HONORABLE JEFFREY M. FREDERICK
MEMBER, HOUSE OF DELEGATES
SEPTEMBER 6, 2005

ISSUE PRESENTED

You inquire regarding the abatement or removal of nuisances[1] by a county with a county executive form of government.[2] You ask whether such a county is required to file its ordinances with the clerk of the circuit court. Next, you ask whether it violates the Constitution of Virginia if that county does not file its ordinances with the circuit court clerk. Finally, you ask whether a citizen must be notified before that county removes the objects causing a nuisance.

RESPONSE

It is my opinion that a county with a county executive form of government is not required to file its ordinances with the clerk of the circuit court, and the failure to do so is not a violation of the Virginia Constitution. Finally, it is my opinion that a citizen must receive notice before that county may remove the objects causing a nuisance.

BACKGROUND

You advise that Prince William County has removed objects from the property of a citizen in your district. You further advise that Prince William County deemed the objects to be a nuisance or unsightly and has removed them from the property.

You also relate that the citizen believes that the statutory law of the Commonwealth requires that he be notified and given an opportunity to remove, cover, or fence the objects prior to Prince William County taking action.[3] In addition, you note that the citizen believes that the Prince William County ordinances authorizing the removal of his property were not properly implemented since they were not filed in the Office of the Clerk of the Circuit Court of Prince William County.

APPLICABLE LAW AND DISCUSSION

The overriding goal of statutory interpretation is to discern and give effect to legislative intent.[4] The Commonwealth follows the rule of strict construction of statutory provisions. In determining legislative intent, the rule is clear that where a power is conferred and the mode of its execution is specified, no other method may be selected; any other means would be contrary to legislative intent and, therefore, unreasonable.[5] A necessary corollary is that where a grant of power is silent upon its mode of execution, a method of exercise clearly contrary to legislative intent, or inappropriate to the ends sought to be accomplished by the grant, also would be unreasonable.[6]

"The powers of county boards of supervisors are fixed by statute and are limited to those powers conferred expressly or by necessary implication."[7] "This rule 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."[8] "[T]he Dillon Rule is applicable to determine in the first instance, from express words or by implication, whether a power exists at all. If the power cannot be found, the inquiry is at an end."[9]

You ask whether a county with a county executive form of government is required to file its ordinances with the clerk of the circuit court. Section 15.2-1427 generally provides the procedure that counties must follow in adopting ordinances. The only statutory requirement regarding the filing of ordinances is found in § 15.2-1427(F), and provides:

> In counties, except as otherwise authorized by law, no ordinance shall be passed until after descriptive notice of an intention to propose the ordinance for passage has been published once a week for two successive weeks prior to its passage in a newspaper having a general circulation in the county. The second publication shall not be sooner than one calendar week after the first publication. The publication shall include a statement either that the publication contains the full text of the ordinance or that a copy of the full text of the ordinance is on file in the clerk's office of the circuit court of the county or in the office of the county administrator; *or in the case of any county organized under the form of government set out in Chapter 5, 7 or 8 of [Title 58.1], a statement that a copy of the full text of the ordinance is on file in the office of the clerk of the*

> *county board*. Even if the publication contains the full text of the ordinance, a complete copy shall be available for public inspection in the offices named herein. [Emphasis added.]

Prince William County is a county with a county executive form of government[10] organized under the form of government set out in Chapter 5 of Title 15.2 of the *Code*. "'Where a statute is unambiguous, the plain meaning is to be accepted without resort to the rules of statutory interpretation.'"[11] Accordingly, when adopting ordinances, Prince William County is required by the General Assembly to file a full text of a proposed ordinance in the office of the clerk *of the county board of supervisors*. In addition, when a subdivision ordinance is adopted, or amended, by Prince William County, § 15.2-2252 requires that a certified copy of the ordinance and any amendments "be filed in the office of an official of the locality, designated in the ordinance, and in the clerk's office of the circuit court." The only other provisions governing filing of an ordinance with the clerk of the circuit court deal with vacation of interests in real property granted to a locality as a condition of site plan approval, vacation of a plat of survey before the sale of any lot, and the vacation of a plat of survey after the sale of any lot.[12] I find no statutory provision requiring a locality to file a copy of its ordinances with the clerk of the circuit court.

The provisions pertaining to the abatement or removal of nuisances by localities are found in Article 1, Chapter 9 of Title 15.2, §§ 15.2-900 through 15.2-926.2. There is no requirement in Article 1 directing a locality to file a copy of its ordinances regarding the abatement or removal of nuisances with the clerk of the circuit court. Accordingly, I must conclude that a county with a county executive form of government is not required to file a copy of its ordinances with the clerk of the circuit court.

You next ask whether the filing procedures of Prince William County violate the Virginia Constitution because copies of the county ordinances are not filed with the clerk of the circuit court. The Virginia Constitution does not require that a copy of the county ordinances be filed with the clerk of the circuit court. The practices of Prince William County in this regard are not addressed by the Virginia Constitution and, therefore, do not violate the Constitution.

Finally, you ask whether a county with a county executive form of government must notify a citizen before taking action to remove inoperable motor vehicles, trailers, or semitrailers from his property.[13] Section 15.2-905(A) authorizes the Prince William County Board of Supervisors to adopt an ordinance that prohibits:

> any person from keeping, except within a fully enclosed building or structure or otherwise shielded or screened from view, on any property zoned or used for residential purposes, or on any property zoned for commercial or agricultural purposes, any motor vehicle, trailer or semitrailer, as such are defined in § 46.2-100, which is inoperable.

> The locality in addition may by ordinance limit the number of inoperable motor vehicles which any person may keep outside of a fully enclosed building or structure.

Section 15.2-905(B) further authorizes Prince William County to adopt an ordinance to "remove the inoperable motor vehicle, whenever the owner of the premises, after reasonable notice, has failed to do so." Prince William County has adopted such an ordinance [14] pursuant to the authority granted in § 15.2-905. Furthermore, § 13-485 of the Prince William County Code provides that the chief of police or the administrative bureau give written notice of the violation and request compliance therewith within ten days after receipt of the notice. Whenever a person fails to comply with the written notice, § 13-488 of the Prince William County Code permits the chief of police or the administrative bureau to direct the removal of the vehicle from the "subject property after obtaining any necessary warrants as may be required." Finally, § 13-488 does not permit removal of any inoperative motor vehicle, trailer, or semitrailer "until after the time for compliance or appeal under sections 13-485 and 13-487 has elapsed, or until such appeal has been heard."

"'Where a statute is unambiguous, the plain meaning is to be accepted without resort to the rules of statutory interpretation.'"[15] A statute that limits the method by which something shall be done indicates a legislative intent that it not be done otherwise.[16] Accordingly, the clear language of the Prince William County Code, as authorized by § 15.2-905, requires that a citizen receive notice before Prince William County may take action to remove inoperable motor vehicles, trailers or semitrailers from the property of any citizen.

CONCLUSION

Accordingly, it is my opinion that a county with a county executive form of government is not required to file its ordinances with the clerk of the circuit court, and the failure to do so is not a violation of the Virginia Constitution. Finally, it is my opinion that a citizen must receive notice before that county may remove the objects causing a nuisance.

[1]Based on the terms used in your request regarding the removal of objects from a citizen's property by Prince William County, I will assume, for purposes of this opinion, that such objects are inoperable motor vehicles, trailers, or semitrailers.

[2]*See* VA. CODE ANN. §§ 15.2-500 through 15.2-541 (LexisNexis Repl. Vol. 2003).

[3]*See supra* note 1.

[4]*See* Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983); Vollin v. Arlington Co. Electoral Bd., 216 Va. 674, 678-79, 222 S.E.2d 793, 797 (1976); 1990 Op. Va. Att'y Gen. 155, 155, and opinions cited therein.

[5]*See* Page v. Belvin, 88 Va. 985, 990, 14 S.E. 843, 845 (1892).

[6]*See* Groner v. City Council, 77 Va. 488, 490 (1883); Kirkham v. Russell, 76 Va. 956, 961 (1882).

[7]County Bd. v. Brown, 229 Va. 341, 344, 329 S.E.2d 468, 470 (1985); *see also* Gordon v. Bd. of Supvrs., 207 Va. 827, 832, 153 S.E.2d 270, 274 (1967); Johnson v. County of Goochland, 206 Va. 235, 237, 142 S.E.2d 501, 502 (1965).

[8]Commonwealth v. County Bd., 217 Va. 558, 574, 232 S.E.2d 30, 40 (1977).

[9]*Id.* at 575, 232 S.E.2d at 41.

[10]*See* VA. ASS'N COUNTIES, VIRGINIA COUNTY SUPERVISOR'S MANUAL, at 3-7 (6th ed. 1998).

[11]Sykes v. Commonwealth, 27 Va. App. 77, 80, 497 S.E.2d 511, 512 (1998) (quoting Last v. Va. State Bd. of Med., 14 Va. App. 906, 910, 421 S.E.2d 201, 205 (1992)).

[12]*See* §§ 15.2-2270, 15.2-2271, 15.2-2272, respectively (LexisNexis Repl. Vol. 2003) (providing that when no appeal is filed or ordinance is upheld on appeal, ordinance "may be" recorded in clerk's office).

[13]*See supra* note 1.

[14]Section 13-483 of Article XVIII of Chapter 13 of the Prince William County Code. The Prince William County Code is available via the Internet. *See* http://www.co.prince-william.va.us/Documents/CountyCode/.

[15]*See Sykes*, 27 Va. App. at 80, 497 S.E.2d at 512 (quoting *Last*, 14 Va. App. at 910, 421 S.E.2d at 205).

[16]Grigg v. Commonwealth, 224 Va. 356, 364, 297 S.E.2d 799, 803 (1982) (explaining maxim *expressio unius est exclusio alterius*).

OP. NO. 05-011

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

No authority for locality to pass site ordinance restricting or requiring specific requirements of undesirable industries or businesses before locating within locality. Adoption of zoning ordinance is only method for locality to generally control location of such industries or businesses. General police power of county does not solely authorize board of supervisors to pass site ordinance in conjunction with distance requirement from water source.

MR. SCOT S. FARTHING
ATTORNEY FOR WYTHE COUNTY
MARCH 31, 2005

ISSUE PRESENTED

You ask whether the Wythe County Board of Supervisors is authorized to pass a site ordinance restricting or requiring specific requirements of potentially undesirable industries or businesses before locating within Wythe County which does not have a zoning ordinance.[1] You also ask whether there is any way other than application of the provisions of a zoning ordinance to control the location of undesirable industries or businesses within Wythe County. Finally, you ask whether the Board may pass a site ordinance pursuant to the County's general police power if it is passed in conjunction with a distance requirement from a water source.

RESPONSE

It is my opinion that Wythe County is not authorized to pass a site ordinance restricting or requiring specific requirements of potentially undesirable industries or businesses before locating within Wythe County. Adoption of a zoning ordinance is the only method permitted by the General Assembly authorizing a locality to generally control the location of undesirable industries or businesses within a locality. Finally, it is my opinion that the Wythe County Board of Supervisors is not authorized solely under the exercise of the County's general police power as you describe to pass a site ordinance in conjunction with a distance requirement from a water source.

BACKGROUND

You relate that the Wythe County Planning Commission ("Planning Commission") was directed by the Wythe County Board of Supervisors (the "Board") to study and draft a proposed zoning ordinance for the County. The Planning Commission spent approximately two years working on the ordinance, using the comprehensive plan, various committees and public meetings to gain input on the needs of the County and translating such into a zoning ordinance. A public hearing was held, and the Planning Commission recommended a zoning ordinance for the consideration of the Board. The Board has conducted several work sessions discussing the ordinance and possible changes to it. You indicate that some of the County's citizens have expressed their concern that the zoning ordinance will intrude on their private property rights.

You advise that over the past couple of years, some businesses have located in the county that citizens have asked the Board to regulate. Such businesses include truck stops, asphalt plants and livestock markets. You relate that the Board has made inquiry of you, as County Attorney, regarding whether the County has some means of controlling potentially undesirable land uses by private owners, such as by a site ordinance for each undesirable use.

APPLICABLE AUTHORITIES AND DISCUSSION

The overriding goal of statutory interpretation is to discern and give effect to legislative intent.[2] The Commonwealth follows the Dillon Rule[3] of strict construction of statutory provisions and its corollary that "the powers of county boards of supervisors are fixed by statute and are limited to those powers conferred expressly or by necessary implication."[4] Additionally, the powers of boards of supervisors are fixed by statute and are limited to those conferred expressly or by necessary implication.[5] "[T]he Dillon Rule is applicable to determine in the first instance, from express words or by implication, whether a power exists at all. If the power cannot be found, the inquiry is at an end."[6]

To determine whether the General Assembly has passed enabling legislation that permits localities to adopt a site ordinance with the provision that you describe, the land use provisions of Title 15.2 must be considered. "[A] fundamental rule of statutory construction requires that … the entire body of legislation and the statutory scheme [be viewed] to determine 'the true intention of each part.'"[7] "[T]he fullest possible effect [must be given] to the legislative intent embodied in the entire statutory enactment."[8] In the land use statutes, the General Assembly "has undertaken to achieve … a delicate balance between the individual property rights of its citizens and the health, safety and general welfare of the public as promoted by reasonable restrictions on those property rights."[9]

Article 7, Chapter 22 of Title 15.2, §§ 15.2-2280 through 15.2-2316, contains Virginia's zoning enabling statutes. Section 15.2-2280 grants any locality the power to classify its territory into districts and to regulate the use of land and buildings within each district for the statutorily recognized purposes of promoting the health,

safety and welfare of the general public.[10] In addition to the uses permitted by right in each district, § 15.2-2286(A)(3) authorizes "the granting of special exceptions under suitable regulations and safeguards." Sections 15.2-2286 and 15.2-2285 prescribe the specific procedures that must be followed when a locality proposes to enact a zoning ordinance or adopt an amendment to such an ordinance. First, the governing body must initiate the proposal by adopting a written resolution stating the underlying public purpose.[11] Second, the proposal must be referred to the local planning commission for review.[12] Third, the commission must give public notice pursuant to the provisions of § 15.2-2204, conduct a public hearing, and report its recommendations to the governing body.[13] Fourth, upon receipt of the commission's report, the governing body must give public notice and conduct its own public hearing.[14] "By complying with these procedures, the governing body acquires the same authority to act upon a zoning proposal as it has to act upon other legislative matters."[15] The only statutory provision permitting the adoption of a specific siting ordinance pertains to the location of a solid waste management facility within a locality.[16] There are no other statutory provisions authorizing a board of supervisors to adopt a specific site ordinance as you describe. It is, therefore, my opinion that the General Assembly has not authorized the Board to pass the site ordinance that you describe absent the adoption of a zoning ordinance.

The decisions of the Supreme Court of Virginia interpreting the police power of a locality clearly explain that § 15.2-1200 and analogous legislative acts constituting a general grant of the police power of the Commonwealth are not a complete grant of the police power of the Commonwealth to the localities.[17] Rather, many decisions apply the Dillon Rule of strict construction to the authority of local governments, thereby requiring that certain activities undertaken, or regulations imposed, by local governments have express enabling legislation or are necessarily implied from enabling legislation.[18] One commentator describes the general limitations on the exercise of the police power under a general grant as follows:

> [T]he ordinance must have a clear, reasonable and substantial relation to the public health, safety, morals, or welfare, and must be reasonably appropriate for the police power objective sought to be obtained.[19]

The Supreme Court of Virginia has held that a local government may, in the exercise of its general police power: (1) require a municipal permit for the purchase of handguns;[20] (2) regulate smoking in public areas;[21] (3) regulate topless dancing;[22] (4) regulate the operation of massage salons;[23] (5) regulate the use of "common towels";[24] (6) prohibit the conduct of lotteries and numbers games;[25] (7) restrict the keeping of vicious dogs;[26] and, (8) regulate or prohibit the operation of pool rooms.[27] A 1984 opinion of this Office interpreting the scope of a county's police power under § 15.1-510, predecessor to § 15.2-1200, concludes that this statute authorizes the

regulation of a broad range of activities that may reasonably be found to be adverse to the public health, safety, or welfare in particular sets of circumstances.[28] The regulation of waste disposal activities and waste disposal sites has generally been approved as an appropriate exercise of a locality's police power.[29]

The General Assembly has, however, expressly granted to localities the authority to prohibit or regulate specific uses of land only in their exercise of the zoning power.[30] Zoning is a valid exercise of the police power of the Commonwealth.[31] In an analogous context, the Supreme Court of Virginia has held that a county could not adopt an "Interim Development Ordinance" prohibiting the filing of subdivision plats and site plans under its general police power when the challenged provisions were not authorized under the applicable subdivision enabling statutes.[32] The Court has also commented that the police powers granted by the General Assembly under the zoning enabling statutes balance an individual's property rights against the health, safety, and welfare of the public by placing reasonable restrictions on such property rights.[33]

There is a well-developed body of case law available to guide the proper exercise of regulation of land uses within the context of the zoning power in any given instance. In addition, the provisions of § 15.2-2283 authorize local zoning ordinances to include reasonable provisions, not inconsistent with applicable state water quality standards, to protect surface water and groundwater. Section 15.2-1200 authorizes the adoption of measures under a county's general police power to prevent the outright pollution of county water "which is dangerous to the health or lives of persons residing in the county."[34] Considering the scope of the police power in § 15.2-1200, and the interaction between the general police power in § 15.2-1200 and Virginia's zoning enabling statutes, however, it is my opinion that the site ordinance you generally describe, used in conjunction with an unspecified distance requirement from a water source, would likely not be held to be a valid exercise of the general police power in generally regulating specific uses of land. I am of the opinion that the appropriate statutory provisions to be used in regulating the private use of land in the County would be through the use of Virginia's zoning enabling statutes.

CONCLUSION

Accordingly, it is my opinion that Wythe County is not authorized to pass a site ordinance restricting or requiring specific requirements of potentially undesirable industries or businesses before locating within Wythe County. Adoption of a zoning ordinance is the only method permitted by the General Assembly authorizing a locality to generally control the location of undesirable industries or businesses within a locality. Finally, it is my opinion that the Wythe County Board of Supervisors is not authorized solely under the exercise of the County's general police power as you describe to pass a site ordinance in conjunction with a distance requirement from a water source.

[1]You do not define the term "site ordinance" as it is used in your letter request. The only reference to a siting ordinance set forth in the *Code* is § 15.2-929. Section 15.2-929 authorizes localities to adopt solid waste management facility siting ordinances, generally describes the contents of such ordinances, and prescribes a procedure for siting approval. I am not aware of any other statutory provision that provides for a site ordinance such as the one you describe.

[2]*See* Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983); Vollin v. Arlington Co. Electoral Bd., 216 Va. 674, 678-79, 222 S.E.2d 793, 797 (1976); 1990 Op. Va. Att'y Gen. 155, 155, and opinions cited therein.

[3]City of Richmond v. County Bd., 199 Va. 679, 684-85, 101 S.E.2d 641, 644-45 (1958) (noting 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).

[4]County Bd. v. Brown, 229 Va. 341, 344, 329 S.E.2d 468, 470 (1985).

[5]Gordon v. Bd. of Supvrs., 207 Va. 827, 832, 153 S.E.2d 270, 274 (1967); Johnson v. County of Goochland, 206 Va. 235, 237, 142 S.E.2d 501, 502 (1965).

[6]Commonwealth v. County Bd., 217 Va. 558, 575, 232 S.E.2d 30, 41 (1977).

[7]Va. Real Estate Bd. v. Clay, 9 Va. App. 152, 157, 384 S.E.2d 622, 625 (1989) (quoting McDaniel v. Commonwealth, 199 Va. 287, 292, 99 S.E.2d 623, 627 (1957)).

[8]*Id.* at 157, 384 S.E.2d at 625.

[9]Bd. of Supvrs. v. Horne, 216 Va. 113, 120, 215 S.E.2d 453, 458 (1975) (interpreting local zoning ordinances; specifically, § 15.1-491, predecessor to § 15.2-2286).

[10]*See* Va. Code Ann. § 15.2-2200 (LexisNexis Repl. Vol. 2003) (recognizing purpose of zoning is to improve public health, safety, and welfare).

[11]Section 15.2-2286(A)(7) (LexisNexis Repl. Vol. 2003) (providing further that local planning commission may initiate amendment by motion that states public purpose or land owner may petition for amendment).

[12]Section 15.2-2285(B) (LexisNexis Repl. Vol. 2003).

[13]Section 15.2-2285(A).

[14]Section 15.2-2285(C).

[15]Town of Vinton v. Falcun Corp., 226 Va. 62, 66, 306 S.E.2d 867, 869 (1983) (construing §§ 15.1-491, 15.1-493, predecessors to §§ 15.2-2285, 15.2-2286).

[16]*See supra* note 1.

[17]*See* cases cited *infra* notes 20-27.

[18]*See, e.g.*, Tabler v. Bd. of Supvrs., 221 Va. 200, 202, 269 S.E.2d 358, 359-60 (1980) (holding that locality did not have express power to require deposit on beverage containers, because power was not implicitly authorized under former § 15.1-510).

[19]Charles S. Rhyne, The Law of Local Government Operations § 19.8, at 452-53 (1980).

[20]Stallings v. Wall, 235 Va. 313, 367 S.E.2d 496 (1988).

[21]*See* Alford v. City of Newport News, 220 Va. 584, 586, 260 S.E.2d 241, 243 (1979) (noting that regardless of how legitimate purpose underlying exercise of police power is, police power may not be used to regulate property interests unless means employed are reasonably suited to achieve stated goal).

[22]Wayside Rest., Inc. v. City of Va. Beach, 215 Va. 231, 208 S.E.2d 51 (1974).

[23]Kisley v. City of Falls Church, 212 Va. 693, 187 S.E.2d 168 (1972).

[24]Nat'l Linen Serv. Corp. v. City of Norfolk, 196 Va. 277, 83 S.E.2d 401 (1954) (noting that ordinance enacted under general police power must bear real and substantial relationship to health, safety or general welfare of city's inhabitants).

[25]Allen v. City of Norfolk, 196 Va. 177, 83 S.E.2d 397, *modifying* 195 Va. 844, 80 S.E.2d 605 (1954).

[26]King v. County of Arlington, 195 Va. 1084, 81 S.E.2d 587 (1954).

[27]Assaid v. City of Roanoke, 179 Va. 47, 18 S.E.2d 287 (1942).

[28]*See* 1983-1984 Op. Va. Att'y Gen. 86, 87 (discussing regulation of sewage sludge disposal).

[29]*See generally* Op. Va. Att'y Gen.: 1984-1985 at 91; 1983-1984 at 89; 1981-1982 at 273; 1980-1981 at 123.

[30]*See* §§ 15.2-2280, 15.2-2281 (LexisNexis Repl. Vol. 2003).

[31]West Bros. Brick Co. v. City of Alexandria, 169 Va. 271, 281, 192 S.E. 881, 885 (1937).

[32]*See Horne*, 216 Va. at 113, 215 S.E.2d at 453.

[33]*Id.* at 120, 215 S.E.2d at 458.

[34]The general authority granted counties in § 15.2-1200 to regulate traditional aspects of public health and safety is broadly construed. *See* Op. Va. Att'y Gen.: 1992 at 59, 61; 1987-1988 at 147, 148 (construing § 15.1-510, predecessor to § 15.2-1200). A broad construction is particularly appropriate when the ordinance relates to a power expressly recognized in § 15.2-1200. *See* 1987-1988 Op. Va. Att'y Gen. 610, 614 (construing § 15.1-510).

OP. NO. 04-093

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

CONSERVATION: CHESAPEAKE BAY PRESERVATION ACT.

Landowner who has secured rezoning of properties for specific use before effective date of subsequent amendment to zoning ordinance and has pursued project committing and expending significant resources has obtained vested right; whether landowner incurs extensive obligations or substantial expenses is factual determination for county, subject to review by courts. Amendments to existing Chesapeake Bay Preservation Act zoning ordinance only affect landowner after amendments are adopted by local ordinance.

THE HONORABLE BRADLEY P. MARRS
MEMBER, HOUSE OF DELEGATES
MARCH 25, 2005

ISSUES PRESENTED

You ask whether the rights of an owner to make a specific use of property that was rezoned, and upon which the landowner committed and expended significant resources before adoption of amendments to a locality's Chesapeake Bay Preservation Act[1] zoning ordinance, vested prior to the applicability of the amended zoning ordinance.

RESPONSE

It is my opinion that a landowner who has secured rezoning of properties for a specific use before the effective date of a subsequent amendment to the zoning ordinance, and who has pursued the project committing and expending significant resources has obtained a vested right with respect to such use. Furthermore, amendments to an existing Chesapeake Bay Preservation Act section of a zoning ordinance only affect a landowner after the amendments are adopted by local ordinance. Finally, it is my opinion that whether a landowner incurs extensive obligations or substantial expenses is a factual determination for the county, subject to review by the courts.

APPLICABLE LAW AND DISCUSSION

1. VESTING

Generally, a landowner has no property right in an anticipated use of land because an owner has no vested property rights in the continuation of a parcel's zoning status.[2] In certain circumstances, however, a landowner may acquire vested rights in a particular use of land that may not subsequently be abrogated by a change in the land's zoning.[3] A determination of the vested rights of a landowner depends upon the facts of each particular case. In 1998, the General Assembly established certain criteria that, if met, will establish a landowner's vested rights.[4]

Section 15.2-2307 lists the criteria and specifically provides that a landowner's rights shall be deemed vested when the landowner:

> (i) obtains or is the beneficiary of a significant affirmative governmental act which remains in effect allowing development of a specific project, (ii) relies in good faith on the significant affirmative governmental act and (iii) incurs extensive obligations or substantial expenses in diligent pursuant of the specific project in reliance on the significant governmental act.

2. SIGNIFICANT GOVERNMENTAL ACT

Section 15.2-2307 provides guidance regarding activities which constitute a significant governmental act:

> [W]ithout limitation, the following are deemed to be significant affirmative governmental acts allowing development of a specific project: (i) the governing body has accepted proffers or proffered conditions which specify use related to a zoning amendment; (ii) the governing body has approved an application for a rezoning for a specific use or density; (iii) the governing body or board of zoning appeals has granted a special exception or use permit with conditions; (iv) the board of zoning appeals has approved a variance; (v) the governing body or its designated agent has approved a preliminary subdivision plant, site plan or plan of development for the landowner's property and the applicant diligently pursues approval of the final plat or plan within a reasonable period of time under the circumstances; or (vi) the governing body or its designated agent has approved a final subdivision plat, site plan or plan of development for the landowner's property.

The Virginia Supreme Court has decided its first case examining the new requirements of § 15.2-2307.[5] The Court has stated that the plain language of § 15.2-2307 now makes clear that the occurrence of one of the six types of actions listed in the second paragraph satisfies the first requirement for vested rights.[6] Such actions, which expressly include "rezoning for a specific use or density," constitute significant

affirmative governmental acts allowing development of a project.[7] In the past under common law, rezoning of a property may not have been deemed a significant governmental act for purposes of vesting; however, under the amended vesting statute, the rezoning of a property for a specific use or density satisfies one of the criteria necessary to prove vesting.

3. RELIANCE

Having benefited from a significant governmental act, a landowner must also rely in good faith on that act,[8] i.e., the landowner must take actions designed to move the project forward. Examples of actions that may show good faith reliance include commissioning consultants and engineers to develop site plans, stormwater plans, marketing plans, environmental information or other actions designed to advance the completion of the project if such actions result in the landowner incurring extensive obligation or expense.[9]

The fact that changes in an ordinance are pending or contemplated by a legislative body, which may preclude certain activities, does not undermine a landowner's good faith reliance on the governmental act.[10]

4. SIGNIFICANT EXPENSE

Further, § 15.2-2307 requires that a landowner incur extensive obligations or substantial expenses pursuing the project in reliance on the governmental act. The statute does not define "substantial expense"; but, in *Suffolk*,[11] the Court concluded that a developer had incurred substantial expense when the developer spent $158,000 over the course of five years on subdivision plats, construction plans, recreation plans and other plans that were designed for the benefit of the developer's project as a whole.[12]

In *Suffolk*, the funds were spent on the development of plans.[13] Other expenditures, such as the closing on the property if it was under option subject to rezoning or the development of environmental information needed for land development, may also qualify provided the landowner can relate the expense to the development of the project.[14]

Ultimately, whether a landowner incurs extensive obligations or substantial expenses is a factual determination for the county and subject to review, if necessary, by the courts. This Office historically has declined to render opinions that involve determinations of fact rather than questions of law.[15]

CONCLUSION

Accordingly, it is my opinion that a landowner who has secured rezoning of properties for a specific use before the effective date of a subsequent amendment to the zoning ordinance, and who has pursued the project committing and expending significant resources has obtained a vested right with respect to such use. Furthermore, amendments to an existing Chesapeake Bay Preservation Act section of a zoning ordinance only affect a landowner after the amendments are adopted by

local ordinance. Finally, it is my opinion that whether a landowner incurs extensive obligations or substantial expenses is a factual determination for the county, subject to review by the courts.

[1]*See* Va. Code Ann. §§ 10.1-2100 to 10.1-2115 (Michie Repl. Vol. 1998). Section 10.1-2116 was repealed by the 2004 Session of the General Assembly. *See* 2004 Va. Acts. ch. 1000, cl. 3, at 1964, 2003.

[2]Bd. Zoning Appeals v. Caselin Systems, Inc., 256 Va. 206, 210, 501 S.E.2d 397, 400 (1998), *quoted in* City of Suffolk v. Bd. Zoning Appeals, 266 Va. 137, 143, 580 S.E.2d 796, 798 (2003).

[3]*Id.*

[4]*See* 1998 Va. Acts ch. 801, at 1923, 1923 (amending and reenacting § 15.2-2307); *see also* VA. CODE ANN. § 15.2-2307 (LexisNexis Supp. 2004).

[5]*See City of Suffolk*, 266 Va. 137, 580 S.E.2d 796.

[6]*Id.* at 145, 580 S.E.2d at 799.

[7]*Id.* (quoting § 15.2-2307).

[8]*See* § 15.2-2307.

[9]*See infra* note 12 and accompanying text.

[10]This conclusion is consistent with prior opinions of this Office. *See, e.g.*, 1990 Op. Va. Att'y Gen. 33, 34-35.

[11]*See supra* note 5.

[12]*Suffolk*, 266 Va. at 148-49, 580 S.E.2d at 801-02.

[13]*Id.*

[14]*See id.*

[15]*See, e.g.*, 1991 Op. Va. Att'y Gen. 122, 124.

OP. NO. 05-023

COUNTIES, CITIES AND TOWNS: TAXES & ASSESSMENTS FOR LOCAL IMPROVEMENTS – SERVICE DISTRICTS.

Authority for local governing bodies to create service district to construct, maintain, and operate facilities and equipment required to, and to employ and fix compensation of technical, clerical, or other force to, test water, remove debris, control weeds, and maintain navigational aids on Smith Mountain Lake. No authority for board of supervisors of one county to adopt ordinance to form service district that encompasses portion of other counties. Properties within service district may be assessed fixed dollar amount for local improvements; such assessments may not be in excess of peculiar benefits resulting from improvements to owner's property within district. Service district may not be loosely described and must have well-defined geographical boundary, not general description. Local government may only exclude section, district, or zone that is specifically identified within service district.

THE HONORABLE KATHY J. BYRON
MEMBER, HOUSE OF DELEGATES
MAY 3, 2005

ISSUES PRESENTED

You inquire concerning service districts created pursuant to § 15.2-2400. First, you inquire whether a service district may be formed to provide governmental services

that currently are provided by other agencies of the Commonwealth. Specifically, you ask whether a service district may perform the water testing on Smith Mountain Lake that the Department of Environmental Quality currently provides. Additionally, you ask whether such a service district may remove debris from, control weeds in, and maintain navigational aids on the lake, which the Tri-County Lake Administrative Commission currently provides. Further, you inquire whether the properties within a service district may be assessed a fixed dollar amount per year to cover the budget of the service district, which budget merely estimates the amount needed for multiple projects spanning multiple years. You next ask whether a single county's board of supervisors may adopt an ordinance to form a service district that will encompass parts of each of the three separate counties that comprise the lake area. You then inquire whether the property to be included within a service district may be loosely described to be waterfront property, off-water property that has water access, and businesses that benefit from the lake. You next ask whether a service district must have a well-defined geographical boundary as opposed to a general property description, such as waterfront and off-water, but with deeded lake access. Further, you ask whether a service district may exclude, from assessment or taxation, specific types of property that are within the geographical boundary of the service district, i.e., farms, property without water access, or businesses with less than a fixed dollar amount of gross income. Finally, you inquire whether such property descriptions contain sufficient specificity to comply with the statutory requirements.

RESPONSE

It is my opinion that the General Assembly authorizes local governing bodies to create a service district to construct, maintain, and operate facilities and equipment necessary or desirable that are required for water testing, debris removal, control of weeds, and maintenance of navigational aids. Furthermore, the General Assembly authorizes local governing bodies to create a service district to employ and fix the compensation of any technical, clerical, or other force, and to employ the help necessary or desirable to test water, remove debris, control weeds, and maintain navigational aids. When there is a geographical area that occupies a portion of three counties, it is my opinion that the board of supervisors of one county may not adopt an ordinance to form a service district that encompasses a portion of the other counties. It is further my opinion that properties within a service district may be assessed a fixed dollar amount required for the local public improvements. Such assessments may not be in excess of the peculiar benefits resulting from the improvements to the owner's property within the district. It is also my opinion that a service district may not be loosely described to be waterfront property, off-water property that has water access, and businesses that benefit from the lake. Additionally, a service district must have a well-defined geographical boundary as opposed to a general description of the property included within the district. Finally, it is my opinion that the General Assembly only authorizes a local governing body to exclude from a service district any section, district, or zone that is specifically identified within the service district.

APPLICABLE AUTHORITIES AND DISCUSSION

The overriding goal of statutory interpretation is to discern and give effect to legislative intent.[1] The Commonwealth follows the rule of strict construction of statutory provisions.[2] In determining legislative intent, the rule is clear that where a power is conferred and the mode of its execution is specified, no other method may be selected; any other means would be contrary to legislative intent and, therefore, unreasonable.[3] A necessary corollary is that where a grant of power is silent upon its mode of execution, a method of exercise clearly contrary to legislative intent, or inappropriate to the ends sought to be accomplished by the grant, also would be unreasonable.[4]

Service districts are creatures of statute.[5] As such, service districts function within the ambit of powers conferred by the General Assembly. Their organization, management, purposes, and powers are delineated in Chapter 24, "Service Districts; Taxes and Assessments for Local Improvements," of Title 15.2, §§ 15.2-2400 through 15.2-2413. In § 15.2-2403(1), the General Assembly authorizes a service district "to provide additional, more complete or more timely governmental services within a service district."

1. FORMATION OF A SERVICE DISTRICT

You first ask whether a service district may be formed to provide governmental services that currently are provided by other agencies of the Commonwealth. You specifically ask whether a service district may perform water testing on Smith Mountain Lake that currently is performed by the Department of Environmental Quality. In addition, you ask whether a service district may remove debris from, control weeds in, and maintain navigational aids that the Tri-County Lake Administrative Commission currently provides.[6]

Section 15.2-2400 authorizes local governing bodies to create service districts "to provide additional, more complete or more timely services of government." A prior opinion of the Attorney General concludes that the phrase "additional governmental services" includes those services of a type usually provided by local governments on a jurisdiction-wide basis.[7] In the service district context, however, such services are provided on an exclusive or enhanced basis within the service district, rather than on a uniform basis throughout the jurisdiction.[8]

In § 15.2-2403, the General Assembly authorizes the governing bodies of localities to exercise certain enumerated powers with regard to service districts. The delegated powers include the maintenance and operation of equipment that is either necessary or desirable to provide additional "services, … which will enhance the public use and enjoyment of and the public safety, public convenience, and public well-being within a service district."[9] Furthermore, the General Assembly authorizes the governing bodies of localities forming service districts

> [t]o employ and fix the compensation of any technical, clerical or other force and help which from time to time, in their judgment may be necessary or desirable to provide the governmental services

> authorized by subdivisions 1, 2 and 11 or for the construction, operation or maintenance of any such facilities and equipment as may be necessary or desirable in connection therewith.[10]

For the purposes of this opinion, I must assume that water testing of the Lake water, debris removal from the Lake, control of weeds in the Lake and maintenance of navigational aids on the Lake enhance the public use and enjoyment of the Lake. Furthermore, I must assume that these additional services will enhance the public safety, public convenience and public well-being within the service district. """"The manifest intention of the legislature, clearly disclosed by its language, must be applied.""""[11] I must conclude, therefore, that the General Assembly authorizes local governing bodies with respect to a service district to construct, maintain and operate facilities and equipment necessary or desirable that is required for water testing, debris removal, control of weeds and maintenance of navigational aids. Therefore, I conclude that the General Assembly authorizes local governing bodies with respect to a service district to employ and fix the compensation of any technical, clerical or other force and help necessary or desirable that is required for water testing, debris removal, control of weeds and maintenance of navigational aids.

2. SERVICE DISTRICT ORDINANCE

You next ask whether a single county board of supervisors may adopt an ordinance to form a service district that will encompass parts of three separate counties within the service district, including the board of supervisors' county.

In § 15.2-2400, the General Assembly provides that "[a]ny locality may by ordinance, or any two or more localities may by concurrent ordinances, create service districts within the locality or localities in accordance with the provisions of this article."

When a particular word in a statute is not defined therein, the word must be given its ordinary meaning.[12] In § 15.2-2400, the General Assembly authorizes local governing bodies to create service districts "within the locality." The term "within" is generally defined to mean "inside the bounds of a place or region."[13] The General Assembly, therefore, authorizes a single local governing body to create a service district within the geographic area of that locality. Consequently, I must conclude that when there is a geographic area that is a part of three separate counties, the board of supervisors of only one of the counties may not adopt an ordinance to form a service district that will encompass portions of each of the three separate counties. Further, § 15.2-2400 clearly provides that two or more localities must enact "concurrent ordinances" to create a service district within such localities.

3. ASSESSMENT OF FIXED DOLLAR AMOUNT

Your next question is whether individual properties within a service district may be assessed a fixed dollar amount as opposed to an amount based upon a rate of the fair market value of the property to cover the budget of the service district when the budget covers multiple projects over multiple years and the amount required for each project is only estimated in the budget.[14]

Section 15.2-2404 authorizes a *locality* to impose taxes or assessments upon abutting property owners for local public improvements. Section 15.2-2404 also provides that the taxes or assessments imposed on abutting property owners "shall not be in excess of the peculiar benefits resulting from the improvements to such property owners." Special assessments for such local improvements are generally distinguished from general tax levies and service charges because special assessments are intended to impose a just share of the costs of improvements on the adjacent property that is enhanced in value. Under the provisions of § 15.2-2405, "[s]uch improvements may be ordered by the governing body" pursuant to (1) "an agreement between the governing body and the abutting landowners"; (2) "a petition from not less than three-fourths of the landowners" affected by the improvement; or (3) "a two-thirds vote of all the members elected to the governing body." "Where a statute is unambiguous, the plain meaning is to be accepted without resort to the rules of statutory interpretation."[15] It is clear from the plain and unambiguous language of § 15.2-2405 that the taxes and assessments must be related to the specific project improvement for which it is being collected, and further, cannot be in excess of the peculiar benefits obtained by the property owner from that project. Therefore, I must conclude that properties within a service district may be assessed a fixed dollar amount required for the local public improvements, but cannot be "in excess of the peculiar benefits resulting from the improvements to such … property owners."[16]

4. DESCRIPTION OF SERVICE DISTRICT PROPERTY

You next inquire regarding whether property to be included within a service district may be loosely described to be waterfront property, off-water property that has water access and business that benefit from the lake.

Section 15.2-2402 provides:

> Any ordinance or petition to create a service district shall:
>
> 1. Set forth the name and describe the boundaries of the proposed district and specify any areas within the district that are to be excluded;
>
> 2. Describe the purposes of the district and the facilities and services proposed within the district;
>
> 3. Describe a proposed plan for providing such facilities and services within the district; and
>
> 4. Describe the benefits which can be expected from the provision of such facilities and services within the district.

The language in § 15.2-2402(1) clearly provides that the ordinance creating the service district shall "set forth the name and describe the boundaries of the proposed district." 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.[17] The language used by the General Assembly in § 15.2-2402(1) requires that property

to be included within a service district must be described by name with its boundaries clearly described. I am, therefore, of the opinion that a service district may not be loosely described to be waterfront property, off-water property that has water access and businesses that benefit from the lake.

5. SERVICE DISTRICT BOUNDARY

You next ask whether a service district is required to have a well-defined geographical boundary as opposed to a general description of the property within the district, such as waterfront, and off-water but with deeded lake access.

Since a service district is purely a statutory creation,[18] it has no authority to change in any way the mold in which it was fashioned by the General Assembly.[19] It cannot alter the fact that it is a governmental agency.[20] In addition, when a statute is expressed in plain and unambiguous terms, whether general or limited, the legislature is assumed to mean what it plainly has expressed, and "no room is left for construction."[21] The provisions of § 15.2-2402(1) clearly require that a service district have a well-defined geographical boundary as opposed to a general description of the property included within the district.

6. EXCLUSIONS FROM SERVICE DISTRICT

Finally, you ask whether a service district may exclude specific property, such as farms, property without water access, or businesses of less than a dollar amount of gross income that are within the geographical boundary of the service district, from being subject to tax or assessment for improvements within the district. You also inquire regarding whether such property descriptions contain sufficient specificity to comply with the statutory requirements.

The language in § 15.2-2402(1) clearly provides that the ordinance creating a service district shall "specify any areas within the district that are to be excluded" from the proposed service district. The term "area" is generally defined to mean "a section, district, or zone of a town or city."[22] "Where a statute is unambiguous, the plain meaning is to be accepted without resort to the rules of statutory interpretation."[23] Furthermore, the term "specify" is generally defined to mean "to mention or name in a specific or explicit manner."[24] The clear, unambiguous language used by the General Assembly, therefore, requires that area containing a section, district or zone of the district that is to be excluded from the proposed district must be specifically described. The General Assembly does not permit specific property that is not specifically described in a section, district or zone such as you describe, to be excluded from a service district.

A statute specifying the method by which something shall be done indicates a legislative intent that it not be done otherwise.[25] The authority and powers of county boards of supervisors are fixed by statute and are limited to those conferred expressly or by necessary implication.[26] This rule 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.[27] "[T]he Dillon

Rule is applicable to determine in the first instance, from express words or by implication, whether a power exists at all. If the power cannot be found, the inquiry is at an end."[28] The General Assembly expressly authorizes a local governing body to exclude from the service district any section, district or zone that is specifically identified within the service district. A local governing body, therefore, is not authorized to exclude property, generally described as farms, property without water access, or businesses of less than a dollar amount of gross income that are within the geographical boundary of the service district, from being subject to tax or assessment for improvements within the district.

CONCLUSION

Accordingly, it is my opinion that the General Assembly authorizes local governing bodies to create a service district to construct, maintain, and operate facilities and equipment necessary or desirable that are required for water testing, debris removal, control of weeds, and maintenance of navigational aids. Furthermore, the General Assembly authorizes local governing bodies to create a service district to employ and fix the compensation of any technical, clerical, or other force, and to employ the help necessary or desirable to test water, remove debris, control weeds, and maintain navigational aids. When there is a geographical area that occupies a portion of three counties, it is my opinion that the board of supervisors of one county may not adopt an ordinance to form a service district that encompasses a portion of the other counties. It is further my opinion that properties within a service district may be assessed a fixed dollar amount required for the local public improvements. Such assessments may not be in excess of the peculiar benefits resulting from the improvements to the owner's property within the district. It is also my opinion that a service district may not be loosely described to be waterfront property, off-water property that has water access, and businesses that benefit from the lake. Additionally, a service district must have a well-defined geographical boundary as opposed to a general description of the property included within the district. Finally, it is my opinion that the General Assembly only authorizes a local governing body to exclude from a service district any section, district, or zone that is specifically identified within the service district.

[1] *See* Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983); Vollin v. Arlington Co. Electoral Bd., 216 Va. 674, 678-79, 222 S.E.2d 793, 797 (1976); 1990 Op. Va. Att'y Gen. 155, 155, and opinions cited therein.

[2] "The Dillon Rule of strict construction controls our determination of the powers of local governing bodies. This rule provides that [local governments] have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable." City of Chesapeake v. Gardner Enters., Inc., 253 Va. 243, 246, 482 S.E.2d 812, 814 (1997), *quoted in* 2004 Op. Va. Att'y Gen. 224, 229 n.22.

[3] *See* Page v. Belvin, 88 Va. 985, 990, 14 S.E. 843, 845 (1892).

[4] *See* Groner v. City Council, 77 Va. 488, 490 (1883); Kirkham v. Russell, 76 Va. 956, 961 (1882).

[5] *See* Va. Code Ann. § 15.2-2400 (LexisNexis Repl. Vol. 2003) (creation of service districts).

[6] The counties of Bedford, Franklin, and Pittsylvania formed the Tri-County Lake Administrative commission pursuant to § 15.2-1300. *See* "Organizational Cooperative Agreement Creating the Tri-County Lake Administrative Commission" (partial copy on file with this Office).

[7]1986-1987 Op. Va. Att'y Gen. 113, 114 (1986) (interpreting § 15.1-18.2(b)(5), predecessor to § 15.2-2403).

[8]*Id.*

[9]Section 15.2-2403(1) (LexisNexis Supp. 2004).

[10]Section 15.2-2403(8).

[11]Sykes v. Commonwealth, 27 Va. App. 77, 80, 497 S.E.2d 511, 512 (1998) (quoting Barr v. Town & Country Props., Inc., 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990) (quoting Anderson v. Commonwealth, 182 Va. 560, 566, 29 S.E.2d 838, 841 (1944))).

[12]*See* McKeon v. Commonwealth, 211 Va. 24, 27, 175 S.E.2d 282, 284 (1970).

[13]Webster's Third New International Dictionary of the English Language Unabridged 2627 (1993) [hereinafter Webster's Third].

[14]Section 15.2-2403(6) permits a tax or assessment to be levied on any property in the service district subject to local taxation. Thus, additional taxes could be imposed on real estate alone, or any of the other categories of property subject to local taxation alone or any combination thereof, subject to the uniformity requirement of Article X, § 1 of the Constitution of Virginia. *See* 1986-1987 Op. Va. Att'y Gen: 111, 113 n.4 (interpreting § 15.1-18.2(b)(5), predecessor to § 15.2-2403).

[15]Last v. Va. State Bd. of Med., 14 Va. App. 906, 910, 421 S.E.2d 201, 205 (1992), *quoted in Sykes*, 27 Va. App. at 80, 497 S.E.2d at 512.

[16]Section 15.2-2404 (LexisNexis Repl. Vol. 2003). The Supreme Court of Virginia has also discussed this principal in relation to local improvements. *See* City of Richmond v. Eubank, 179 Va. 70, 18 S.E.2d 397 (1942) (noting that assessments for local improvements are based on maxim that person receiving benefit should bear burden apportionately).

[17]*See* Andrews v. Shepherd, 201 Va. 412, 414-15, 111 S.E.2d 279, 281-82 (1959) (discussing intention of legislature in using words "shall" and "may"); *see also* Schmidt v. City of Richmond, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965) (noting that word "shall" in statute generally is used in imperative or mandatory sense).

[18]*See supra* note 5 and accompanying text.

[19]*See, e.g.*, Kellam v. Sch. Bd., 202 Va. 252, 254, 117 S.E.2d 96, 97 (1960).

[20]*Id*.

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

[22]Webster's Third, *supra* note 13, at 115.

[23]*See supra* note 15.

[24]Webster's Third, *supra* note 13, at 2187.

[25]Grigg v. Commonwealth, 224 Va. 356, 364, 297 S.E.2d 799, 803 (1982) (explaining maxim, *expressio unius est exclusio alterius*).

[26]*See* County Bd. v. Brown, 229 Va. 341, 344, 329 S.E.2d 468, 470 (1985); Gordon v. Bd. of Supvrs., 207 Va. 827, 832, 153 S.E.2d 270, 274 (1967); Johnson v. County of Goochland, 206 Va. 235, 237, 142 S.E.2d 501, 502 (1965).

[27]City of Richmond v. Bd. of Supvrs., 199 Va. 679, 684-85, 101 S.E.2d 641, 644-45 (1958).

[28]Commonwealth v. County Bd., 217 Va. 558, 575, 232 S.E.2d 30, 41 (1977).

OP. NO. 05-012

COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS – IMMEDIATE CUSTODY, ARREST, DETENTION AND SHELTER CARE – TRANSFER AND WAIVER.

Juvenile convicted as adult may be housed in adult jail facility pending transfer to Department of Juvenile Justice.

THE HONORABLE ROBERT J. MCCABE
SHERIFF FOR CITY OF NORFOLK
MARCH 29, 2005

ISSUE PRESENTED

You inquire concerning the appropriate facility in which to house a juvenile who has been transferred for trial as an adult and convicted by the circuit court, but sentenced in the manner prescribed for the disposition of cases in the juvenile court. You also ask whether a jail that is not certified to hold juveniles may nevertheless house such a convicted juvenile pending his transfer to the Department of Juvenile Justice.

RESPONSE

It is my opinion that a juvenile who has been convicted as an adult may be housed in an adult jail facility pending transfer to the Department of Juvenile Justice.

APPLICABLE LAW AND DISCUSSION

Section 16.1-249(B) provides that "[n]o juvenile shall be detained or confined in any jail or other facility for the detention of adult offenders or persons charged with crime except as provided in subsection D, E, F or G of this section."

Section 16.1-249(D) provides:

> When a case is transferred to the circuit court in accordance with the provisions of subsection A of § 16.1-269.1 and an order is entered by the circuit court in accordance with § 16.1-269.6, or in accordance with the provisions of § 16.1-270 where the juvenile has waived the jurisdiction of the district court, or when the district court has certified a charge to the grand jury pursuant to subsection B or C of § 16.1-269.1, the juvenile, if in confinement, may be transferred to a jail or other facility for the detention of adults and need no longer be entirely separate and removed from adults.

A 1995 opinion of the this Office concludes that a juvenile transferred for trial as an adult and convicted by the circuit court should be thereafter treated as an adult for all purposes.[1]

Section 16.1-272(A)(2) provides that:

> If the juvenile is convicted of any other felony, the court may sentence or commit the juvenile offender in accordance with the criminal laws of this Commonwealth or may in its discretion deal with the juvenile in the manner prescribed in [Chapter 11] for the hearing and disposition of cases in the juvenile court, including, but not limited to, commitment under § 16.1-285.1 or may in its discretion impose an adult sentence and suspend the sentence

> conditioned upon successful completion of such terms and conditions as may be imposed in a juvenile court upon disposition of a delinquency case.

Thus, § 16.1-272(A)(2) allows the circuit court, upon conviction of a juvenile transferred for trial as an adult, to sentence the juvenile either as an adult or in the manner prescribed for the disposition of cases in the juvenile court. Nevertheless, it is the fact of "transfer" that allows the juvenile to be detained in the jail as an adult, and the ultimate disposition of the case is irrelevant to that determination.

CONCLUSION

Accordingly, it is my opinion that a juvenile who has been convicted as an adult may be housed in an adult jail facility pending transfer to the Department of Juvenile Justice.

[1] *See* 1995 Op. Va. Att'y Gen. 109, 109-10, and opinions cited therein (reasoning that it was intent of General Assembly to permit juveniles who previously have been tried and convicted as adults, and who again are charged with commission of offenses classified as felonies to be housed with adult inmates).

OP. NO. 05-037

COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS—JURISDICTION AND VENUE.

Juvenile court retains jurisdiction over probationer who has reached age twenty-one prior to probation revocation hearing.

THE HONORABLE HARVEY L. BRYANT
COMMONWEALTH'S ATTORNEY FOR THE CITY OF VIRGINIA BEACH
JUNE 20, 2005

ISSUE PRESENTED

You inquire concerning the proper court in which to bring a probation violation proceeding where the terms of probation were issued by a juvenile and domestic relations district court ("juvenile court") in its disposition of a delinquency case, and the probationer has reached the age of twenty-one prior to the proceeding.

RESPONSE

It is my opinion that the juvenile court retains jurisdiction over a probationer although he has reached the age of twenty-one prior to a probation revocation proceeding.

BACKGROUND

You relate that you have a number of juvenile defendants that have been convicted of delinquent acts and placed on probation with specific terms and conditions. You note that the court often orders the defendants to make restitution or perform other conditions; however, they fail to perform as ordered. Additionally, you relate that the Commonwealth initiates probation violation proceedings, but occasionally a defendant is not apprehended until after he reaches the age of twenty-one or older.

Thus, you inquire whether that proceeding should be brought in juvenile court or in a general district court.

APPLICABLE LAW AND DISCUSSION

Section 16.1-242 provides:

> When jurisdiction has been obtained by the [juvenile] court in the case of any child, such jurisdiction may be retained by the court until such person becomes twenty-one years of age …. In any event, when such person reaches the age of twenty-one and *a prosecution has not been commenced against him,* he shall be *proceeded* against as an adult, even if he was a juvenile when the offense was committed.[1] [Emphasis added.]

Section 16.1-291 provides:

> A. A juvenile or person who violates an order of the juvenile court entered into pursuant to §§ 16.1-278.2 through 16.1-278.10, … may be *proceeded* against for a revocation or modification of such order or parole status.…
>
> ….
>
> E. If a person adjudicated delinquent and found to have violated an order of the court or the terms of his probation or parole was a juvenile at the time of the original offense and is eighteen years of age or older when the court enters disposition for violation of the order of the court or the terms of his probation or parole, the dispositional alternative specified in § 16.1-284[2] shall be available to the court. [Emphases added.]

The Supreme Court of Virginia has stated that "'[t]he manifest intention of the legislature, clearly disclosed by its language, must be applied.'"[3] "'[T]ake the words as written' and give them their plain meaning."[4] The word "proceeding" is not defined in the context of juvenile courts in Title 16.1. Absent a statutory definition, words are given their ordinary meaning.[5] The word "proceeding" means "[t]he regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment."[6] The Supreme Court of Virginia notes that the term "proceeding" is "broad enough to cover any act, measure, step or all steps in a course taken in conducting litigation, civil or criminal."[7]

The Court of Appeals of Virginia has considered whether a proceeding for violation of probation constitutes a separate misdemeanor prosecution for the purpose of counting the number of misdemeanor convictions required to commit a juvenile to the Department of Juvenile Justice.[8] The Court found that the probation violation did not constitute a separate offense that could be counted toward the number of misdemeanors required for commitment.[9] The probation violation was not a Class 1 misdemeanor if committed by an adult as required by statute, and it was not sufficient

to commit the juvenile to the Department.[10] The Court did not consider a probation violation to be a separate offense that required a new prosecution of the individual, but merely a continuation of the original case.

Section 16.1-242 requires that a person who has reached age twenty-one be prosecuted as an adult, even if he was a juvenile at the time of the commission of the offense. A probation violation proceeding is not a prosecution in the sense of the adjudication and disposition of a new offense. It simply is the continuation of the proceeding begun in the juvenile court. A petition for violation of probation should, therefore, be brought in the juvenile court. If the violation is found, the court may dispose of it in the manner provided in § 16.1-291(E).

CONCLUSION

Accordingly, it is my opinion that the juvenile court retains jurisdiction over a probationer although he has reached the age of twenty-one prior to a probation revocation proceeding.

[1]"[A] defendant who is charged with the commission of a crime when a juvenile, [but not] tried therefor before he reaches [age twenty-one], is no longer within the jurisdiction of the juvenile court but may be proceeded against as an adult." Pruitt v. Guerry, 210 Va. 268, 270-71, 170 S.E.2d 1, 3 (1969) (interpreting § 16.1-159, repealed, but substantially similar to § 16.1-242).

[2]"When the juvenile court sentences an adult who has committed, before attaining the age of eighteen, an offense which would be a crime if committed by an adult, the court may impose the penalties which are authorized to be imposed on adults for such violations, not to exceed the punishment for a Class 1 misdemeanor for a single offense or multiple offenses." VA. CODE ANN. § 16.1-284 (LexisNexis Repl. Vol. 2003).

[3]Barr v. Town & Country Props., 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990) (quoting Anderson v. Commonwealth, 182 Va. 560, 566, 29 S.E.2d 838, 841 (1944)); *see also* 2001 Op. Va. Att'y Gen. 179, 180.

[4]Birdsong Peanut Co. v. Cowling, 8 Va. App. 274, 277, 381 S.E.2d 24, 26 (1989) (quoting Brown v. Lukhard, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985)), *quoted in* Adkins v. Commonwealth, 27 Va. App. 166, 169, 497 S.E.2d 896, 897 (1998); *see also* 2001 Op. Va. Att'y Gen. *supra* note 3, at 180.

[5]1987-1988 Op. Va. Att'y Gen. 513, 514.

[6]*See* BLACK'S LAW DICTIONARY 1241 (8th ed. 2004); *see also* 1979-1980 Op. Va. Att'y Gen. 133, 134 (defining "proceeding") (quoting BLACK'S LAW DICTIONARY 1368 (4th ed. 1968)).

[7]*See* Sigmon v. Commonwealth, 200 Va. 258, 267, 105 S.E.2d 171, 178 (1958).

[8]*See* Salvatierra v. City of Falls Church, 35 Va. App. 453, 546 S.E.2d 214 (2001). Section 16.1-278.8(A)(14) requires that a juvenile may only be committed on a conviction of a felony offense, a misdemeanor if the juvenile has a prior felony offense, or a fourth misdemeanor offense. At the time of the *Salvatierra* decision, only two misdemeanors were required. *See id.* at 456, 546 S.E.2d at 215.

[9]*Id.* at 458, 546 S.E.2d at 216.

[10]*Id.*

OP. NO. 05-002

COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS – JURISDICTION AND VENUE.

Proper venue for juvenile detention hearing is place where proceeding has been commenced.

THE HONORABLE MICHAEL W. LEE
COMMONWEALTH'S ATTORNEY FOR CITY OF COLONIAL HEIGHTS
MARCH 29, 2005

ISSUE PRESENTED

You inquire concerning the proper venue for juvenile detention hearings. Because detention hearings must be held within a specific time period, you also ask whether a judge may hold a detention hearing in another venue within his judicial district.

RESPONSE

It is my opinion that the proper venue for a juvenile detention hearing is the place where the proceeding has been commenced.

BACKGROUND

You relate that § 16.1-250 requires that juvenile detention hearings be held within seventy-two hours of the child having been taken into custody. You recognize that many judicial districts cover multiple geographical jurisdictions and that a judge may not always be scheduled to sit in a particular venue to fall within the seventy-two-hour period. For that reason, you indicate that a judge may wish to hold the detention hearing in another venue within his judicial district.

APPLICABLE LAW AND DISCUSSION

Section 16.1-243(1)(a) provides that with regard to original venue, "[i]f delinquency is alleged, [the case is to] be commenced in the city or county where the acts constituting the alleged delinquency occurred."[1] Further, § 16.1-250(A) provides that:

> When a child has been taken into immediate custody and not released …, such child shall appear before a judge on the next day on which the court sits within the county or city wherein the charge against the child is pending. In the event the court does not sit within the county or city on the following day, such child shall appear before a judge within a reasonable time, not to exceed seventy-two hours, after he has been taken into custody.

Thus, it is clear that the case must be commenced in the jurisdiction where the offense occurred and that the detention hearing must be held within seventy-two hours after the child has been taken into custody. It is, therefore, necessary to determine whether every step of the proceeding must take place within the venue in which the case is begun.

A 1980 opinion of the Attorney General concludes that

> The term "proceeding" is defined in the general sense as "the form and manner of conducting judicial business before a court or judicial officer; regular or orderly progress in form of law;

> including all possible steps in an action from its commencement to the execution of judgment[.]" The Virginia Supreme Court has held that "proceeding" is broad enough to cover any act, measure, step or all steps in a court taken in conducting litigation, civil or criminal.[2]

A detention hearing is an integral step in the prosecution of a juvenile delinquency proceeding. It is at that hearing that the child and his parent are advised of the right to counsel, probable cause is determined, and the need to hold the child in secure detention is decided. In making these determinations, the court may hear all relevant and material evidence.[3]

While venue in juvenile delinquency cases may be transferred, "such transfer may occur only *after adjudication* in delinquency cases."[4] "The jurisdiction, practice, and procedure of the juvenile … courts are entirely statutory …."[5] Detention hearings are by their very nature preadjudication proceedings. Therefore, there is no statutory authority to transfer venue for a detention hearing to another location within the court's judicial district.

CONCLUSION

Accordingly, it is my opinion that the proper venue for a juvenile detention hearing is the place where the proceeding has been commenced.

[1]Section 16.1-243(1)(a) also provides that "with the written consent of the child and the attorney for the Commonwealth for both jurisdictions, [the case may] be commenced in the city or county where the child resides[.]"

[2]1979-1980 Op. Va. Att'y Gen. 133, 134 (citations omitted).

[3]*See* VA. CODE ANN. § 16.1-250(G) (LexisNexis Repl. Vol. 2003).

[4]VA. CODE ANN. § 16.1-243(B)(1) (LexisNexis Repl. Vol. 2003) (emphasis added).

[5]Walker v. Dep't of Pub. Welfare, 223 Va. 557, 562, 290 S.E.2d 887, 890 (1982), *quoted in* 2004 Op. Va. Att'y Gen. 86, 86.

OP. NO. 05-068

COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS – ORGANIZATION AND PERSONNEL.

'List of eligible persons' for state-operated court services unit directors is individuals submitted by Director of Department of Juvenile Justice to judges; such list is only list from which judges may appoint director. Should list be unsatisfactory, judges may request, without limitation, that new lists be developed using process for initial list.

MR. BARRY R. GREEN
DIRECTOR, DEPARTMENT OF JUVENILE JUSTICE
OCTOBER 19, 2005

ISSUES PRESENTED

You pose two questions regarding the appointment of state-operated court services unit directors pursuant to § 16.1-236.1. You ask the meaning of the phrase "list of eligible persons" as used in that statute. You also ask what process should be used

to develop a new list of additional eligible persons in the event the judges deem the first list unsatisfactory.

RESPONSE

It is my opinion that the "list of eligible persons," for state-operated court service unit directors provided to the judges, is those individuals submitted by the Director of the Department of Juvenile Justice pursuant to state personnel laws and regulations and Department policies and procedures. It is further my opinion that such list is the only list from which the judges may appoint a director. Finally, should the list be unsatisfactory to the judges, they may request, without limitation, new lists of additional eligible persons that shall be developed using the same process as the initial list.

BACKGROUND

You relate that the hiring of a state-operated court services unit director is a unique and sometimes problematic blend of executive and judicial functions and authority. You note that the Department of Juvenile Justice develops a list of eligible persons consistent with state and Department policies and procedures. You state that the Director of the Department submits the list from which the judges may appoint the unit director. You further note that when the judges are not satisfied with the initial list of eligible persons submitted to them, they may request a new list from which to choose. On occasion, you relate that disagreements arise between the Department and the judges regarding the determination of who is eligible, how many persons constitute a list, and how many new lists may be requested.

APPLICABLE LAW AND DISCUSSION

Section 16.1-236.1(A) provides that in state operated court services units:

> The judge or judges of the juvenile and domestic relations district court shall, from a list of eligible persons submitted by the Director [of Department of Juvenile Justice] appoint one court services unit director for the state-operated court service unit serving that district court. The list of eligible persons shall be developed in accordance with state personnel laws and regulations, and Department [of Juvenile Justice] policies and procedures.
>
> If any list of eligible persons submitted by the Director is unsatisfactory to the judge or judges, the judge or judges may request the Director to submit a new list containing the names of additional eligible persons. Upon such request by the judge or judges, the Director shall develop and submit a new list of eligible persons in accordance with state personnel laws and regulations, and Department policies and procedures.

The applicable personnel policy, as promulgated by the Department of Human Resource Management, is "Hiring" Policy No. 2.10.[1] You indicate that Department

of Juvenile Justice policies and procedures are consistent with those of the Human Resource Department.[2] The Human Resource Department policy provides that agencies may interview all applicants for a position or reduce the pool by screening the applications or resumes.[3] The initial screening process must be done by consistent application of job specific criteria.[4] When a selection panel is used, the panel must meet certain criteria and develop a set of interview questions, which must be job-related, and the panel must document the applicant's responses to the questions.[5] You indicate that pursuant to the policy of the Juvenile Justice Department, the panel selects the most qualified candidates to be submitted by the Director. The terms "eligible persons" and "eligible candidate" are not defined in the *Code*, Human Resource Department policy, or Juvenile Justice Department policy. Absent a statutory definition, words are given their ordinary meaning.[6] Therefore, I conclude that the terms "eligible persons" or "eligible candidates"[7] are equivalent to the list of the most qualified candidates determined by the selection panel for purposes of Policy 2.10 and submitted by the Director. As long as the Juvenile Justice Department follows such procedures, the judges have no part in the determination of the list of eligible persons for the position.

In the event the initial list[8] of eligible persons is unsatisfactory to the judges, a new list following the same procedures and polices should be developed and submitted. I note that § 16.1-236.1 places no limit on the number of new lists that may be requested. Further, because the new list contains the names of "additional eligible persons," the judges may make their selection from those on the new list and any previously submitted list. Until such time as the judges appoint a director pursuant to this process, the unit may be managed by an acting director assigned by the Department of Human Resource Management.[9]

CONCLUSION

Accordingly, it is my opinion that the "list of eligible persons," for state-operated court services unit directors provided to the judges, is those individuals submitted by the Director of the Department of Juvenile Justice pursuant to state personnel laws and regulations and Department policies and procedures. It is further my opinion that such list is the only list from which the judges may appoint a director. Finally, should the list be unsatisfactory to the judges, they may request, without limitation, new lists of additional eligible persons that shall be developed using the same process as the initial list.

[1] *See generally* Department of Human Resource Management, Policies and Procedure Manual, Hiring, Policy No. 2.10, *available at* http://www.dhrm.state.va.us/hrpolicy/policy/pol2_10Hiring.pdf [hereinafter "HRM Policy"].

[2] You do not provide a copy of the Department of Juvenile Justice policy for review. Therefore, I am unable to offer an opinion regarding the sufficiency of your Department's policies.

[3] *See* HRM Policy, *supra* note 1, at 9.

[4] *Id.* at 9.

[5] *See id.* at 9-10.

[6]*See* McKeon v. Commonwealth, 211 Va. 24, 27, 175 S.E.2d 282, 284 (1970); Bd. of Supvrs. v. Boaz, 176 Va. 126, 130, 10 S.E.2d 498, 499 (1940); 2004 Op. Va. Att'y Gen. 72, 77.

[7]The term "eligible" means "qualified to participate or be chosen" or "worthy of being chosen." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 374 (10th ed. 1993). The term "candidate" means "one that aspires to be or is … qualified for an office." *Id.* at 165.

[8]The term "list" is not defined in the *Code* or in Human Resource Management or Juvenile Justice Department policies. Absent a statutory definition, words are given their ordinary meaning. *See McKeon*, 211 Va. at 27, 175 S.E.2d at 284; *Boaz*, 176 Va. at 130, 10 S.E.2d at 499; 2004 Op. Va. Att'y Gen., *supra* note 6, at 77. A "list" has been defined as "a simple series of words or numerals (as the names of persons or objects)." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY, *supra* note 7, at 678. Therefore, I conclude that a list of eligible persons in the context of § 16.1-236.1 must consist of two or more names.

[9]While there is no explicit Human Resource Management policy regarding the temporary reassignment of an employee to an acting position, such is implicit in Policy 2.10. *See* HRM Policy, *supra* note 1, at 6-7 (providing that temporary assignments are exempt from recruiting announcement requirements); *see also* Department of Human Resource Management, Policies and Procedure Manual, Compensation, Policy No. 3.05, at 5 *available at* http://www.dhrm.state.va.us/hrpolicy/policy/pol3_05.pdf (providing temporary pay for employees serving in acting capacity in higher level position or for employee assigned to key duties on interim basis).

OP. NO. 05-054

COURTS OF RECORD: CLERKS, CLERKS' OFFICES AND RECORDS — GENERAL PROVISIONS — CIRCUIT COURTS.

Circuit court clerk's statutory duties do not extend to preparation of sketch orders in criminal cases.

THE HONORABLE JUDY L. WORTHINGTON
CLERK OF CIRCUIT COURT OF CHESTERFIELD COUNTY
SEPTEMBER 19, 2005

ISSUE PRESENTED

You ask whether a circuit court clerk has a statutory obligation to prepare sketch criminal orders for the court.

RESPONSE

It is my opinion that a circuit court clerk's statutory duties do not extend to the preparation of sketch orders in criminal cases.

APPLICABLE LAW AND DISCUSSION

Article VII, § 4 of the Constitution of Virginia establishes the office of clerk of the court and provides that the clerk's duties are "prescribed by general law or special act."[1] Among the duties the General Assembly requires clerks' offices to perform are keeping records of the orders of each day's proceedings in circuit court,[2] providing access to these records,[3] and maintaining and purging such records.[4] Although it is the longstanding practice of clerks to assist circuit courts in the preparation of sketch orders in criminal cases,[5] I find no statute that compels this practice.

The comprehensive list of statutory duties placed upon circuit court clerks demonstrates that when the General Assembly intends to require clerks' offices to perform a task, it knows how to express its intention.[6] Furthermore, unlike the clerks of the general district and juvenile and domestic relations courts, the General

Assembly has not required circuit court clerks to perform "other duties as may be prescribed by a judge."[7]

CONCLUSION

Accordingly, it is my opinion that a circuit court clerk's statutory duties do not extend to the preparation of sketch orders in criminal cases.

[1]The General Assembly has established the duties of clerks of the court. *See* VA. CODE ANN. tit. 17.1, ch. 2, §§ 17.1-200 to 17.1-291 (LexisNexis Repl. Vol. 2003 & Supp. 2005) ("Clerks, Clerks' Offices and Records"). The General Assembly has also established provisions governing courts of record, which includes certain duties for circuit court clerks. *See generally* tit. 17.1, ch 1, §§ 17.1-100 to 17.1-131 (LexisNexis Repl. Vol. 2003 & Supp. 2005) ("General Provisions"); ch. 5, §§ 17.1-500 to 17.1-524 (LexisNexis Repl. Vol. 2003 & Supp. 2005) ("Circuit Courts").

[2]*See* §§ 17.1-123(A), 17.1-124 (LexisNexis Repl. Vol. 2003).

[3]*See* § 17.1-208 (LexisNexis Repl. Vol. 2003).

[4]*See* § 17.1-213 (LexisNexis Supp. 2005); *see also* VA. CODE ANN. § 19.2-165 (LexisNexis Repl. Vol. 2004) (requiring circuit court clerks to preserve recording or transcripts of criminal trials).

[5]*See* VA. SUPREME CT. *Circuit Court Clerk's Manual – Criminal (2004)*, ch. 5, § 5.30, at 5-45 (rev. July 2003) (providing that clerks prepare judgment orders in criminal cases), § 5.50, at 5-71 (rev. March 1993) (providing that clerks prepare trial orders in criminal cases), *available at* http://www.courts.state.va.us/ed/resources/cc_manual_criminal/chapter5.pdf.

[6]*See* 2004 Op. Va. Att'y Gen. 68, 71 n.16, and opinions cited therein (noting that when General Assembly intends statute to impose requirements, it knows how to express its intention).

[7]VA. CODE ANN. § 16.1-69.40 (LexisNexis Repl. Vol. 2003).

OP. NO. 05-013

CRIMES AND OFFENSES GENERALLY: CRIMES AGAINST THE PERSON – ASSAULTS AND BODILY WOUNDINGS.

No authority for courts to grant 'general continuance' as alternative to plea or finding of guilt for an adult charged with first offense of assault and batter against family or household member.

THE HONORABLE MICHAEL J. VALENTINE
JUDGE, JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT
NINETEENTH JUDICIAL DISTRICT
MARCH 31, 2005

ISSUE PRESENTED

You ask whether a court may grant a "general continuance" for up to a year without a plea by the defendant or a finding of facts by the court that would justify a finding of guilt as an alternative to § 18.2-57.3, which provides for deferred judgments when an adult is charged with a first offense of assault and battery against a family or household member under § 18.2-57.2.

RESPONSE

It is my opinion that courts do not have the authority to grant a "general continuance" as an alternative to § 18.2-57.3 for cases involving an adult charged with a first offense of assault and battery against a family or household member under § 18.2-57.2.

BACKGROUND

You relate that courts have granted "general continuances" in cases involving persons charged with domestic violence offenses.[1] In these cases, you note that the defendants have not entered pleas, nor have the courts made a finding of fact that would justify a finding of guilt. You also relate that courts have continued such cases for up to a year to be dismissed and that some dismissals contain an order prohibiting contact with the victim. Finally, you relate that counsel for the prosecution and defense have agreed to the "general continuances" that have been granted by the court. You inquire whether the courts have authority for these practices.

APPLICABLE LAW AND DISCUSSION

The General Assembly has expressly authorized trial courts to defer a judgment of guilt for the first offense of certain criminal offenses.[2] Upon a guilty plea or a finding of facts by the court that would justify a finding of guilt, § 18.2-57.3 allows the court, without entering a judgment, to place first time offenders of assault and battery against a family or household member under § 18.2-57.2 on probation. Further, § 18.2-57.3 authorizes the court to add conditions to the probation that require the accused to enter an education or treatment program or other community-based probation programs. The statute allows courts to determine an appropriate course of action for the accused to foster rehabilitation while ensuring accountability for criminal behavior. Even when the court does not order supervised probation, § 18.2-57.3 provides that "the court shall order the defendant to be of good behavior for a period of not less than two years following the finding of facts that would justify a finding of guilt."

Despite the rehabilitative qualities of § 18.2-57.3, the General Assembly treats violations of § 18.2-57.2 with great concern. A 2004 opinion of the Attorney General concludes that a deferred finding of guilt is considered a conviction for purposes of applying § 18.2-57.3 in subsequent proceedings and for purposes of the concealed weapons statute during a defendant's term of probation.[3] Additionally, charges dismissed pursuant to this section are ineligible for expungement under § 19.2-392.2. Taken together, the language of the statute indicates that "the General Assembly intended that a person is to be afforded one chance only to avoid a conviction."[4]

"When a legislative enactment limits the manner in which something may be done, the enactment also evinces the intent that it shall not be done another way."[5] The Court of Appeals of Virginia has addressed this issue:

> Except in those instances where the General Assembly has expressly authorized a trial court to defer a finding of guilt even though the proof has established the guilt of the defendant beyond a reasonable doubt, trial courts may not defer a factual finding of guilt or acquittal or a judgment of guilt or acquittal.[6]

Accordingly, the General Assembly expressly granted trial courts the authority to defer judgment in cases involving persons charged with a first offense under § 18.2-57.2 as prescribed in § 18.2-57.3 and in no other way. Granting a "general

continuance" employs an unauthorized manner, and it undermines the clear intent of the General Assembly, which is to afford first time offenders of assault and battery against a family or household member only one chance to avoid a conviction while giving them an opportunity for rehabilitation. At a minimum, the General Assembly has mandated courts to: (a) order offenders of such crimes to be of good behavior for no less than two years following a finding of guilt; (b) ensure that offenders would not have the same access to weapons as other citizens; and, (c) ensure that their charges would not be expunged.[7] The plain and unambiguous language of a statute must be given effect.[8] To do otherwise would be to say "that the General Assembly did not mean what it actually has stated."[9]

The fact that trial courts have the general authority to grant continuances does not authorize the courts to use a continuance as an alternative to § 18.2-57.3. The authority to grant a continuance is one of broad and general discretion of the court, but the court's discretion is not without limitation. Specifically, where the parties and witnesses are present and prepared for trial, the court may grant a continuance "only upon a showing that to proceed with the trial would not be in the best interest of justice."[10] Section 18.2-57.3, however, expressly prescribes the manner in which trial courts may handle cases involving first time offenders of assault and battery against a family or household member under § 18.2-57.2. To the extent that any conflict or variance exists between a rule of the Supreme Court and a statute, the terms of the statute must prevail.[11] Furthermore, it is clear that continuances were not intended to be granted to avoid giving full effect to a statute or to evade trial.[12]

CONCLUSION

Accordingly, it is my opinion that courts do not have the authority to grant a "general continuance" as an alternative to § 18.2-57.3 for cases involving an adult charged with a first offense of assault and battery against a family or household member under § 18.2-57.2.

[1]For purposes of this opinion, I limit the context of domestic violence to a first offense of an adult or a person treated as an adult as mandated by § 18.2-57.3 for offenses committed under § 18.2-57.2.

[2]*See, e.g.*, VA. CODE ANN. § 18.2-57.3 (LexisNexis Repl. Vol. 2004) (assault and battery against a family or household member); § 18.2-251 (LexisNexis Repl. Vol. 2004) (possession of controlled substances); VA. CODE ANN. § 19.2-303.2 (LexisNexis Repl. Vol. 2004) (misdemeanor crimes against property).

[3]2004 Op. Va. Att'y Gen. 96, 96.

[4]*Id.* at 98.

[5]Grigg v. Commonwealth, 224 Va. 356, 364, 297 S.E.2d 799, 803 (1982), *quoted in* Powell v. Commonwealth, 36 Va. App. 231, 235, 548 S.E.2d 926, 928 (en banc) (2001) (Humphreys, J., concurring).

[6]*Powell*, 36 Va. App. at 235, 548 S.E.2d at 928 (footnote omitted) (Humphreys, J., concurring).

[7]*See* § 18.2-57.3.

[8]*See* Temple v. City of Petersburg, 182 Va. 418, 423, 29 S.E. 357, 358 (1944), *cited in* 1996 Op. Va. Att'y Gen. 88, 89.

[9]Williams v. Commonwealth, 265 Va. 268, 271, 576 S.E.2d 468, 470 (2003), *quoted in* 2004 Op. Va. Att'y Gen., *supra* note 3, at 97.

[10] VA. SUP. CT. R. pt. 8, 8:14(d) (2004).

[11] *See* Op. Va. Att'y Gen.: 1996 at 23, 23; 1992 at 155, 156-57; *see also* Waterman v. Halverson, 261 Va. 203, 206, 540 S.E.2d 867, 868 (2001) (noting that to extent of conflict or variance between Supreme Court rule and statute, terms of subsequent statute prevail).

[12] *See, e.g.*, Carter v. Commonwealth, 39 Va. App. 735, 745, 576 S.E.2d 773, 778 (2003) (determining whether real purpose in moving for continuance is to delay or evade trial and not to prepare for it).

OP. NO. 05-065

CRIMINAL PROCEDURE: BAIL AND RECOGNIZANCES – BAIL.

Appeal of determination of bond from general district court to circuit court is civil in nature; fees and costs for appeal should be calculated, taxed, and collected as civil proceeding.

THE HONORABLE MICHAEL D. WOLFE
CLERK OF THE CIRCUIT COURT OF ALLEGHANY COUNTY
OCTOBER 4, 2005

ISSUE PRESENTED

You ask whether, pursuant to § 19.2-124, an appeal of a determination of bond from a general district court to a circuit court should be treated as a civil or a criminal matter for purposes of filing and calculating the appropriate fees and costs.

RESPONSE

It is my opinion that an appeal of a determination of bond from a general district court to a circuit court is civil in nature; therefore, the fees and costs for such appeal should be calculated, taxed, and collected as a civil proceeding.

BACKGROUND

You advise that your office has treated an appeal pursuant to § 19.2-124 as a civil matter while other circuit court clerks' offices do not. You note that, while the underlying misdemeanor case is still pending in general district court, other clerks' offices consider such an appeal to be part of the misdemeanor case and charge no fee for the appeal. You state that the other clerks' offices treat the appeal in this manner even though the underlying criminal case is pending and may never be appealed to the circuit court.

APPLICABLE LAW AND DISCUSSION

Since Title 19.2 is titled "Criminal Procedure," the natural reaction is to conclude that any statute in Title 19.2 concerns a criminal matter. While the vast majority of the statutes in Title 19.2 do involve matters of criminal procedure, there are chapters, which are associated with the underlying criminal proceeding, that are not criminal in nature. For instance, forfeiture proceedings,[1] which generally are the result of criminal conduct and convictions, are civil in nature.[2] Likewise, expungement proceedings,[3] which are based upon the dismissal of criminal charges, are civil in nature.[4]

Similar to other chapters of Title 19.2, a determination of bond[5] is associated with a pending criminal matter. Unlike criminal matters, however, bond forfeiture

proceedings, which have a lower burden of proof that shifts to the defendant once the Commonwealth establishes a *prima facie* case, are treated as civil in nature.[6] Although issues regarding proceedings on bonds have arisen in different contexts over time, the Supreme Court of Virginia consistently has treated such proceedings as civil rather than criminal matters.[7] In one such instance, the Supreme Court noted that "from a practical standpoint, appellate issues relating to bail are routinely handled separately from the issues in the criminal prosecution and are often the subject of separate petitions for appeal."[8]

At the time the Virginia Supreme Court issued the *Smith* opinion,[9] the Commonwealth did not have the right to appeal in criminal matters.[10] The Commonwealth's right to appeal criminal matters did not occur until 1998.[11] The Commonwealth, however, did have the right to appeal determinations of bond.[12] Indeed, it is the Commonwealth's right to pursue a petition for appeal that the Virginia Supreme Court routinely has relied upon in finding an action was civil in nature.[13] "Thus, a bail proceeding is not an integral part of the guilt-innocence determination. Rather, it is ancillary to the criminal prosecution."[14]

Given the ancillary nature of bail and bond proceedings, and their consistent characterization as civil by the Virginia Supreme Court, an appeal pursuant to § 19.2-124 from a general district court to a circuit court of a bail or bond determination would also be treated as a civil matter and ancillary to the underlying criminal proceedings. Such an appeal should be treated as a civil matter for the purposes of filing and calculating the appropriate fees and costs by the clerk of the circuit court.[15]

CONCLUSION

Accordingly, it is my opinion that an appeal of a determination of bond from a general district court to a circuit court is civil in nature; therefore, the fees and costs for such appeal should be calculated, taxed, and collected as a civil proceeding.

[1] *See generally* VA. CODE ANN. ch. 22, §§ 19.2-369 to 19.2-386; ch. 22.1, §§ 19.2-386.1 to 19.2-386.14; ch. 22.2, §§ 19.2-386.15 to 19.2-386.31 (LexisNexis Repl. Vol. 2004 & Supp. 2005).

[2] *See* Commonwealth v. Lincoln Auto., 212 Va. 597, 598, 186 S.E.2d 279, 280 (1972).

[3] *See generally* ch. 23.1, §§ 19.2-392.1 to 19.2-392.4 (LexisNexis Repl. Vol. 2004).

[4] Section 19.2-392.2(G) provides that the Commonwealth is to be made the party defendant in the case and that "[a]ny party aggrieved by the decision of the court may appeal, as provided by law in civil cases." Another example of the Commonwealth's right to appeal matters associated with criminal cases is found in Title 18.2 (Crimes). The Supreme Court of Virginia has rejected challenges to the Commonwealth's right to appeal adverse decisions in the trial court of unreasonable refusal judgments because such matters are civil. *See* Commonwealth v. Rafferty, 241 Va. 319, 323-24, 402 S.E.2d 17, 20 (1991); *see also* City of Va. Beach v. Siebert, 253 Va. 250, 253-54 483 S.E.2d 214, 216 (1997) (holding that municipality is allowed to appeal adverse judgment in unreasonable refusal proceeding). This is so even though the unreasonable refusal proceedings are based upon a violation of Title 18.2. *See* VA. CODE ANN. §§ 18.2-268.3, 18.2-268.4 (LexisNexis Supp. 2005). I note, however, that under § 18.2-268.3(D), a first offense for refusing to submit to testing is a civil offense and subsequent violations are criminal offenses.

[5] *See generally* ch. 9, §§ 19.2-119 to 19.2-152.7 (LexisNexis Repl. Vol. 2004 & Supp. 2005).

[6]*See e.g.*, Heacock v. Commonwealth, 228 Va. 235, 241, 321 S.E.2d 645, 648 (1984) (quoting Collins v. Commonwealth, 145 Va. 468, 471, 134 S.E. 688, 689 (1926)).

[7]*See, e.g.*, *Heacock*, 228 Va. at 242, 321 S.E.2d at 649 (noting that proceedings to forfeit bail bonds are civil in nature); McGhee v. Commonwealth, 211 Va. 434, 437, 177 S.E.2d 649, 652 (1970) (noting that bond forfeiture proceedings are civil rather than criminal matters); *see also* Commonwealth v. Smith, 230 Va. 354, 357, 337 S.E.2d 278, 279 (1985) (noting that post conviction bail proceeding is ancillary to criminal prosecution and is not part of criminal judgment of conviction).

[8]*See Smith*, 230 Va. at 357, 337 S.E.2d at 279.

[9]*Id.* at 354, 337 S.E.2d 278.

[10]Since December 1, 1986, the Commonwealth has had a limited right to appeal certain pretrial rulings in criminal cases. *See* 1985 Va. Acts ch. 510, at 820, 820-21, (adding Chapter 25, § 19.2-398, to Title 19.2); *see also*, *e.g.*, Commonwealth v. Brown, 8 Va. App. 41, 43, 378 S.E.2d 623, 624 (1989) (noting Commonwealth's right to appeal does not include all allegedly erroneous pretrial rulings).

[11]In 1998, the General Assembly expanded the Commonwealth's right to appeal in criminal cases to include the appeal of adverse decisions by the Court of Appeals of Virginia to the Virginia Supreme Court. *See* 1998 Va. Acts ch. 872, at 2128, 2189 (adding § 17.1-411).

[12]*See Smith*, 230 Va. at 358, 337 S.E.2d at 280.

[13]*See* Va. Dept. of Corrs. v. Crowley, 227 Va. 254, 262-63, 316 S.E.2d 439, 443-44 (1984) (recognizing Commonwealth could appeal denial of motion to vacate invalid order entered in criminal case after judgment became final because proceeding was not part of criminal prosecution); Smyth v. Godwin, 188 Va. 753, 759-60, 51 S.E.2d 230, 233 (1949) (noting prohibition against Commonwealth appealing in criminal proceeding did not apply to habeas proceeding challenging judgment entered in criminal matter because habeas proceedings are civil in nature).

[14]*See Smith*, 230 Va. at 357, 337 S.E.2d at 279.

[15]Of course, an indigent party may apply to proceed without the payment of fees or costs. *See* VA. CODE ANN. § 17.1-606 (LexisNexis Repl. Vol. 2003).

OP. NO. 05-033

CRIMINAL PROCEDURE: DISABILITY OF JUDGE OR ATTORNEY FOR COMMONWEALTH; COURT-APPOINTED COUNSEL, INTERPRETERS; TRANSCRIPTS – INDIGENT DEFENSE.

COUNTIES, CITIES AND TOWNS: GENERAL POWERS OF LOCAL GOVERNMENTS — POWERS OF CITIES AND TOWNS — GENERAL POWERS AND PROCEDURES OF COUNTIES.

No authority for locality to supplement salaries of public defender or his staff.

THE HONORABLE MITCHELL VAN YAHRES
MEMBER, HOUSE OF DELEGATES
DECEMBER 2, 2005

ISSUE PRESENTED

You inquire whether a locality may provide funds to supplement the salaries of the employees of the public defender office practicing in its jurisdiction.[1] You also ask whether an employee of the public defender's office would violate any state conflict of interests laws by soliciting or accepting such supplements from a locality.[2]

RESPONSE

It is my opinion that a locality does not have the authority to supplement the salaries of the public defender or his staff. Because I reach such conclusion, it is unnecessary to address the conflict of interests question that you present.

BACKGROUND

You state that a city and county served by the same public defender office are interested in supplementing the salaries of that office.[3] You further state that under the proposed arrangement, the Virginia Indigent Defense Commission, which employs and oversees personnel in public defender offices statewide,[4] would enter into an agreement with each locality. Under this agreement, you relate that the locality would provide an annual payment to the Commission, which would use the money to supplement individual salaries in the local office. Finally, you relate that the Commission's executive director would set the actual compensation of each employee in accordance with Commission policies and procedures.[5]

APPLICABLE LAW AND DISCUSSION

Virginia follows the Dillon Rule, which states that local governments "possess and can exercise only those powers expressly granted by the General Assembly, those necessarily or fairly implied therefrom, and those that are essential and indispensable."[6] A review of the statutory grants of power made by the General Assembly to local governments generally,[7] and to cities[8] and counties[9] specifically, reveals that the General Assembly has not expressly granted localities the authority to fund such supplements.

"[T]he Dillon Rule is applicable to determine in the first instance, from express words or by implication, whether a power exists at all. If the power cannot be found, the inquiry is at an end."[10] Questions of implied legislative authority are resolved by analyzing legislative intent.[11] In determining legislative intent, the Supreme Court of Virginia has looked both to legislation adopted and bills rejected by the General Assembly.[12] The Virginia Supreme Court "has consistently refused to imply powers that the General Assembly clearly did not intend to convey."[13]

In this case, the General Assembly has acted in a related area, while declining to do so in situation you present.[14] The General Assembly has expressly granted authority for localities to supplement the salaries of the Commonwealth's attorneys "or any of their deputies or employees."[15] The General Assembly, however, has not granted such authority to public defenders' offices. Thus, the absence of a similar statute leads me to conclude that the General Assembly has not granted implied authority for localities to supplement the salaries of the public defender or his staff.

You also inquire whether an employee of the public defender's office would violate any conflict of interests laws by soliciting or accepting such supplements from a locality. Since localities lack the authority to provide such payments, the question regarding acceptance of such a payment is moot.

CONCLUSION

Accordingly, it is my opinion that a locality does not have the authority to supplement the salaries of the public defender or his staff. Because I reach such conclusion, it is unnecessary to address the conflict of interests question that you present.

[1]For purposes of this opinion, the term "locality" collectively refers to cities and counties.

[2]Specifically, you ask whether § 2.2-3103, which prohibits certain conduct by state or local government employees, would affect the proposed appropriations.

[3]The General Assembly has established several public defender offices that serve multiple localities. *See* VA. CODE ANN. § 19.2-163.04(t) (LexisNexis Supp. 2005) (combining city of Charlottesville and Albemarle County). The duties of public defenders and their assistants are delineated at § 19.2-163.3.

[4]Section 19.2-163.01 (LexisNexis Supp. 2005).

[5]*See* § 19.2-163.01(B) (providing that executive director, with approval of Commission, sets compensation for public defenders and their personnel).

[6]Norton v. City of Danville, 268 Va. 402, 408 n.3, 602 S.E.2d 126, 129 n.3 (2004); *see also* Arlington County v. White, 259 Va. 708, 712, 528 S.E.2d 706, 708 (2000) (*quoting* City of Va. Beach v. Hay, 258 Va. 217, 221, 518 S.E.2d 314, 316 (1999)).

[7]*See* VA. CODE ANN. §§ 15.2-900 to 15.2-975 (LexisNexis Repl. Vol. 2003 & Supp. 2005).

[8]*See* §§ 15.2-1100 to 15.2-1132 (LexisNexis Repl. Vol. 2003 & Supp. 2005).

[9]*See* §§ 15.2-1200 through 15.2-1249 (LexisNexis Repl. Vol. 2003 & Supp. 2005).

[10]Commonwealth v. County Bd., 217 Va. 558, 575, 232 S.E.2d 30, 41 (1977).

[11]Tabler v. Bd. of Supvrs., 221 Va. 200, 202, 269 S.E.2d 358, 360 (1980).

[12]*Id*. Apparently, no bills specifically addressing the issue of local supplementation of public defender offices previously have been introduced in the General Assembly.

[13]*Id*.

[14]The *Virginia Code* is one body of law. When possible, statutes are construed "with a view toward harmonizing" them with other statutes. *See* Branch v. Commonwealth, 14 Va. App. 836, 839, 419 S.E.2d 422, 425 (1992). Moreover, much can be inferred from the absence of statutory provisions or language in the *Code*, particularly when comparing related statutes therein. *See, e.g.*, Indus. Dev. Auth. v. Bd. of Supvrs., 263 Va. 349, 353, 559 S.E.2d 621, 623 (2002) (holding that when General Assembly includes specific language in one section of act, but omits that language from another section, courts presume that exclusion of language was intentional); Williams v. Matthews, 248 Va. 277, 284, 448 S.E.2d 625, 629 (1994) (holding that when statute contains given provision with reference to one subject, omission of such provision from similar statute dealing with related subject is significant to show existence of different legislative intent); Forst v. Rockingham Poultry Mktg. Coop., 222 Va. 270, 278, 279 S.E.2d 400, 404 (1981) (holding that when General Assembly uses two different terms in same act, it is presumed to mean two different things).

[15]Section 15.2-1605.1 (LexisNexis Repl. Vol. 2003). The Commonwealth's attorney is responsible for prosecutions at the local level. *See* § 15.2-1627(B) (LexisNexis Repl. Vol. 2003). Section 19.2-163.01(A)(13) allows the Virginia Indigent Defense Commission "[t]o receive and expend moneys appropriated by the General Assembly of Virginia and *to receive other moneys as they become available to it* and expend the same in order to carry out the duties imposed upon it." (Emphasis added.) This language, however, is neither an express nor an implied authorization for the localities to provide such funds.

OP. NO. 05-016

CRIMINAL PROCEDURE: TRIAL AND ITS INCIDENTS – MISCELLANEOUS PROVISIONS.

CONSTITUTION OF THE UNITED STATES: AMENDMENTS IV, V, & VI.

COURTS OF RECORD: CIRCUIT COURTS.

Defense objections to suppress evidence, based on violations of certain constitutional rights or unconstitutional statutes, to be raised before trial are applicable only to proceedings in circuit courts.

THE HONORABLE ROBERT HURT
MEMBER, HOUSE OF DELEGATES
MAY 17, 2005

ISSUE PRESENTED

You ask whether § 19.2-266.2, governing defense objections to be raised before trial, applies in district courts as well as circuit courts.

RESPONSE

It is my opinion that the requirements of § 19.2-266.2, governing defense objections to be raised before trial, are applicable only to proceedings in circuit courts and not to proceedings in district courts.

APPLICABLE LAW AND DISCUSSION

Section 19.2-266.2 addresses defense motions seeking (1) suppression of evidence obtained in violation of the Fourth, Fifth, or Sixth Amendments or (2) dismissal of a criminal charge that is based on an unconstitutional statute. Section 19.2-266.2 requires that such motions be filed in writing, with notice given to opposing counsel, not later than seven days before trial. A hearing on all such motions must be held no later than three days before trial. "The court may, however, for good cause shown and in the interest of justice, permit the motions or objections to be raised at a later time."[1] Section 19.2-266.2 provides that "[t]o assist the defense in filing such motions or objections in a timely manner, the trial court shall, upon motion of the defendant, direct the Commonwealth to file a bill of particulars pursuant to § 19.2-230."

Section 19.2-230 provides that "[*a*] *court of record* may direct the filing of a bill of particulars." (Emphasis added.) The reference in § 19.2-266.2 to § 19.2-230, and the adoption of the latter section's provisions, is strong evidence that § 19.2-266.2, like § 19.2-230, was intended by the General Assembly to apply only to courts of record.

This conclusion is supported by the history of the provisions found in § 19.2-266.2. "A statute must be construed with reference to its subject matter, the object sought to be attained, and the legislative purpose in enacting it…."[2] The 1987 Session of the General Assembly enacted § 19.2-399, together with §§ 19.2-400 through 19.2-409, all of which established procedures for the new pretrial appeals process from courts of record to the Court of Appeals of Virginia.[3] Such appeals were first permitted, pursuant to § 19.2-398, as of December 1, 1986.[4] Section 19.2-399 has never been repealed by the General Assembly, but was recodified in 1995 by the Virginia Code Commission as § 19.2-266.2. No legislative intent to change the meaning or purpose of this statute may be gleaned by such a recodification.[5] The Court of Appeals of Virginia has recognized that § 19.2-266.2 was enacted specifically to govern Commonwealth's pretrial appeals from the circuit courts, holding that "[t]he public policy advanced by … § 19.2-266.2 is directly related to the provisions of … § 19.2-398."[6]

CONCLUSION

Accordingly, it is my opinion that the requirements of § 19.2-266.2, governing defense objections to be raised before trial, are applicable only to proceedings in circuit courts and not to proceedings in district courts.

[1]VA. CODE ANN. § 19.2-266.2 (LexisNexis Repl. Vol. 2004); *see also* Schmitt v. Commonwealth, 262 Va. 127, 145-46, 547 S.E.2d 186, 199, (2001) (interpreting § 19.2-266.2 to require that, "in the absence of good cause shown and in the interests of justice," all motions that seek to suppress evidence based on violations of Fourth, Fifth, and Sixth Amendments be made in writing, not later than seven days before trial).

[2]Esteban v. Commonwealth, 266 Va. 605, 609, 587 S.E.2d 523, 526 (2003); *accord* Ambrogi v. Koontz, 224 Va. 381, 386-87, 297 S.E.2d 660, 663 (1982).

[3]*See* 1987 Va. Acts ch. 710, at 1265 (amending and reenacting § 19.2-398 and adding §§ 19.2-399 through 19.2-409).

[4]*See* 1985 Va. Acts ch. 510, cl. 2, at 820, 821 (providing that provisions of the act "shall take effect on December 1, 1986," provided that majority of those voting in referendum vote in favor of amendment to Article VI, § 1 of Constitution of Virginia). The voters ratified the amendment to Article VI, § 1 of the Virginia Constitution on November 4, 1986.

[5]The Code Commission is authorized to renumber and rearrange Code sections when "it is necessary because of any disturbance or interruption of orderly or consecutive arrangement." VA. CODE ANN. § 30-149 (LexisNexis Repl. Vol. 2004); *see, e.g.*, Jones v. Robinson, 229 Va. 276, 283 n.3, 329 S.E.2d 794, 799 n.3 (1985) (explaining reason for renumbering change by Code Commission).

[6]Upchurch v. Commonwealth, 31 Va. App. 48, 52, 521 S.E.2d 290, 292 (1999).

OP. NO. 05-055

DOMESTIC RELATIONS: DIVORCE, AFFIRMATION AND ANNULMENT.

COURTS OF RECORD: CIRCUIT COURT.

Delaying divorce petition brought by incarcerated complainant until his release is inadvisable; where transportation of incarcerated complainant is inappropriate, authorized alternatives are available.

THE HONORABLE MARK S. DAVIS
JUDGE, THIRD JUDICIAL CIRCUIT
AUGUST 1, 2005

ISSUE PRESENTED

You inquire concerning the proper procedure to follow when divorce petitions are filed by incarcerated complainants who are unable to appear before the court for the necessary evidentiary proceedings. Specifically, you ask whether it is appropriate to place the case on hold until the complainant is able to present himself personally upon release.

RESPONSE

It is my opinion that delaying a divorce petition brought by an incarcerated complainant until his release is inadvisable. Even where transportation of the incarcerated complainant is inappropriate, authorized alternatives are available.

BACKGROUND

You relate that the court generally advises incarcerated complainants to proceed once they are able to present themselves to the court upon their release. You state that while the incarcerated complainant awaits release, the case remains pending as an inactive case file. You note that the court feels there are financial and security problems associated with entering transportation orders or conducting telephonic hearings. Therefore, you state that it is not clear whether placing the case on hold is an appropriate alternative to dismissal.

APPLICABLE LAW AND DISCUSSION

A divorce petition is a civil matter properly brought in the circuit court.[1] The Supreme Court of Virginia states that "[c]onvicts are not civilly dead in Virginia."[2] Even when a court determines that a prisoner should not personally appear in a civil case, the Commonwealth may not preclude a prisoner from asserting a civil claim.[3] Where a prisoner's claim falls within the jurisdictional limits of the circuit court, he may bring the claim there; the court has discretion to enter a transportation order or obtain testimony by alternate means.[4] The problems associated with transportation are insufficient grounds to dismiss a divorce petition brought by an incarcerated complainant otherwise entitled to assert his civil claim and present his evidence.[5]

In a divorce action brought by an incarcerated complainant, the appointment by the court of a committee is proper. Section 53.1-221(A) provides that "[w]hen a person is convicted of a felony and sentenced to confinement in a state correctional facility, his estate, both real and personal, may, on motion of any party interested, be committed by the circuit court." Additionally, § 53.1-221(B) provides that:

> If a person so convicted and sentenced, whether a resident or a nonresident of Virginia, has no property or estate in the Commonwealth, a committee may be appointed for him, on motion of any party interested, by the circuit court of the county or city wherein the offense for which he was convicted was committed.

A divorce case falls under § 53.1-221; and, therefore, the appointment of a committee is appropriate.[6] The committee is authorized to "sue and be sued in respect to all claims of every nature in favor of or against such prisoner."[7]

At this point, the court may collect the necessary evidence by one of three means: (1) an *ore tenus* hearing; (2) a deposition testimony; or (3) refer the case to a commissioner in chancery.[8] An *ore tenus* hearing may be held with an appearance by the complainant pursuant to a transportation order.[9] Whenever any party in a civil action requires an inmate as a witness, a circuit court in Virginia may

> in its discretion and upon consideration of the importance of the personal appearance of the witness and the nature of the offense for which he is imprisoned, issue an order to the Director of the Department of Corrections to deliver such witness to the sheriff of the jurisdiction of the court issuing the order.[10]

Although § 8.01-410 specifically addresses inmates as witnesses, the Virginia Supreme Court has ruled that it also applies to inmates who initiate civil proceedings.[11] In a divorce proceeding, the importance of the personal appearance of one of the parties is significant. Should, however, the court in its discretion believe transportation is not a viable option, it may consider alternative means of evidence collection.[12] For example, the court may: (a) hold a telephonic or video hearing with the complainant;[13] (b) allow testimony by deposition;[14] or (c) send a commissioner in chancery to the correctional facility.[15]

A similar situation arises when a spouse who is not incarcerated initiates divorce proceedings against an incarcerated spouse. The spouse is not required to suspend action until the release of the incarcerated spouse. The action proceeds despite the fact that concerns regarding transporting a prisoner or obtaining testimony by alternative means are the same if the inmate contests the action. In those instances, the circuit court would avail itself of one of the options listed above. The procedure should not be different if the incarcerated spouse is the complainant.[16]

Finally, placing a divorce case initiated by an incarcerated complainant on hold places the action on tenuous footing. Inactive cases which are pending for more than three years with no order or proceeding, except continuances, may be removed from the court's docket and discontinued with no notice to either party.[17] In addition, allowing the case to linger in the courts is contrary to the idea that "'[c]ourts are provided for the purpose of putting an end, and a speedy end, to controversies, and not as a forum for endless litigation.'"[18]

CONCLUSION

Accordingly, it is my opinion that delaying a divorce petition brought by an incarcerated complainant until his release is inadvisable. Even where transportation of the incarcerated complainant is inappropriate, authorized alternatives are available.

[1] *See* VA. CODE ANN. § 20-96 (LexisNexis Repl. Vol. 2004).

[2] Dunn v. Terry, 216 Va. 234, 239, 217 S.E.2d 849, 854 (1975).

[3] *See* Commonwealth v. Brown, 259 Va. 697, 706-07, 529 S.E.2d 96, 101 (2000).

[4] *Id.* at 707, 529 S.E.2d at 101-02.

[5] *See* Saleem v. Saleem, No. 2845-00-4, 2001 Va. App. LEXIS 646, at *4-5 (Va. Ct. App. Nov. 20, 2001).

[6] Note that in a divorce proceeding instituted against a prisoner, the court must appoint a committee prior to a determination of property under § 20-107.3. *See* VA. CODE ANN. § 53.1-223 (LexisNexis Repl. Vol. 2005).

[7] Section 53.1-222 (LexisNexis Repl. Vol. 2005).

[8] *See* Burts v. Burts, 227 Va. 618, 620, 316 S.E.2d 745, 746 (1984).

[9] *See Brown*, 259 Va. at 707, 529 S.E.2d at 101-02.

[10] VA. CODE ANN. § 8.01-410 (LexisNexis Supp. 2005).

[11] *See Brown*, 259 Va. at 704, 529 S.E.2d at 100 (noting that "§ 8.01-410 is the only statute that addresses the issuance of prisoner transportation orders in civil cases *initiated by prisoners*" (emphasis added)).

[12]*Id.* at 707, 529 S.E.2d at 102.

[13]*See* VA. CODE ANN. § 17.1-513.2 (LexisNexis Repl. Vol. 2003) (granting discretion to court in any civil proceeding in which party is incarcerated to conduct hearing using telephonic communication system or electronic audio and video communication system to provide for appearance of any party).

[14]*See* § 8.01-410 (providing that any party to civil action in any circuit court in Commonwealth may take deposition of inmate, which may be admissible in evidence).

[15]*See* § 8.01-607 (LexisNexis Supp. 2005) (authorizing circuit court to appoint commissioners in chancery to dispatch business of court); § 8.01-609 (LexisNexis Repl. Vol. 2000) (directing commissioner in chancery to examine and report any matters referred to him by court); § 8.01-614 (LexisNexis Repl. Vol. 2000) (authorizing commissioner in chancery to adjourn proceeding to anywhere in Commonwealth and to continue proceeding and take depositions and other evidence with same force and effect as if done in same place where he was appointed).

[16]In fact, the Virginia Supreme Court has stated that "the modern view [is] that prisoners, after judgments of conviction and while incarcerated, have a right to bring civil actions." *Brown*, 259 Va. at 703, 529 S.E.2d at 99.

[17]*See* § 8.01-335(B) (LexisNexis Repl. Vol. 2000).

[18]Holmes v. Holmes, 7 Va. App. 472, 481-82, 375 S.E.2d 387, 393 (1988) (quoting Gills v. Gills, 126 Va. 526, 546, 101 S.E. 900, 906 (1920)).

OP. NO. 04-090

EDUCATION: PUPILS – COMPULSORY SCHOOL ATTENDANCE – DISCIPLINE.

School board has authority to establish policies and procedures to enforce compulsory attendance law. Parent's awareness and support of child's absence from school does not allow repeated absenteeism, tardiness, or early departures.

THE HONORABLE DANNY W. MARSHALL III
MEMBER, HOUSE OF DELEGATES
JANUARY 31, 2005

ISSUE PRESENTED

You ask whether local school boards have the authority to set standards for excused and unexcused absences and to determine what constitutes excessive tardiness and leaving school early. You also ask whether a parent's awareness and support of his child's absence excuses the absence thereby precluding enforcement action.

RESPONSE

It is my opinion that a board has the authority to establish policies and procedures to enforce the Commonwealth's compulsory attendance law. A parent's awareness and support of his child's absence from school does not, of itself, allow repeated absenteeism, tardiness, or early departures.

APPLICABLE LAW AND DISCUSSION

You relate that some school systems have had difficulty in enforcing attendance policies because courts have interpreted the applicable statutes to excuse a pupil's absence when the parent is aware of and supports the absence.

Article 1, Chapter 14 of Title 22.1, §§ 22.1-254 through 22.1-269.1, governs compulsory school attendance in the Commonwealth. Specifically, § 22.1-254(A) provides that:

> Except as otherwise provided in this article, every parent, guardian, or other person in the Commonwealth having control or charge of any child who will have reached the fifth birthday on or before September 30 of any school year and who has not passed the eighteenth birthday shall, during the period of each year the public schools are in session and for the same number of days and hours per day as the public schools, send such child to a public school or to a private, denominational or parochial school or have such child taught by a tutor or teacher of qualifications prescribed by the Board of Education and approved by the division superintendent or provide for home instruction of such child as described in § 22.1-254.1.

Section 22.1-254 sets forth circumstances under which the local school board either must or may excuse a pupil's attendance at school. For example, a "school board *shall* excuse from attendance at school" a student who, together with his parents, conscientiously is opposed to attendance at school by reason of a bona fide religious belief.[1] A "school board *may* excuse from attendance at school" a pupil who, in the judgment of the juvenile and domestic relations court "cannot benefit from education at [the] school."[2] These mandatory or permissive excusals provide relief from the compulsory attendance requirement in its entirety. This is distinguished from the circumstances you present, where a student is enrolled in school, but is chronically absent.

Section 22.1-258 authorizes school boards to employ attendance officers, who are charged with the enforcement of the provisions of the compulsory attendance law, and provides that:

> Whenever any pupil fails to report to school on a regularly scheduled school day and no indication has been received by school personnel that the pupil's parent is aware of and supports the pupil's absence, a reasonable effort to notify by telephone the parent to obtain an explanation for the pupil's absence shall be made….

The statute establishes procedures to be followed in the event of a certain number of absences where "no indication has been received by school personnel that the pupil's parent is aware of and supports the pupil's absence."[3] For example, after five days of such absences and where reasonable efforts to notify the parent have failed, school officials "shall make a reasonable effort to ensure that direct contact is made with the parent … to obtain an explanation for the pupil's absence and to explain to the parent the consequences of continued nonattendance."[4] Section 22.1-258 next provides that:

> If the pupil is absent an additional day after direct contact with the pupil's parent and the attendance officer has received no indication that the pupil's parent is aware of and supports absence, the attendance officer shall schedule a conference … with the pupil, his parent, and school personnel.

The next such absence, without indication of parental awareness or support, triggers the use of judicial means to enforce the compulsory attendance law.[5] The judicial remedies specified in § 22.1-258 are: "(i) filing a complaint with the juvenile and domestic relations court alleging the pupil is a child in need of supervision as defined in § 16.1-228[6] or (ii) instituting proceedings against the parent pursuant to § 18.2-371[7] or § 22.1-262."[8] The provisions of § 22.1-258 do not apply to certain classes of pupils who are exempted from the compulsory attendance law.[9]

Section 22.1-258 makes plain that the steps described therein constitute the minimum response a school board must make to chronic absenteeism: "Nothing in this section shall be construed to limit in any way the authority of any attendance officer or division superintendent to seek immediate compliance with the compulsory school attendance law as set forth in [Article 1]."

Under the facts you present, some courts have concluded that, if a parent is or becomes aware of his child's absence and supports the absence, the courts regard such absences as excused; and, thus, no adverse consequences may befall either the parent or the pupil. While the authority of the parent is to be given great weight, and the statute assumes that parental knowledge and support will be given for legitimate reasons; the statute does not confer the right of repeated or sustained absenteeism in pupils even with parental knowledge or support.

Apart from § 22.1-254, the *Code* does not define "excused" absences. The Board of Education has promulgated "Regulations Governing Pupil Accounting Records"[10] that address whether a pupil may be counted as present under certain specific circumstances.[11] The regulations provide that "[e]xcused full-day absences must not be counted as 'present' under any condition."[12] The regulations do not define an "excused full-day absence."

The next question is whether a school board may establish additional standards under which a pupil's absence may be excused. Section 22.1-254(G) provides that "[w]thin one calendar month of the opening of school, each school board shall send to the parents or guardian of each student enrolled in the division a copy of the compulsory school attendance law and the enforcement procedures and policies established by the school board." Plainly, school boards have the authority to set enforcement procedures and policies for school attendance.[13] Such procedures and policies should not conflict with state law or the regulations of the State Board of Education.

I am unaware of any provision of law declaring that a parent's awareness and approval of his child's absence, standing alone, constitute an "excused absence." This conclusion is supported by § 22.1-279.3, which outlines parental responsibility for

enforcing compulsory school attendance. Section § 22.1-279.3(D) specifically refers to the parents' responsibility "to ensure the student's compliance with compulsory school attendance law." A parent who fails to comply with the statute is subject to court order or a court order and a civil penalty not to exceed $500.[14] Not only does a parent's support of his child's chronic absenteeism fails to excuse the pupil's absences, the parent himself is subject to civil and criminal liability.[15]

CONCLUSION

Accordingly, it is my opinion that a school board has the authority to establish policies and procedures to enforce the Commonwealth's compulsory attendance law. A parent's awareness and support of his child's absence from school does not, of itself, allow repeated absenteeism, tardiness, or early departures.

[1]VA. CODE ANN. § 22.1-254(B)(1) (LexisNexis Supp. 2004) (emphasis added) (providing that such belief does not include political, sociological, or philosophical views or personal moral code).

[2]Section 22.1-254(C)(2) (emphasis added).

[3]Section 22.1-258 (LexisNexis Repl. Vol. 2003).

[4]*Id.*

[5]*Id.*

[6]"*'Child in need of supervision'* means:
"1. A child who, while subject to compulsory school attendance, is habitually and without justification absent from school, and (i) the child has been offered an adequate opportunity to receive the benefit of any and all educational services and programs that are required to be provided by law and which meet the child's particular educational needs, (ii) the school system from which the child is absent or other appropriate agency has made a reasonable effort to effect the child's regular attendance without success, and (iii) the school system has provided documentation that it has complied with the provisions of § 22.1-258; or
"2. A child who, without reasonable cause and without the consent of his parent, lawful custodian or placement authority, remains away from or deserts or abandons his family or lawful custodian on more than one occasion or escapes or remains away without proper authority from a residential care facility in which he has been placed by the court, and (i) such conduct presents a clear and substantial danger to the child's life or health, (ii) the child or his family is in need of treatment, rehabilitation or services not presently being received, and (iii) the intervention of the court is essential to provide the treatment, rehabilitation or services needed by the child or his family."

VA. CODE ANN. § 16.1-228 (LexisNexis Supp. 2004).

[7]"Any person 18 years of age or older, including the parent of any child, who (i) willfully contributes to, encourages, or causes any act, omission, or condition which renders a child delinquent, in need of services, in need of supervision, or abused or neglected as defined in § 16.1-228 … shall be guilty of a Class 1 misdemeanor." VA. CODE ANN. § 18.2-371 (LexisNexis Repl. Vol. 2004).

[8]"If the parent (i) fails to comply with the provisions of § 22.1-261 within the time specified in the notice; or (ii) fails to comply with the provisions of § 22.1-254; or (iii) refuses to participate in the development of the plan to resolve the student's nonattendance or in the conference provided for in § 22.1-258, it shall be the duty of the attendance officer, with the knowledge and approval of the division superintendent, to make complaint against the pupil's parent in the name of the Commonwealth before the juvenile and domestic relations district court. If proceedings are instituted against the parent for failure to comply with the provisions of § 22.1-258, the attendance officer is to provide documentation to the court regarding the school division's compliance with § 22.1-258. In addition thereto, such child may be proceeded against as a child in need of services or a child in need of supervision as provided in Chapter 11 (§ 16.1-226 et seq.) of Title 16.1." Section 22.1-262 (LexisNexis Repl. Vol. 2003).

[9]The provisions of the compulsory school attendance article do not apply to:
"1. Children suffering from contagious or infectious diseases while suffering from such diseases;
"2. Children whose immunizations against communicable diseases have not been completed as provided in § 22.1-271.2;
"3. Children under 10 years of age who live more than two miles from a public school unless public transportation is provided within one mile of the place where such children live;
"4. Children between the ages of 10 and 17, inclusive, who live more than 2.5 miles from a public school unless public transportation is provided within 1.5 miles of the place where such children live; and
"5. Children excused pursuant to subsections B and C of this section."
Section 22.1-254(H) (LexisNexis Supp. 2004).

[10]8 VA. ADMIN. CODE 20-110-10 through 20-110-130 (West 2002).

[11]8 VA. ADMIN. CODE 20-110-50 (providing that student is counted present when attending school field trip and other activities approved by school board); 20-110-90 (providing that student is counted present when school is dismissed early due to inclement weather); 20-110-110 (providing that student who attends morning sessions and is dismissed for work in afternoon is counted present).

[12]8 VA. ADMIN. CODE 20-110-100.

[13]Prior opinions of this Office have not questioned the existence of such authority. *See, e.g.*, 2000 Op. Va. Att'y Gen. 114 (concluding that school board may not require that parents pay cost of testing and treatment program as condition to grant excused absence to pupil suspended for substance abuse).

[14]*See* § 22.1-279.3(G)(1)-(2) (LexisNexis Supp. 2004); *see also* § 22.1-267 (LexisNexis Repl. Vol. 2003) ("Any child permitted by any parent, guardian, or other person having control thereof to be habitually absent from school contrary to the provisions of [Article 1] may be proceeded against as a child in need of supervision as provided in Chapter 11 … of Title 16.1.").

[15]*See, e.g.,* 1987-1988 Op. Va. Att'y Gen. 334 (discussing available avenues for prosecution of parents for failing to send children to school).

OP. NO. 05-024

EDUCATIONAL INSTITUTIONS: FRONTIER CULTURE MUSEUM OF VIRGINIA.

Governor must consent to acquisition of Zirkle Mill by Frontier Culture Museum. American Frontier Culture Foundation, Inc., may acquire, deconstruct, and remove Mill without such consent. Governor must approve reconstruction of Mill on Museum property owned by Commonwealth.

THE HONORABLE ALLEN L. LOUDERBACK
MEMBER, HOUSE OF DELEGATES
MAY 20, 2005

ISSUES PRESENTED

You ask whether the purchase and subsequent deconstruction, removal, and reconstruction of the Zirkle Mill by either the Frontier Culture Museum of Virginia or the American Frontier Culture Foundation, Inc., requires the prior approval of the Governor. You next ask whether there are other legal restrictions that the Museum must consider in the purchase and subsequent deconstruction, removal, and reconstruction of the Mill.

RESPONSE

It is my opinion that the Frontier Culture Museum of Virginia must have the consent of the Governor to acquire the Zirkle Mill. Further, it is my opinion that the American

Frontier Culture Foundation, Inc., may acquire, deconstruct, and remove the Mill without the consent of the Governor. Finally, it is my opinion that under either method of acquisition, the Governor must approve the reconstruction of the Mill on the property that is owned by the Commonwealth, which includes the Museum property.[1]

APPLICABLE LAW AND DISCUSSION

The Frontier Culture Museum of Virginia (the "Museum") is an educational institution and state agency under § 23-296. The American Frontier Culture Foundation, Inc. (the "Foundation"), is a non-profit stock corporation. You relate that either the Museum or the Foundation intends to purchase the Zirkle Mill in Shenandoah County. Further, you relate that the purchaser then plans to dismantle the building and reconstruct it on the "campus"[2] of the Museum. Restrictions are dependent upon which entity is the purchaser as well as which purchaser is the legal owner of the property on which the Zirkle Mill is reconstructed. The Foundation is a private nonprofit corporation. A nonprofit corporation such as the Foundation may enter into legally binding contracts subject to any limitations set forth in the incorporating documents. The Museum is an agency of the Commonwealth.[3] A state agency is an entity that serves as a subordinate or auxiliary body to fulfill a state purpose, is dependent upon state appropriations, and is subject to state control to a great degree.[4]

Chapter 25 of Title 23, §§ 23-296 through 23-298 governs the Frontier Culture Museum of Virginia. Specifically, § 23-298 enumerates the powers of the Board of Trustees for the Museum. Among the Board's powers is the authority to acquire structures to fulfill the purpose of the Museum, but only with the consent of the Governor.[5] The factual situation you present does not suggest that the proposed acquisition of the Zirkle Mill would be contrary to the Museum's stated purpose in § 23-296. The Museum, however, must have the Governor's consent to acquire the Mill. Whether it is the Museum or the Foundation that is the "purchaser," the Zirkle Mill cannot be placed on property of the Commonwealth, including the Museum property, without the consent of the Governor.[6]

Finally, I note that § 2.2-2402(B) requires approval of the Governor, acting with the advice and counsel of the Art and Architectural Review Board, where a state agency constructs or erects any building or appurtenant structure on property belonging to the Commonwealth. Additionally, § 10.1-1190 requires the written approval of the Governor[7] for payment of funding from the state treasury for major state projects, which by definition are projects that cost $100,000 or more.

CONCLUSION

Accordingly, it is my opinion that the Frontier Culture Museum of Virginia must have the consent of the Governor to acquire the Zirkle Mill. Further, it is my opinion that the American Frontier Culture Foundation, Inc., may acquire, deconstruct, and remove the Mill without the consent of the Governor. Finally, it is my opinion that under either method of acquisition, the Governor must approve the reconstruction

of the Mill on the property that is owned by the Commonwealth, which includes the Museum property.[8]

[1]The American Frontier Culture Foundation, Inc., could, however, deconstruct, remove, and reconstruct the Zirkle Mill on property adjacent to the Frontier Culture Museum.

[2]You do not define the term campus. It is unclear whether you refer exclusively to property of the Museum or whether it might also include property owned by the Foundation located adjacent to the Museum's property.

[3]VA. CODE ANN. § 23-296 (LexisNexis Repl. Vol. 2003).

[4]1985-1986 Op. Va. Att'y Gen. 336, 336.

[5]*See* § 23-298(A)(7) (LexixNexis Repl. Vol. 2003); *see also* 1997 Op. Va. Att'y Gen. 33 (concluding that Museum's Board of Trustees, with consent of Governor, may lease land in accordance with Museum's mission; Trustee's must solicit appropriate approval from Governor's office to determine whether Museum may retain lease proceeds).

[6]In addition to the approval required by the Governor, any contractual arrangements entered into by the Museum must be approved by the Attorney General. Section 23-298(A)(9). Therefore, if the Museum entered into contractual arrangements related to the acquisition or relocation of the Zirkle Mill, such contracts are subject to approval of the Attorney General.

[7]This approval is based on an environmental impact report and comments to the report that are made by the Department of Environmental Quality to the Governor. *See* VA. CODE ANN. § 10.1-1190 (Michie Repl. Vol. 1998).

[8]*See supra* note 1.

OP. NO. 05-050

ELECTIONS: ABSENTEE VOTING.

No conflict between federal Voting Rights Act of 1965 and specific requirement for completion of voter statement on absentee ballot; federal act would not preempt Commonwealth from requiring such statement. Authority for State Board of Elections to adopt standards and instructions for use by local election officials to determine what constitutes error or omission in completion of such statement.

THE HONORABLE JEAN R. JENSEN
SECRETARY, STATE BOARD OF ELECTIONS
AUGUST 1, 2005

ISSUES PRESENTED

You inquire regarding § 24.2-706, which pertains to the statement of the voter required by the General Assembly on the absentee ballot oath envelope (the "voter statement"). You first inquire whether the provisions of the federal Voting Rights Act of 1965,[1] specifically 42 U.S.C.A. § 1971(a)(2)(B), apply to the completion of the voter statement. If so, you ask whether the federal Act supercedes the specific requirements contained in §§ 24.2-706 and 24.2-707. Finally, you ask whether the State Board of Elections has the authority to adopt standards and instructions for use by local election officials in determining what constitutes an error or omission in completion of the voter statement that is not material in determining whether an individual is qualified to vote in an election.

RESPONSE

It is my opinion that 42 U.S.C.A. § 1971(a)(2)(B) does not conflict with the specific requirement of completion of the voter statement required by § 24.2-706 and would not preempt the Commonwealth from requiring such a statement. It is further my opinion that the State Board of Elections has the authority to adopt standards and instructions for use by local election officials in determining what constitutes an error or omission in completion of the voter statement that is not material in determining whether an individual is qualified to vote in an election.

BACKGROUND

You advise that the staff of the State Board of Elections has conducted an analysis following the November 2004 general election. The analysis has identified varying reasons for rejections of absentee ballots by local election officials. You relate that the analysis reveals that the failure of voters to fully complete the voter statement required by § 24.2-706 is the primary reason for the rejection of absentee ballots. You observe that § 24.2-706 requires the voter to complete the following statement that appears on the absentee ballot envelope:

"Statement of Voter."

> "I do hereby state, subject to felony penalties for making false statements pursuant to § 24.2-1016, that my **FULL NAME** is …… (last, first, middle); that I am now or have been at some time since last November's general election a legal resident of …… (**STATE YOUR LEGAL RESIDENCE IN VIRGINIA** including the house number, street name or rural route address, city, zip code); that I received the enclosed ballot(s) upon application to the registrar of such county or city; that I opened the envelope marked 'ballot within' and marked the ballot(s) in the presence of the witness, without assistance or knowledge on the part of anyone as to the manner in which I marked it (or I am returning the form required to report how I was assisted); that I then sealed the ballot(s) in this envelope; and that I have not voted and will not vote in this election at any other time or place.
>
> Signature of Voter ……
> Date…….....…
>
> Signature of witness ……"

You further advise that when this statutory statement is not completed exactly as the statute requires, local election officials are required to void the ballot pursuant to § 24.2-707, which provides, in part, that the "(f)ailure to follow the procedures set forth above shall render the applicant's ballot void." You relate that the staff analysis has revealed that the errors or omissions frequently include that the voter: (1) has not listed the names specifically in the order of last, first and middle name; (2) has listed a middle initial or maiden name, instead of the full middle name; (3) has omitted the

street identifier, such as the term road or street when filling in the legal residence; or (4) has omitted the date of the signature of the voter.

You further relate that 42 U.S.C.A. § 1971(a) provides, in part, that:

> (2) No person acting under color of law shall—
>
> ….
>
> (B) deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election[.]

You believe that this federal statute may provide broader discretion to determine whether absentee ballots should be rejected for omitting the date signed, the voter's full middle name as it was listed upon registration, or the street designation on the voter statement. You relate that the dilemma faced by the staff of the State Board of Elections lies in the interpretation of §§ 24.2-706 and 24.2-707, which require strict compliance regarding completion of the voter statement.

You note that § 24.2-706 pertaining to the application for an absentee ballot mirrors the language of the federal Voting Rights Act and provides, in part, that:

> In reviewing the application for an absentee ballot, the general registrar and electoral board shall not reject the application of any individual because of an error or omission on any record or paper relating to the application, if such error or omission is not material in determining whether such individual is qualified to vote absentee.

APPLICABLE AUTHORITIES AND DISCUSSION

Congress has designed the Voting Rights Act[2] "to banish the blight of racial discrimination in voting. The Act [contains] stringent … remedies for voting discrimination where it persists on a pervasive scale, and in addition the statute strengthens existing remedies for pockets of voting discrimination elsewhere in the country."[3] The Supreme Court of the United States has declared that Congress intended the Voting Rights Act requirements to apply to virtually any alteration in laws affecting elections, however minor.[4] The Voting Rights Act is aimed at all state regulations that have the effect of denying citizens their right to vote because of their race.[5]

The overriding goal of statutory interpretation is to "ascertain and give effect to legislative intent."[6] In addition, the reading of the entire statutory provision as a whole influences the proper construction of any apparently ambiguous individual provisions.[7] "[F]ull force and effect must [then] be given to every provision of statutory law."[8]

Section 24.2-706 begins with the phrase "[o]n receipt of an application for an absentee ballot," and provides further that:

> If the application has been properly completed and signed and the applicant is a registered voter of the precinct in which he offers to vote, the electoral board shall immediately send to the applicant by mail, obtaining a certificate of mailing, or deliver to him in person in the office of the secretary or registrar, the following items and nothing else[.]

Sections 24.2-701 through 24.2-705.2 set forth the statutory provisions pertaining to the application by a qualified voter for absentee ballots. Section 24.2-707 contains the following procedures by which a voter actually casts an absentee ballot: (1) a voter who receives his ballot by mail may return his marked ballot by mail or deliver it personally to the electoral board or the general registrar; and (2) a voter who applies for an absentee ballot in person at a time when the printed ballots are available may follow the same procedure or may cast his ballot at the time of application in the office of the general registrar or secretary of the electoral board. Section 24.2-707 contains detailed requirements for marking the absentee ballot, refolding the absentee ballot, sealing the absentee ballot envelope, and signing the statement printed on the absentee ballot envelope in the presence of a witness.

Section 1971(a)(1) of Title 42 of the Code of the United States guarantees that "[a]ll citizens of the United States who are otherwise qualified by law to vote … shall be entitled and allowed to vote at all … elections, without distinction of race, color, or previous condition of servitude; any constitution, law, custom, usage, or regulation … to the contrary notwithstanding." This federal law prevents persons from being denied the right to vote in any election on specified grounds. The statutory provision also forbids state and local government officials from denying any person "the right … to vote … because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting."[9] The term "requisite" means "required by the nature of things or by circumstances or by the end in view; ESSENTIAL, INDISPENSABLE, NECESSARY."[10]

Using the familiar principle of statutory construction, *noscitur a sociis*,[11] the phrase "requisite to voting"[12] must also be construed with reference to the words with which it is used.[13] Like the words "any record or paper relating to any application, registration"[14] found with this phrase, "other act requisite to voting,"[15] must be construed to mean the acts in the process required to be followed, which generally is referred to as voter registration, all of which occur prior to the time one actually casts a vote by use of a ballot. The context of the phrase "other act requisite to voting" clearly refers to every action that is taken leading up to the actual casting of a vote by means of marking a ballot.

The language of § 24.2-706 to which you refer pertains to the act of casting an absentee ballot and not to the application process to vote by absentee ballot or any

process that must be followed prior to actually casting an absentee ballot. Therefore, it is important to focus on the fact that your questions are directed to the actual process of casting a vote by use of an absentee ballot, as opposed to the process of making application to vote or any other "act requisite to voting."

Section 5 of the Voting Rights Act of 1965, as amended,[16] which is applicable to the Commonwealth, requires that prior to the implementation of any change in state election laws or voting practices or procedures be submitted to the United States Department of Justice for review and evaluation of its potential impact on minority voters. This review is commonly referred to as "§ 5 preclearance."[17] Section 24.2-706 has been reviewed by the United States Department of Justice in each of the past five years and no objection has been imposed by the Attorney General of the United States as a result of each review.[18] Accordingly, I must conclude that the Attorney General of the United States does not believe there is a conflict between § 24.2-706 and 42 U.S.C.A. § 1971(a)(2)(B).

The United States Supreme Court repeatedly has recognized the legitimate interest of the states in keeping elections fair, honest, and orderly.[19] The Court has also recognized that the states have a legitimate and compelling interest in preventing election fraud and preserving the integrity of the election process.[20] A "State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions."[21] The specific interest of the Commonwealth in preventing election fraud has been recognized by the federal court system.[22] The General Assembly clearly intends that § 24.2-706 preserve the integrity of the absentee voting process in every election and prevent possible voter fraud by requiring the voter statement. It is my opinion that in addressing the integrity of the absentee voting process and preventing possible voter fraud, the voter statement required by § 24.2-706 protects a legitimate and compelling interest of the Commonwealth that is applied on a nondiscriminatory basis.

A federal law, such as 42 U.S.C.A. § 1971, preempts or supplants a conflicting state law, by virtue of the supremacy clause of the Constitution of the United States.[23] The preemption of state law by federal law may occur by express statutory language or other clear indication that Congress intends to legislate exclusively in the area.[24] Even if Congress does not intend the enactment of a federal statutory scheme to preempt state law in the area, congressional enactments in the same field override state laws with which they conflict.[25]

The intent of Congress in adopting the Voting Rights Act clearly preempts the states' power to restrict registration and voting. There is, however, no inherent conflict between 42 U.S.C.A. § 1971(a)(2)(B) and § 24.2-706. Therefore, 42 U.S.C.A. § 1971(a)(2)(B) does not preempt the specific requirements of §§ 24.2-706 and 24.2-707 that absentee ballots be voided for certain errors or omissions.

The fundamental objective of the State Board of Elections is to provide overall supervision and coordination of election activities throughout the Commonwealth,

and to obtain uniformity in local election practices and proceedings and legality and purity in all elections.[26] In considering the detailed procedures in Title 24.2 for casting and counting absentee ballots,[27] it is clear that the General Assembly has given wide discretion to the Board to carry out its administrative responsibilities with regard to such ballots. As in other instances that require interpretation of election laws, any decision of the Board in performing its statutory duty, i.e. the counting of absentee ballots, will be entitled to great weight.[28] Accordingly, it is my opinion that the Board has the authority to adopt necessary standards and instructions for use by local election officials to determine what constitutes an error or omission in completion of the voter statement that is not material in determining whether such individual is qualified to vote in such election.

CONCLUSION

Accordingly, it is my opinion that 42 U.S.C.A. § 1971(a)(2)(B) does not conflict with the specific requirement of completion of the voter statement required by § 24.2-706 and would not preempt the Commonwealth from requiring such a statement. It is further my opinion that the State Board of Elections has the authority to adopt standards and instructions for use by local election officials in determining what constitutes an error or omission in completion of the voter statement that is not material in determining whether an individual is qualified to vote in an election.

[1] *See* 42 U.S.C.A. §§ 1971 through 1974(e) (West 2003 & Supp. 2005).

[2] *See supra* note 1.

[3] South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966).

[4] *See* Allen v. State Bd. of Elections, 393 U.S. 544, 566-69 (1969); *see also*, Dougherty County v. White, 439 U.S. 32, 37 (1978).

[5] *See Allen*, 393 U.S. at 565.

[6] *See* Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983); *see also* Vollin v. Arlington Co. Electoral Bd., 216 Va. 674, 678-79, 222 S.E.2d 793, 797 (1976); 1990 Op. Va. Att'y Gen. 155, 155 and opinions cited therein.

[7] Nat'l Mar. Union v. City of Norfolk, 202 Va. 672, 682, 119 S.E.2d 307, 314 (1961); *see also Vollin*, 216 Va. at 679, 222 S.E.2d at 797.

[8] County of Fairfax v. City of Alexandria, 193 Va. 82, 92, 68 S.E.2d 101, 107 (1951).

[9] 42 U.S.C.A. § 1971(a)(2)(B) (West 2003).

[10] Webster's Third New International Dictionary Of The English Language Unabridged 1929 (1993). Because the term "requisite" is not defined in this statute, it must be given its common, ordinary meaning. *See, e.g.*, Anderson v. Commonwealth, 182 Va. 560, 565, 29 S.E.2d 838, 840 (1944) (noting that words "listed or assessed" have well recognized meaning and are commonly used to express thought that personal property is to be placed on tangible person property roll for taxation purposes).

[11] "The meaning of a word … takes color and expression from the purport of the entire phrase of which it is a part, and it must be construed so as to harmonize with the context as a whole." Kohlberg v. Va. Real Estate Comm'n, 212 Va. 237, 239, 183 S.E.2d 170, 172 (1971). "[I]t is known by its associates." Black's Law Dictionary 1087 (8th ed. 2004) (noting Latin derivation of *noscitur a sociis*).

[12] 42 U.S.C.A. § 1971(a)(2)(B).

[13] Students for Animals v. Univ. of Va., 12 Va. Cir. 247, 249 (1988).

[14]42 U.S.C.A. § 1971(a)(2)(B).

[15]*Id.*

[16]*See* 42 U.S.C.A. § 1973c (1994) (West 2003).

[17]*See* 28 C.F.R. § 51.13 (2004) (listing examples of changes affecting voting which must meet § 5 preclearance requirement). Section 51.13(e) requires preclearance for "[a]ny change in the constituency of an official or the boundaries of a voting unit (e.g., through redistricting, … reapportionment …)."

[18]By letters dated June 24, 2004, May 2, 2003, July 1, 2002, June 15, 2001 and June 21, 2000, the Attorney General did not interpose any objection to the provisions of this statutory provision (copies on file with this Office).

[19]*See, e.g.*; Storer v. Brown, 415 U.S. 724, 730 (1974); Bullock v. Carter, 405 U.S. 134, 144-45 (1972).

[20]*See* Anderson v. Celebrezze, 460 U.S. 780, 788-79 (1983); Richardson v. Ramirez, 418 U.S. 24, 79 (1974) (Marshall, J., dissenting).

[21]*Anderson*, 460 U.S. at 788.

[22]Howlette v. City of Richmond, 485 F. Supp. 17 (E.D. Va.), *aff'd*, 580 F.2d 704 (4th Cir. 1978).

[23]Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 210-11 (1824).

[24]*See* Op. Va. Att'y Gen.: 1984-1985 at 280, 282; 1973-1974 at 284, 285.

[25]*See* Jones v. Rath Packing Co., 430 U.S. 519, 525-26 (1977).

[26]*See* VA. CODE ANN. § 24.2-103(A) (LexisNexis Supp. 2005); *see also* 1983-1984 Op. Va. Att'y Gen. 152, 153.

[27]*See* tit. 24.2, ch. 7, §§ 24.2-700 to 24.2-713 (LexisNexis Repl. Vol. 2003 & Supp. 2005); *see also* 1 H. & S. DOCS., *Report of the Election Laws Study Commission to the Governor and the General Assembly of Virginia*, H. Doc. No. 14, at 2-3, 9-10, 103-10 (1969 Extra Sess.) (reporting on revisions from Title 24 to Title 24.1).

[28]*See* Forst v. Rockingham Poultry Mktg. Coop., 222 Va. 270, 276, 279 S.E.2d 400, 403 (1981) (noting that long standing construction of statute by Tax Commissioner is entitled to great weight); Dep't of Taxation v. Prog. Comty. Club, 215 Va. 732, 739, 213 S.E.2d 759, 763 (1975) (noting that construction of statute by state official charged with its administration is entitled to great weight); 1993 Op. Va. Att'y Gen. 226, 227 (noting that interpretation given to statute by state agency charged with its administration is entitled to great weight). This rule of statutory construction is particularly persuasive in construing individual statutes that constitute parts of a complex statutory scheme, such as the voting system established in Title 24.2. In such an instance, deference to a decision of the agency charged by the General Assembly with the statewide administration of such a system is appropriate unless the decision clearly is wrong.

OP. NO. 05-069

ELECTIONS: CAMPAIGN FINANCE DISCLOSURE ACT — DISCLOSURE FOR POLICTICAL CAMPAIGN ADS.

Private right of action does not exist for private individuals and entities to enforce provisions of Campaign Finance Disclosure Act and Disclosure Requirements for Political Campaign Advertisements.

THE HONORABLE KEN CUCCINELLI
MEMBER, SENATE OF VIRGINIA
OCTOBER 12, 2005

ISSUE PRESENTED

You inquire whether a private right of action exists for private individuals and entities to enforce the provisions of the Campaign Finance Disclosure Act, §§ 24.2-900

through 24.2-930 ("Campaign Act"), and the Disclosure Requirements for Political Campaign Advertisements, §§ 24.2-941 through 24.2-944 ("Disclosure Act").

RESPONSE

It is my opinion that a private right of action does not exist for private individuals and entities to enforce the provisions of the Campaign Finance Disclosure Act and the Disclosure Requirements for Political Campaign Advertisements.

BACKGROUND

You advise that in *Virginia Society of Human Life, Inc. v. Caldwell*,[1] the federal court describes private enforcement actions in political campaigns in 1989 and 1993 whereby private individuals attempted to enforce predecessor statutes of the Campaign Act and the Disclosure Act through private legal proceedings in the circuit courts of the Commonwealth.[2] You advise further that the reported decision in *Virginia Society* describes cases in which such circuit courts entered injunctions barring the distribution of voter guides and other written political materials in the closing days of the political campaigns in 1989 and 1993.[3]

The federal court described the 1989 and 1993 enforcement actions to which you make reference as follows:

> In connection with the 1989 elections, the "Committee for Providing Truth in Political Candidate Positions," an unincorporated association in Fairfax County, Virginia, consisting of various Fairfax County residents, prepared a handbill entitled "Read Before You Vote." The Democratic Party of Virginia ("DPV"), brought suit against that association and the VLC seeking an injunction. The day before the election, the Circuit Court of Fairfax County issued an unconstitutional prior restraint enjoining them from distributing or causing to be distributed the "Read Before You Vote" handbills and the "Leadership '89 Voter Cards" as well as "any other materials or publications or writings as defined in 24.1-277." The injunction was effective "until such time as the defendants [could] demonstrate to the Court compliance with the law."
>
> In 1993, elections were held again for Governor, Lieutenant Governor, Attorney General, and the General Assembly. Following a similar pattern, the Circuit Court of Fairfax County entertained a suit shortly before the election to enjoin distribution of certain handbills. On October 27, 1993, the Circuit Court enjoined the defendants "from distributing any writing about candidates for any office elective … without first filing a statement of organization with the [Virginia State] Board [of Elections]" and identified on the writing "the person responsible therefore" and the registration number. The Virginia Supreme Court dissolved the injunction on November 1, 1993, without opinion.[4]

APPLICABLE LAW AND DISCUSSION

As a general rule, a private right of action cannot be implied from statutory provisions because "[[w]hen] 'a statute creates a right and provides a remedy for the vindication of that right, then that remedy is exclusive unless the statute says otherwise.'"[5] Clearly, the Campaign Act and the Disclosure Act confer certain rights and obligations upon citizens and entities of the Commonwealth and the enforcement of such obligations on certain governmental entities. It is equally clear that the rights and obligations conferred by these Acts did not exist in the common law and were created through the statutory scheme of these Acts.[6]

The Campaign Act constitutes "the exclusive and entire campaign finance disclosure law of the Commonwealth."[7] Section 24.2-923(A) of the Act 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 subsections C, D, and E." The Campaign Act requires contributions and expenditures of persons and political committees to be reported to the State Board in accordance with the schedule set forth in the Act.[8]

The provisions of the Disclosure Act "apply to any sponsor of an advertisement in the print media or on radio or television the cost or value of which constitutes an expenditure or contribution required to be disclosed" by the Campaign Act.[9] Section 24.2-943 of the Disclosure Act sets forth the basic disclosure requirements for political campaign advertisements in the print media or that appear in print on television, and § 24.2-944 sets forth the basic disclosure requirements for political campaign advertisements that appear on radio or television.

Both the Campaign Act and the Disclosure Act contain civil and criminal penalties for violation of their reporting requirements. Section 24.2-928 of the Campaign Act specifically requires the State Board of Elections and the local electoral board, in cases involving required filings with the local electoral board, to report any violation of the Campaign Act to the appropriate Commonwealth's attorney. Furthermore, § 24.2-929(A) of the Campaign Act requires that within 90 days of any missed deadline, the "State Board or the general registrar or local electoral board, as appropriate, shall … notify the [Commonwealth's] attorney … who shall initiate civil proceedings to enforce the civil penalties and penalties assessed by the State Board or the local electoral board as provided herein." In the case of a willful violation of the Campaign Act, the party "shall be guilty of a Class 1 misdemeanor."[10]

Section 24.2-943(C) of the Disclosure Act requires the assessment of a civil penalty not to exceed $100 for a violation of this section. Section 24.2-944(G) of the Act requires the assessment of a civil penalty not to exceed $500 for each violation of the disclosure requirements of the Act. Both statutory provisions provide that a willful violation is a Class 1 misdemeanor.

The General Assembly clearly authorizes the civil penalties in both the Campaign Act and the Disclosure Act to proscribe conduct which, though not criminal in nature, is

in violation of the statutory requirements. The obvious purpose of the civil penalties is not punitive in nature, but rather to strengthen the effectiveness of the regulatory requirements of the Acts. The civil penalties, therefore, clearly are designed to regulate conduct.[11] It is equally clear that the General Assembly intends for willful violations of the Campaign Act and the Disclosure Act to be treated as criminal acts punishable as Class 1 misdemeanors.[12]

It is my opinion that the Campaign and Disclosure Acts do not create a cause of action for enforcement by a private entity or an individual. No civil right of action exists unless the Acts, by virtue of the terms used therein, so provide or unless proof of a set of facts establishing violation of these Acts also constitutes proof of an otherwise existing civil cause of action.[13] The clear provisions of both Acts place the duty for the enforcement of the Acts on the State Board of Elections, the general registrars and the local electoral boards, and in some cases, enforcement of the Acts with the assistance of the appropriate Commonwealth's attorney.[14] It is presumed that public officials will discharge their duties in accordance with law.[15]

The General Assembly knows how to create a private cause of action and how to preserve a private cause of action when that is its intention.[16] Considered as a whole, it is my opinion that the statutory language demonstrates a clear legislative intent to require enforcement of violations of the Campaign Act and the Disclosure Act by the appropriate elections officials of the Commonwealth. My conclusion is supported by the general rule that a penal statute does not automatically create a private right of action, and that equity will not enter an injunction merely because a statute has been violated.[17] This rule, however, is qualified by the long standing principle that an injunction is appropriate relief where violation of a penal statute results in special damage to property rights which would be difficult to quantify.[18]

CONCLUSION

Accordingly, it is my opinion that a private right of action does not exist for private individuals and entities to enforce the provisions of the Campaign Finance Disclosure Act and the Disclosure Requirements for Political Campaign Advertisements.

[1] 906 F. Supp. 1071 (W.D. Va. 1995).

[2] *Id.* at 1073-1074.

[3] *Id.* at 1081-88.

[4] *Id.* at 1073-74 (alterations in original) (footnotes omitted).

[5] Vansant & Gusler, Inc. v. Washington, 245 Va. 356, 360, 429 S.E.2d 31, 33 (1993) (alteration in original) (quoting Sch. Bd. v. Giannoutsos, 238 Va. 144, 147, 380 S.E.2d 647, 649 (1989)).

[6] VA. CODE ANN. § 1-200 (LexisNexis Repl. Vol. 2005) (providing that common law continues in full force except as altered by General Assembly).

[7] VA. CODE ANN. § 24.2-900 (LexisNexis Supp. 2005).

[8] *See* §§ 24.2-914 to 24.2-928 (LexisNexis Repl. Vol. 2003 & Supp. 2005).

[9] Section 24.2-941 (LexisNexis Repl. Vol. 2003).

[10]Section 24.2-929(A)(4) (LexisNexis Supp. 2005).

[11]*See* Op. Va. Att'y Gen.: 1990 at 109, 111; 1977-1978 at 162, 164.

[12]*See* § 24.2-929(A)(4); § 24.2-943(C) (LexisNexis Supp. 2005); § 24.2-944(G) (LexisNexis Supp. 2005).

[13]*See, e.g.*, Hortenstein v. Virginia-Carolina Ry. Co., 102 Va. 914, 923-24, 47 S.E. 966, 999 (1904).

[14]*See* § 24.2-928(A)-(B) (LexisNexis Supp. 2005); § 24.2-929(A); § 24.2-943(C), § 24.2-944(G).

[15]WTAR Radio-TV Corp. v. City Council, 216 Va. 892, 895, 223 S.E.2d 895, 898 (1976); Ours Props., Inc. v. Ley, 198 Va. 848, 850-51, 96 S.E.2d 754, 756 (1957).

[16]*See, e.g.*, VA. CODE ANN. § 6.1-363.24 (LexisNexis Supp. 2005) (providing that any person who suffers loss from violation may bring civil action); § 6.1-469 (LexisNexis Supp. 2005) (providing that any person who suffers loss from violation may bring civil action); VA. CODE ANN. § 32.1-138.14 (LexisNexis Repl. Vol. 2004) (providing that no private right of action is created); VA. CODE ANN. § 55-226.2(E) (LexisNexis Supp. 2005) (providing that tenants and owners retain private right of action resulting from breach of rental agreement or lease terms); VA. CODE ANN. § 56-235.8(G)(2) (LexisNexis Repl. Vol. 2003) (providing that person who suffers loss from certain violations may initiate action to recover damages); § 56-593(B)(1) (LexisNexis Repl. Vol. 2003) (providing that person who suffers loss from certain violations may initiate action to recover damages); VA. CODE ANN. § 62.1-44.22 (LexisNexis Repl. Vol. 2001) (providing that owner holding certificate does not constitute defense in civil action involving private rights). *Compare* 1998 Op. Va. Att'y Gen. 87, 88 (noting that when General Assembly intends statute to impose mandatory requirements, it knows how to express its intention).

[17]*See* Woodfin v. Overnite Transp. Co., 199 Va. 165, 166-67, 98 S.E.2d 525, 526 (1957); *see also Washington*, 245 Va. at 359-60, 429 S.E.2d at 33.

[18]*Woodfin*, 199 Va. at 167, 98 S.E.2d at 526; Mears v. Colonial Beach, 166 Va. 278, 282, 184 S.E. 175, 176 (1936); Turner v. Hicks, 164 Va. 612, 615, 180 S.E. 543, 544 (1935); Long's Baggage Transfer Co. v. Burford, 144 Va. 339, 353, 132 S.E. 355, 359 (1926).

OP. NO. 05-008

GAME, INLAND FISHERIES AND BOATING: WILDLIFE AND FISH LAWS – GENERAL PROVISIONS.

Landowners receiving fee for use of their property from political subdivision are covered by indemnification provisions of § 29.1-509(E). Political subdivisions are not indemnified except when they enter into arrangement with agency of Commonwealth. Political subdivisions that control private property by lease or contract to provide free public recreational use are entitled to reduced liability under § 29.1-509(B) and (C).

THE HONORABLE CLARENCE E. (BUD) PHILLIPS
MEMBER, HOUSE OF DELEGATES
MARCH 29, 2005

ISSUES PRESENTED

You ask two questions regarding the application of § 29.1-509, which governs a landowner's duty of care and liability for certain activities. You first inquire whether § 29.1-509 provides indemnification for landowners who receive rental or other remuneration from a political subdivision in return for allowing use of their land for public recreational purposes. You also ask whether § 29.1-509 provides indemnification for political subdivisions which are leasing or managing private property for public recreational use.

RESPONSE

It is my opinion that landowners who receive a fee for the use of their property from a political subdivision are covered by the indemnification provisions of § 29.1-509(E). It is further my opinion that political subdivisions[1] are not covered by those provisions except when they enter into an arrangement with an agency of the Commonwealth. At the same time, political subdivisions which control private property by lease or contract in order to provide free public recreational use are entitled to the benefit of reduced liability under the provisions of § 29.1-509(B) and (C).

APPLICABLE LAW AND DISCUSSION

Section 29.1-509 is central to your inquiry and provides as follows:

> A. For the purpose of this section:
>
> "*Fee*" means any payment or payments of money to a landowner for use of the premises or in order to engage in any activity described in subsections B and C of this section, but does not include rentals or similar fees received by a landowner from governmental sources or payments received by a landowner from incidental sales of forest products to an individual for his personal use, or any action taken by another to improve the land or access to the land for the purposes set forth in subsections B and C of this section or remedying damage caused by such uses.
>
> "*Land*" or "*premises*" means real property, whether rural or urban, waters, boats, private ways, natural growth, trees and any building or structure which might be located on such real property, waters, boats, private ways and natural growth.
>
> "*Landowner*" means the legal title holder, lessee, occupant or any other person in control of land or premises.
>
> B. A landowner shall owe no duty of care to keep land or premises safe for entry or use by others for hunting, fishing, trapping, camping, participation in water sports, boating, hiking, rock climbing, sightseeing, hang gliding, skydiving, horseback riding, foxhunting, racing, bicycle riding or collecting, gathering, cutting or removing firewood, for any other recreational use, or for use of an easement granted to the Commonwealth or any agency thereof to permit public passage across such land for access to a public park, historic site, or other public recreational area. No landowner shall be required to give any warning of hazardous conditions or uses of, structures on, or activities on such land or premises to any person entering on the land or premises for such purposes, except as provided in subsection D.
>
> C. Any landowner who gives permission, express or implied, to another person to hunt, fish, launch and retrieve boats, swim, ride, foxhunt, trap, camp, hike, rock climb, hang glide, skydive,

sightsee, engage in races, to collect, gather, cut or remove forest products upon land or premises for the personal use of such person, or for the use of an easement as set forth in subsection B does not thereby:

1. Impliedly or expressly represent that the premises are safe for such purposes; or

2. Constitute the person to whom such permission has been granted an invitee to whom a duty of care is owed; or

3. Assume responsibility for or incur liability for any intentional or negligent acts of such person or any other person, except as provided in subsection D.

D. Nothing contained in this section, except as provided in subsection E, shall limit the liability of a landowner which may otherwise arise or exist by reason of his gross negligence or willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity. The provisions of this section shall not limit the liability of a landowner which may otherwise arise or exist when the landowner receives a fee for use of the premises or to engage in any activity described in subsections B and C of this section. Nothing contained in this section shall relieve any sponsor or operator of any sporting event or competition including but not limited to a race or triathlon of the duty to exercise ordinary care in such events.

E. For purposes of this section, whenever any person enters into an agreement with, or grants an easement to, the Commonwealth or any agency thereof, any county, city, or town, or with any local or regional authority created by law for public park, historic site or recreational purposes, concerning the use of, or access over, his land by the public for any of the purposes enumerated in subsections B and C of this section, the government, agency, county, city, town, or authority with which the agreement is made shall hold a person harmless from all liability and be responsible for providing, or for paying the cost of, all reasonable legal services required by any person entitled to the benefit of this section as the result of a claim or suit attempting to impose liability. Any action against the Commonwealth, or any agency, thereof, for negligence arising out of a use of land covered by this section shall be subject to the provisions of the Virginia Tort Claims Act (§ 8.01-195.1 et seq.). Any provisions in a lease or other agreement which purports to waive the benefits of this section shall be invalid, and any action against any county, city, town, or local or regional authority shall be subject to the provisions of § 15.2-1809, where applicable.

1. INDEMNIFICATION OF LANDOWNERS RECEIVING PAYMENTS

You first ask whether § 29.1-509 provides indemnification of landowners who receive rentals or other financial remuneration from a political subdivision in return for allowing the use of their land for recreational purposes, including use by off-highway vehicles.

Section 29.1-509 is designed to encourage landowners to open their lands for public recreational use by reducing the standard of care and duties owed to those who engage in such use. Together, subsections B and C of § 29.1-509 provide that landowners who allow recreational uses owe no duty of care to such users, are not required to warn of hazardous conditions, and do not make any representations to those users about the conditions of the premises. Subsection D then provides that the duty of care applicable to landowners in such a situation is "gross negligence or willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity."[2] Section 29.1-509(D) further provides that the reduced duty of care provided by subsections B and C does not apply to landowners who receive a "fee" for use of the premises or to engage in the recreational uses described in subsections B and C.[3] But because § 29.1-509(A) defines "fee" to exclude "rentals or similar fees received by a landowner from governmental sources," subsection D does not apply to the question you present. Should a landowner, however, receive a "fee" as that term is defined in § 29.1-509(A) from a political subdivision for the use of his land, the reduced duty of care would not apply.

Subsection E of § 29.1-509 governs when a landowner enters into an easement or agreement with any state or local governmental agency to allow public access to his lands for the purposes set out in subsections B and C. Subsection E provides that the governmental agency "shall hold [the landowner] harmless from all liability and …, pay[] the cost of, all reasonable legal services" in defending against claims of liability.[4]

Subsection E initially was added by the 1989 Session of the General Assembly.[5] At the same time the legislature added subsection E, it added the phrase, "except as provided in subsection E," to the first line of subsection D.[6] Under basic principles of statutory construction, the intent of the General Assembly must be determined from the words contained in the statute.[7] Thus, subsection E clearly provides a landowner contracting with a governmental agency indemnification regardless of the applicable duty of care or whether or not he is paid a fee.

2. INDEMNIFICATION OF POLITICAL SUBDIVISIONS

You also ask whether political subdivisions, including local governments, may be held harmless from liability when they manage or lease property for public recreational use.

As previously discussed, the indemnification provisions of § 29.1-509(E) run from governmental agencies to landowners. Under subsection E, a governmental agency cannot be the beneficiary of such indemnification with the possible exception of

an arrangement between an agency of local government and an agency of the Commonwealth.[8]

Nevertheless, the Supreme Court of Virginia has ruled that a local government may be considered a landowner entitled to the reduced standard of care provided by § 29.1-509(B). In *City of Virginia Beach v. Flippen*,[9] the Court considered a suit by a person injured while walking on a stairway over a bulkhead to a beach. By agreement with the private owners of the property, the city maintained such stairways to provide free public recreational beach access.[10] The Court found that as a result of its activities in providing and maintaining such public access, the city was a "person in control of the premises"; thus, the city was a "landowner" as defined in subsection A.[11] As such, the city was entitled to the immunity from simple negligence provided in subsection B.[12] The Court added that § 29.1-509 was intended to encourage the opening of private lands to public use and that a broad interpretation of the definition of "landowner" was appropriate.[13] As a result, a political subdivision that leases or manages lands intended for public recreational use would fall within the scope of the foregoing ruling.[14]

CONCLUSION

Accordingly, it is my opinion that landowners who receive a fee for the use of their property from a political subdivision are covered by the indemnification provisions of § 29.1-509(E). It is further my opinion that political subdivisions[15] are not covered by those provisions except when they enter into an arrangement with an agency of the Commonwealth. At the same time, political subdivisions which control private property by lease or contract in order to provide free public recreational use are entitled to the benefit of reduced liability under the provisions of § 29.1-509(B) and (C).

[1]A political subdivision may be considered a state agency for limited purposes. *See* 2002 Op. Va. Att'y Gen. 281, 283. Whether a political subdivision may in some circumstance be a state agency for the purposes of § 29.1-509 would be a question of fact not addressed herein.

[2]The effect of this language absolves the landowners of liability for simple negligence and replaces the duty of care with "gross negligence" and the limited liability in § 29.1-509(D).

[3]Subsections B and C of § 29.1-509 do not specifically list "off-highway vehicles" among the uses covered. Subsection B, however, includes as uses racing, bicycle riding, and any other recreational use. Such language is broad enough to encompass the use of off-highway vehicles for recreational purposes.

[4]In fact, any agreement that does not so provide is declared invalid. *See* VA. CODE ANN. § 29.1-509(E) (LexisNexis Supp. 2004). The liability of the Commonwealth or its agencies is limited by the Virginia Tort Claims Act. *See* §§ 8.01-195.1 to 8.01-195.9 (Michie Repl. Vol. 2000 & LexisNexis Supp. 2004). The liability of localities is subject to the provisions of § 15.2-1809, where applicable.

[5]1989 Va. Acts ch. 500, at 733, 734.

[6]*Id.* at 734.

[7]*See* Williams v. Commonwealth, 265 Va. 268, 271, 576 S.E.2d 468, 470 (2003).

[8]A local government could, for example, lease its property to an agency of the Commonwealth for recreational purposes and take advantage of the hold harmless provisions of § 29.1-509(E).

[9]251 Va. 358, 467 S.E.2d 471 (1996).

[10] *Id.* at 360, 467 S.E.2d at 472.

[11] *Id.* at 361-62, 467 S.E.2d at 473-74.

[12] *Id.*

[13] *Id.* at 362, 467 S.E.2d at 474.

[14] You imply and I assume that the local government does not charge fees for public recreational uses. If it did, the provisions of § 29.1-509(D) as discussed herein might well cancel the reduced duty of care and limitation of liability provided by subsections B and C.

[15] *See supra* note 1.

OP. NO. 05-047

GAME, INLAND FISHERIES AND BOATING: WILDLIFE AND FISH LAWS – HUNTING AND TRAPPING.

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY – DANGEROUS USE OF FIREARMS OR OTHER WEAPONS.

Game laws establish procedure used to forfeit firearm used by person convicted of shooting firearm in or across road or street. Court convicting such violator may declare forfeiture of firearm used in crime. Commonwealth's attorney of county or city wherein forfeiture was incurred must file an information to enforce forfeiture in his circuit court.

THE HONORABLE PHILLIP C. STEELE
COMMONWEALTH'S ATTORNEY FOR GILES COUNTY
AUGUST 19, 2005

ISSUES PRESENTED

You ask what statute is applicable to the forfeiture of a firearm subsequent to a conviction under § 18.2-286, which prohibits shooting in or across a road or a street. In particular, you ask whether a court may enter an order disposing of the firearm pursuant to § 19.2-386.29, which applies generally to criminal offenses, or § 29.1-521.2(A), which applies specifically to violations of § 18.2-286. Should § 29.1-521.2(A) be the applicable statute, you ask whether you must file an information pursuant to Chapter 22 of Title 19.2, which governs the enforcement of forfeiture. Finally, if so, you ask in which court should such proceeding be initiated.

RESPONSE

It is my opinion that § 29.1-521.2(A), with very rare possible exceptions, establishes the procedure to be used in forfeiting a firearm used by a person convicted of violating § 18.2-286. It is further my opinion that the court convicting the violator has the discretion to declare a forfeiture of the firearm used in the crime. Finally, it is my opinion that the Commonwealth's attorney of the county or city wherein the forfeiture was incurred must file an information to enforce that forfeiture in the circuit court of his county or city.

APPLICABLE LAW AND DISCUSSION

Section 29.1-521.2(A) provides that:

> Any firearm, crossbow or bow and arrow used by any person to hunt any game bird or game animal in a manner which violates § 18.2-286 *may, upon conviction of such person violating*

> *§ 18.2-286, be forfeited to the Commonwealth by order of the court trying the case*. The forfeiture shall be enforced as provided in Chapter 22 (§ 19.2-369 et seq.) of Title 19.2. The officer or other person seizing the property shall immediately give notice to the attorney for the Commonwealth. [Emphasis added.]

Section 19.2-386.29 provides that:

> All pistols, shotguns, rifles, dirks, bowie knives, switchblade knives, ballistic knives, razors, slingshots, brass or metal knucks, blackjacks, stun weapons and tasers, and other weapons used by any person in the commission of a criminal offense, *shall, upon conviction of such person, be forfeited to the Commonwealth by order of the court trying the case*. The court shall dispose of such weapons as it deems proper by entry of an order of record. Such disposition may include the destruction of the weapons or, subject to any registration requirements of federal law, sale of the firearms to a licensed dealer in such firearms in accordance with the provisions of Chapter 22 (§ 19.2-369 et seq.) of this title regarding sale of property forfeited to the Commonwealth. [Emphasis added.]

Chapter 22 of Title 19.2, §§ 19.2-369 through 19.2-386, governs the enforcement of forfeitures. Section 19.2-369 authorizes a Commonwealth's attorney "for the county or city wherein the forfeiture was incurred [to] file in the clerk's office of the circuit court of his county or city an information in the name of the Commonwealth against" any property or money seized as forfeited for a violation of any provision of the *Code*. Additionally, § 19.2-369 states that this process shall apply when a "different mode of enforcing the forfeiture is not prescribed."

As you indicate in your request,[1] a 1989 opinion of the Attorney General (the "1989 Opinion") construing § 29.1-524 has concluded that the mandatory forfeiture of weapons and vehicles used in spotlighting deer must be accomplished through condemnation under Chapter 22.[2] The material difference between § 29.1-524 and § 29.1-521.2(A) is that under § 29.1-524, weapons "shall" be forfeited; while § 29.1-521.2(A) states that any firearm used in violating § 18.2-286 "may" be forfeited. I see no reason why the general reasoning of the 1989 Opinion should not be applicable to your inquiry. As here, the question involves a choice between the application of a specific statutory remedy and a general one.

"It is firmly established that, 'when one statute speaks to a subject generally and another deals with an element of that subject specifically, the statutes will be harmonized, if possible, and if they conflict, the more specific statute prevails.'"[3] Thus, when faced with a choice between a specific and a general statute, the former is controlling.[4] When statutes provide different procedures on the same subject matter, the general gives way to the more specific.[5] Given the history of the recodification described in the 1989 Opinion, it is my opinion that the procedures in § 29.1-521.2(A) regarding

forfeitures of firearms used in violating § 18.2-286 must be followed. Under the plain language of § 29.1-521.2(A), the use of the word "may" indicates that the forfeiture of any firearm is discretionary with the convicting court. If such a forfeiture is ordered, however, the forfeiture is enforced pursuant to Chapter 22.[6]

You indicate that cases brought under § 29.1-521.2 generally are tried in general district court. I find no provision in Chapter 22 or any other authorizing the transfer of forfeiture proceedings from circuit court to general district court. Thus, jurisdiction for the filing of such proceedings remains in the circuit court where the conviction occurred.[7]

CONCLUSION

Accordingly, it is my opinion that § 29.1-521.2(A), with very rare possible exceptions, establishes the procedure to be used in forfeiting a firearm used by a person convicted of violating § 18.2-286. It is further my opinion that the court convicting the violator has the discretion to declare a forfeiture of the firearm used in the crime. Finally, it is my opinion that the Commonwealth's attorney of the county or city wherein the forfeiture was incurred must file an information to enforce that forfeiture in the circuit court of his county or city.

[1]A 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." VA. CODE ANN. § 2.2-505(B) (LexisNexis Repl. Vol. 2001).

[2]*See* 1989 Op. Va. Att'y Gen. 187, 188-89.

[3]Gas Mart Corp. v. Bd. of Supvrs., 269 Va. 334, 350, 611 S.E.2d 340, 348 (2005) (quoting Commonwealth *ex rel.* Dep't of Corr. v. Brown, 259 Va. 697, 706, 529 S.E.2d 96, 101 (2000).

[4]2001 Op. Va. Att'y Gen. 59, 60

[5]2000 Op. Va. Att'y Gen. 94, 95

[6]You suggest that "firearm" as used in § 29.1-521.2(A) may not be inclusive of all weapons that may be used to commit violations of the statute. Section 29.1-100 defines the term "firearm" for purposes of Title 29.1 to mean "any weapon that will or is designed to or may readily be converted to expel single or multiple projectiles by the action of an explosion of a combustible material." In the unlikely event that a weapon does not meet this broad statutory definition, the forfeiture provisions of § 29.1-521.2(A) would not apply to violations thereof. In that event, the general automatic forfeiture provision of § 19.2-386.29 could be invoked, and the court trying the case would enter an order of disposition. *See* 1982-1983 Op. Va. Att'y Gen. 174, 174-75 (interpreting § 18.2-310, predecessor to § 19.2-386.29).

[7]This may be at least in part because Chapter 22 applies to proceedings for the condemnation of various types of property such as motor vehicles. It also provides for trial by jury. *See* VA. CODE ANN. § 19.2-380 (LexisNexis Repl. Vol. 2004). Jury trials are not available in general district courts. *See* 1977-1978 Op. Va. Att'y Gen. 281, 282.

OP. NO. 05-030

GENERAL ASSEMBLY: GENERAL ASSEMBLY CONFLICTS OF INTERESTS ACT.

No violation of Act for current member of General Assembly to act as attorney for or represent clients for compensation before executive agencies of Commonwealth in administrative law proceedings or legal matters.

THE HONORABLE TERRY G. KILGORE
MEMBER, HOUSE OF DELEGATES
APRIL 5, 2005

ISSUE

You ask whether a member of the General Assembly may represent clients[1] as an attorney for compensation before executive agencies of the Commonwealth in administrative law proceedings or other legal matters.[2]

RESPONSE

It is my opinion that it is not a violation of the General Assembly Conflicts of Interests Act for a current member of the General Assembly to act as an attorney for and represent clients for compensation before executive agencies of the Commonwealth in administrative law proceedings or other legal matters.

APPLICABLE LAW AND DISCUSSION

The qualifications to hold office as a member of the General Assembly are set out in Article II, § 5(c) of the Constitution of Virginia, which provides that "nothing in this Constitution shall limit the power of the General Assembly to prevent conflicts of interests, dual officeholding, or other incompatible activities by elective or appointive officials of the Commonwealth or of any political subdivision."

The General Assembly enacted the General Assembly Conflicts of Interests Act[3] (the "Act"), which governs conflicts of interest by General Assembly members. A legislator is prohibited from accepting any position that would "reasonably tend[] to influence him in the performance of his official duties"[4] or where "there is a reasonable likelihood that the opportunity is being afforded him to influence him in the performance of his official duties."[5] The legislator bears the initial burden of determining whether a business opportunity is being offered to influence him in his official capacity, and if so, the legislator must decline such opportunity to avoid an impermissible conflict of interest.[6] In the situation about which you inquire, you state that the representation of clients is not being afforded to influence a member of the General Assembly, nor would it influence such member, in the performance of his official duties.

A legislator may also have a conflict of interest by participating in certain transactions in which he has a personal interest.[7] By definition, this prohibition is limited to matters considered by the General Assembly[8] and, therefore, not applicable to the facts you present.

Additionally, § 30-105 of the Act sets forth certain contractual arrangements that are considered to be a conflict of interest:

> A. No legislator shall have a personal interest in a contract[9] with the legislative branch of state government.
>
> B. 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 § 2.2-4301.
>
> C. No legislator shall have a personal interest in a contract with any governmental agency of local government, other than in a contract of regular employment, unless such contract is (i) awarded as a result of competitive sealed bidding or competitive negotiation as defined in § 2.2-4301 or is awarded as a result of a procedure embodying competitive principles as authorized by subdivision 10 or 11 of § 2.2-4343, or (ii) is awarded after a finding, in writing, by the administrative head of the local governmental agency that competitive bidding or negotiation is contrary to the best interest of the public.
>
> D. The provisions of this section shall not apply to contracts for the sale by a governmental agency of services or goods at uniform prices available to the general public.
>
> E. The provisions of this section shall not apply to a legislator's personal interest in a contract between a public institution of higher education in Virginia and a publisher or wholesaler of textbooks or other educational materials for students, which accrues to him solely because he has authored or otherwise created such textbooks or materials.

Generally, the representation of clients as an attorney for compensation before executive agencies of the Commonwealth in administrative law proceedings or other legal matters would not implicate the contracts described in § 30-105.

Please be advised that the purpose of the Act is to ensure that "the citizens are entitled to be assured that the judgment of the members of the General Assembly will not be compromised or affected by inappropriate conflicts."[10] Our system of government is dependent in large part on its citizens maintaining the highest trust in their public officials. The conduct and character of public officials is of particular concern to state and local governments, because it is chiefly through that conduct and character that the government's reputation is derived. The purpose of the conflict of interests law is to assure the citizens of the Commonwealth that the judgment of public officers and employees will not be compromised or affected by inappropriate conflicts. To this end, the Act defines certain standards and types of conduct that clearly are improper. The law cannot, however, protect against all appearances of conflict. It is incumbent, therefore, on members of the General Assembly and other state and local government officials to examine their conduct to determine if it involves an appearance of impropriety that they find unacceptable and that could affect the confidence of the public in their ability to perform their duties impartially.

CONCLUSION

Accordingly, it is my opinion that it is not a violation of the General Assembly Conflicts of Interests Act for a current member of the General Assembly to act as an attorney for and represent clients for compensation before executive agencies of the Commonwealth in administrative law proceedings or other legal matters.

[1]For purposes of this opinion, I assume that the clients to which you refer are not agencies of the Commonwealth.

[2]Please note that this opinion is not a legal ethics opinion as such matters are reserved by the Supreme Court rules to the Virginia State Bar. *See* 1994 Op. Va. Att'y Gen. 9, 12 n.1.

[3]VA. CODE ANN. tit. 30, ch. 13, §§ 30-100 through 30-129 (LexisNexis Repl. Vol. 2004).

[4]Section 30-103(5).

[5]Section 30-103(6).

[6]*See* COI Adv. Op. No. 99-A16, at 1 (2000) (noting that legislator should exercise caution in any representation where opportunity could be construed as being afforded to him to influence him in his official capacity).

[7]*See* § 30-108.

[8]*See* § 30-101 (defining "personal interest in a transaction" to mean "a personal interest of a legislator in any matter considered by the General Assembly").

[9]*See id.* (defining "personal interest in a contract" to mean "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").

[10]Section § 30-100.

OP. NO. 05-057

HIGHWAYS, BRIDGES AND FERRIES: COMMONWEALTH TRANSPORTATION BOARD, ETC. – SECONDARY SYSTEM OF STATE HIGHWAYS.

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

Authority for Department of Transportation to prohibit county from participating in rural addition program when county's subdivision ordinance does not require that all subdivision streets meet standards that qualify roads for acceptance into secondary system of state highways.

MR. MARTIN M. MCMAHON
MONTGOMERY COUNTY ATTORNEY
SEPTEMBER 6, 2005

ISSUE PRESENTED

You ask whether § 33.1-72.1, which governs the "taking" of streets into the secondary system of state highways, authorizes the Department of Transportation to prohibit a county from participating in the Department's rural addition program[1] when such county's subdivision ordinance does not require that all subdivision streets meet or exceed the standards that qualify roads for acceptance into the Department's secondary system of state highways.

RESPONSE

It is my opinion that the Department of Transportation is authorized to prohibit a county from participating in its rural addition program when such county's subdivision ordinance does not require that all subdivision streets meet the standards that qualify roads for acceptance into the Department's secondary system of state highways.

APPLICABLE LAW AND DISCUSSION

Section 33.1-72.1 provides that:

> B. *"County,"* as used in this section, means a county in which the secondary system of the state highways is constructed and maintained by the Department of Transportation and which has adopted a local ordinance for control of the development of subdivision streets to the necessary standards for acceptance into the secondary system.
>
> ….
>
> E. Whenever the governing body of a county recommends in writing to the Department of Transportation that any street in the county be taken into and become a part of the secondary system of the state highways in such county, the Department of Transportation thereupon, within the limit of available funds and the mileage available in such county for the inclusion of roads and streets in the secondary system, shall take such street into the secondary system of state highways for maintenance, improvement, construction and reconstruction if such street, at the time of such recommendation, either: (i) has a minimum dedicated width of 40 feet or (ii) in the event of extenuating circumstances as determined by the Commonwealth Transportation Commissioner, such street has a minimum dedicated width of 30 feet at the time of such recommendation. In either case such streets must have easements appurtenant thereto which conform to the policy of the Commonwealth Transportation Board with respect to drainage. After the streets are taken into the secondary system of state highways, the Department shall maintain the same in the manner provided by law.

Prior opinions of this Office have concluded that § 33.1-72.1 implicitly requires that to comply with § 33.1-72.1 a subdivision ordinance must control all subdivision street development to the necessary standards for acceptance into the Department of Transportation's secondary road system.[2] The General Assembly enacted § 33.1-72.1 in response to the costly problems associated with accepting substandard roads into the state's secondary system.[3] The purpose of § 33.1-72.1 is to husband the limited financial resources of the Department and spend them where they will be of greater benefit to the public.[4] Thus, § 33.1-72.1 creates the framework to address

the acceptance of substandard roads into the secondary system. Under the statutory framework, a county adopts a local ordinance that compels developers to build future subdivision streets to the standards of the state secondary system.[5] In return, the Department accepts the county's established subdivision streets into the system.[6] Thus, the county is helped with its current street problem in exchange for an assurance to the Department that the problem will not be allowed to occur in the future.[7] Should § 33.1-72.1 be interpreted to permit a county's subdivision ordinance to include whatever exceptions the county desires, the Department's assurance of future control is lost.[8] Accordingly, there is no authority in § 33.1-72.1 to make exceptions for local subdivision ordinances that control the development of some subdivision streets but fail to control other such streets.[9]

Article 6, Chapter 22 of Title 15.2, §§ 15.2-2240 through 15.2-2279, governs local subdivision ordinances. You note[10] that § 15.2-2241 does not specifically state that a county's subdivision ordinance must require that all streets be designed and constructed to Department of Transportation standards. In the event that streets in a subdivision will not be constructed to meet the standards necessary for inclusion in the secondary system, you also note that § 15.2-2242(A)(3) provides that a county subdivision ordinance may require that a notation be placed on all subdivision plats and all approved deeds advising that the streets do not meet state standards and will not be maintained by the Department. You further note that the General Assembly has not recently amended § 33.1-72.1(B). Thus, you conclude that § 15.2-2242 implies that a subdivision street must meet Department standards before it is required to accept the street into the secondary system; however, you also conclude that § 15.2-2242 implies that a county's subdivision ordinance does not have to require that all subdivision streets meet Department standards to qualify for the Department's rural addition program.

A 1992 opinion of the Attorney General notes that a locality may effectively prohibit private streets in subdivisions by imposing mandatory dedication requirements and requiring that construction conform to Department of Transportation secondary highway standards.[11] In addition to the power to prohibit private ownership of subdivision streets, the General Assembly has expressly authorized localities to permit private streets in subdivisions and to prescribe standards for their construction.[12] The powers of localities to set construction standards for private subdivision streets, and to require a statement that private streets will not be maintained at public expense, were given to localities to enable them to protect themselves on an ongoing basis from concerns about the maintenance of private subdivision streets.[13] Similarly, it is my opinion that the General Assembly enacted § 33.1-72.1 to allow the Department to protect itself from costs associated with upgrading substandard private subdivision streets after July 1, 1992. The Department may also set conditions for the acceptance of rural additions under § 33.1-72.1.[14] The Department has interpreted § 33.1-72.1 to mean that a subdivision ordinance does not adequately control the development of subdivision streets unless the ordinance requires that all subdivision streets brought into use after July 1, 1992, are constructed to the standards for acceptance into the

secondary system of state highways.[15] The Department's administrative interpretation concerning what constitutes adequate control of subdivision streets under § 33.1-72.1 is entitled to great deference.[16] Prior opinions of the Attorney General defer to the interpretations of law by an agency charged with administering the law, unless the agency interpretation clearly is wrong.[17]

CONCLUSION

Accordingly, it is my opinion that the Department of Transportation is authorized to prohibit a county from participating in its rural addition program when such county's subdivision ordinance does not require that all subdivision streets meet the standards that qualify roads for acceptance into the Department's secondary system of state highways.

[1]For purposes of this opinion, I assume that the phrase "rural addition program" means the process pursuant to § 33.1-72.1 by which a county may seek the addition of certain of its streets into the Department of Transportation's secondary system of state highways.

[2]*See* Op. Va. Att'y Gen.: 1983-1984 at 195, 196; 1986-1987 at 216, 216-17.

[3]*See* Op. Va. Att'y Gen: 1983-1984, *supra* note 2, at 196; 1983-1984 at 192, 194.

[4]*See* 1981-1982 Op. Va. Att'y Gen 193, 194.

[5]*See* VA. CODE ANN. § 33.1-72.1(A) (LexisNexis Supp. 2004); *see also* 1983-1984 Op. Va. Att'y Gen., *supra* note 2, at 196.

[6]*See* § 33.1-72.1(E), (F); *see also* 1983-1984 Op. Va. Att'y Gen., *supra* note 2, at 196.

[7]*See* 1983-1984 Op. Va. Att'y Gen., *supra* note 2, at 196.

[8]*Id.*

[9]*See* 1986-1987 Op. Va. Att'y Gen, *supra* note 2, at 217.

[10]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." VA. CODE ANN. § 2.2-505(B) (LexisNexis Repl. Vol. 2001).

[11]*See* 1992 Op. Va. Att'y Gen. 53, 56 (interpreting § 15.1-466(A)(4), predecessor to §§ 15.2-2241 and 15.2-2242); 1987-1988 Op. Va. Att'y Gen. 204, 206 (interpreting § 15.1-466(A)(e), predecessor to § 15.1-466(A)(4)).

[12]*See* 1992 Op. Va. Att'y Gen., *supra* note 11, at 56.

[13]*Id.*

[14]*See* 1983-1984 Op. Va. Att'y Gen., *supra* note 3, at 193.

[15]*See generally* VA. ADMIN. CODE tit. 24, ch. 91, 30-91-10 through 30-91-160 (West Supp. 2005) ("Subdivision Street Requirements"). In its subdivision street regulations, the Department defines the term "private streets" to mean "subdivision streets that have not been dedicated to public use or that require the permission or invitation of a resident or owner to use the street. Such streets are not intended to be included in the secondary system of state highways." 24 VA. ADMIN. CODE 30-91-10. Additionally, the Department "does not recognize any provision of an ordinance adopted by the governing body that exempts the development of streets from [the Subdivision Street Requirements] based on its definition of the term subdivision." 24 VA. ADMIN. CODE 30-91-30(B). Finally, the Department "establishes the minimum standards that must be satisfied for new subdivision streets to be considered for maintenance by the department as part of the secondary system of state highways under its jurisdiction." 24 VA. ADMIN. CODE 30-91-150(A)(2).

[16] *See* Op. Va. Att'y Gen.: 2002 at 186, 187; 1998 at 91, 93-94 (noting that great deference should be given to administrative interpretation of statutes by agency charged with such responsibility).

[17] *See* 2002 Op. Va. Att'y Gen., *supra* note 16, at 187.

OP. NO. 05-036

HOUSING: UNIFORM STATEWIDE BUILDING CODE.

COUNTIES, CITIES AND TOWNS: GENERAL POWERS OF LOCAL GOVERNMENTS – PUBLIC HEALTH AND SAFETY, NUISANCES — GENERAL POWERS AND PROCEDURES OF COUNTIES – MISCELLANEOUS POWERS — JOINT ACTIONS BY LOCALITIES – JOINT EXERCISE OF POWER.

Authority for county to enforce Uniform Statewide Building Code in any town located within county with population of less than 3,500, provided that town has not elected, or contracted with another authorized governmental entity, to enforce Code. County may bring suit against public nuisance located anywhere within county, including any town.

MR. HENRY A. THOMPSON SR.
SUSSEX COUNTY ATTORNEY
JUNE 21, 2005

ISSUES PRESENTED

You seek guidance concerning the enforcement of the Uniform Statewide Building Code and actions against public nuisances by a county for property located within an incorporated town, which has a population of less than 3,500, that is entirely within that county. Specifically, you ask whether a county is authorized to enforce the Building Code when a town does not have a building department or an agreement to enforce the Building Code. You also ask whether a county is authorized to bring a suit against an alleged public nuisance located within the town limits, whether or not it is contrary to the wishes of the governing body of the town.

RESPONSE

It is my opinion that a county is authorized to enforce the Uniform Statewide Building Code in any town located within the county that has a population of less than 3,500, provided that the town has not elected, or contracted with another authorized governmental entity, to enforce the Building Code. It is further my opinion that a county may bring suit against a public nuisance located anywhere within the territory of the county, including any town located therein.

BACKGROUND

You indicate that several towns with populations of less than 3,500 are located within Sussex County. Further, you note that at least two of these towns currently do not have building departments and are negotiating with Sussex County and others to enforce the Uniform Statewide Building Code[1] (the "Building Code"). You further indicate that no contract has been signed at this time. Finally, you relate that one town takes the position that absent such contract or other agreement with the town's governing body, Sussex County has no authority to bring a suit against an alleged public nuisance located within the town limits.

APPLICABLE LAW AND DISCUSSION

Enforcement of the Building Code is governed by § 36-105(A), which provides that:

> Enforcement of the provisions of the Building Code for construction and rehabilitation shall be the responsibility of the local building department.… Whenever a county or municipality does not have such a building department or board of Building Code appeals, the local governing body shall enter into an agreement with the local governing body of another county or municipality or with some other agency, or a state agency approved by the Department [of Housing and Community Development] for such enforcement and appeals resulting therefrom. For the purposes of this section, towns with a population of less than 3,500 may elect to administer and enforce the Building Code; however, where the town does not elect to administer and enforce the Building Code, the county in which the town is situated shall administer and enforce the Building Code for the town.

Section 15.2-900 governs the issue of public nuisance and provides, in pertinent part, that:

> In addition to the remedy provided by § 48-5 and any other remedy provided by law, any locality may maintain an action to compel a responsible party to abate, raze, or remove a public nuisance. If the public nuisance presents an imminent and immediate threat to life or property, then the locality may abate, raze, or remove such public nuisance, and a locality may bring an action against the responsible party to recover the necessary costs incurred for the provision of public emergency services reasonably required to abate any such public nuisance.

Additionally, § 15.2-1200 relates to public nuisance and provides that:

> Any county may adopt such measures as it deems expedient to secure and promote the health, safety and general welfare of its inhabitants which are not inconsistent with the general laws of the Commonwealth. Such power shall include, but shall not be limited to, the adoption of quarantine regulations affecting both persons and animals, the adoption of necessary regulations to prevent the spread of contagious diseases among persons or animals and the adoption of regulations for the prevention of the pollution of water which is dangerous to the health or lives of persons residing in the county.

Finally, § 15.2-1300(A) relates to public nuisances and provides that:

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

1. ENFORCEMENT OF THE BUILDING CODE

Section 36-105(A) of the Building Code provides that the enforcement thereof by a town with a population of less than 3,500 is optional. Should such a town elect to enforce the Building Code, it may do so through its own building department or board of appeals or by contracting with another party as provided by § 36-105(A). Should the town fail to make such an election, however, § 36-105(A) provides that the county in which the town is located "shall administer and enforce the Building Code for the town."[2]

The word "shall" primarily is mandatory, whereas the word "should" ordinarily implies no more than expediency and is directory only.[3] Although when the word "shall" is used in connection with the actions of a public official, its meaning is usually directory or permissive, and the intent is to be construed from the statute as a whole.[4] Section 36-105, taken as a whole, clearly establishes the intent that the Building Code must be enforced, and that it is the responsibility of each local government to enforce it within its territory. Since a town with less than 3,500 population may elect not to enforce the Building Code, a directory or permissive reading of "shall" with respect to the county would mean that should the county fail to act, then no government entity would enforce the Building Code within that town. Such an interpretation is at odds with the fundamental purpose of the statute.[5]

2. SUITS BY COUNTY AGAINST PUBLIC NUISANCE LOCATED IN TOWN

Sections 15.2-900 and 15.2-1200, both individually and together, authorize a county to take action against a public nuisance. The fact that land located within the limits of the town remains a part of the county is an established concept in Virginia.[6]

Unlike the limited authority of the county to enforce the Building Code within the town limits only when the town has elected not to act, or when the town has contracted with the county to enforce the Building Code within the town, the authority of the county to take action against a public nuisance is not dependent on the actions or inactions of the town. The town and the county simultaneously have the authority to take action against a public nuisance.[7] Pursuant to § 15.2-1300(A), as long as a power is available to the county generally, it is not prohibited from exercising that power within the town limits merely because the town also has that power.[8]

CONCLUSION

Accordingly, it is my opinion that a county is authorized to enforce the Uniform Statewide Building Code in any town located within the county that has a population of less than 3,500, provided that the town has not elected, or contracted with another

authorized governmental entity, to enforce the Building Code. It is further my opinion that a county may bring suit against a public nuisance located anywhere within the territory of the county, including any town located therein.

[1]*See* VA. CODE ANN. §§ 36-97 to 36-119.1 (Michie Repl. Vol. 1996 & LexisNexis Supp. 2004).

[2]*See* 1993 Op. Va. Att'y Gen. 163, 165 (concluding that towns with population of less than 3,500 may choose to enforce Building Code themselves, but if they do not, county in which town is situated has that responsibility under § 36-105). In 1992, the General Assembly amended § 36-105 to include the election of enforcement provision relating to towns with a population of less than 3,500. *See* 1992 Va. Acts ch. 73, at 74.

[3]*See* Brushy Ridge Coal Co. v. Blevins, 6 Va. App. 73, 78, 367 S.E.2d 204, 206 (1988).

[4]*See* Commonwealth v. Wilks, 260 Va. 194, 199, 530 S.E.2d 665, 667 (2000) (noting that courts consistently have held that use of "shall," in statute requiring action by public official, is directory and not mandatory unless statute manifests contrary intent).

[5]Statutes should not be interpreted to produce absurd results or irrational consequences. *See* McFadden v. McNorton, 193 Va. 455, 461, 69 S.E.2d 445, 449 (1952); 2001 Op. Va. Att'y Gen. 164, 165.

[6]"[I]n Virginia[,] an incorporated town continues to be an integral part of the county, subject to the jurisdiction of the county authorities and to taxation for general county purposes." Nexsen v. Bd. of Supvrs., 142 Va. 313, 318, 128 S.E. 570, 571 (1925); *see also* Op. Va. Att'y Gen.: 1978-1979 at 288, 288; 1977-1978 at 131, 133; 1973-1974 at 273, 273.

[7]*See* VA. CODE ANN. § 15.2-900 (LexisNexis Repl. Vol. 2003) (authorizing localities to maintain action to remove public nuisance); § 15.2-1300(A) (LexisNexis Repl. Vol. 2003) (authorizing joint exercise of authority by political subdivisions).

[8]The last portion of § 15.2-1300(A), "except where an express statutory procedure is otherwise provided for the joint exercise," prohibits the county from exercising its power to enforce the Building Code within the town limits except under the conditions noted in the text. This is because § 36-105 provides the "express statutory procedure" which limits the ability of the county to exercise such power to the specified situations.

OP. NO. 05-026

LAW ENFORCEMENT OFFICERS SAFETY ACT OF 2004.

PRISONS AND OTHER METHODS OF CORRECTION: LOCAL CORRECTIONAL FACILITIES – JAIL AUTHORITIES – REGIONAL JAILS AND JAIL FARMS.

Local or regional jail officer who is not part of local police or sheriff's department may meet definition of 'qualified law enforcement officer' for purposes of federal Law Enforcement Officers Safety Act of 2004. Regional jail authority may generally prohibit its officers, or prohibit particular officer, from carrying concealed weapon absent valid concealed handgun permit.

THE HONORABLE CHARLES E. JETT
SHERIFF FOR STAFFORD COUNTY
JUNE 21, 2005

ISSUES PRESENTED

You ask whether a local correctional officer working for a regional jail authority is considered a "qualified law enforcement officer" for purposes of the federal Law Enforcement Officers Safety Act of 2004. You also ask whether a regional jail authority may generally prohibit its officers, or prohibit a particular officer, from carrying a concealed weapon absent a valid concealed handgun permit.

RESPONSE

It is my opinion that a local or regional jail officer[1] who is not part of a local police or sheriff's department, may meet the definition of a "qualified law enforcement officer" for purposes of the federal Law Enforcement Officers Safety Act of 2004. Further, it is my opinion that pursuant to state law a regional jail authority may prohibit its officers in general, or an officer in particular, from carrying a concealed weapon absent a valid concealed handgun permit.

APPLICABLE LAW AND DISCUSSION

The first issue is whether a local correctional officer working for a regional jail authority is considered a "qualified law enforcement officer" for purposes of the federal Law Enforcement Officers Safety Act of 2004.[2] Section 926(B)(c) of the Act defines a "qualified law enforcement officer" as:

> [A]n employee of a governmental agency who—
>
> (1) *is authorized by law to engage in or supervise* the prevention, detection, investigation, or prosecution of, or *the incarceration of any person for, any violation of law, and has statutory powers of arrest;*
>
> (2) *is authorized by the agency to carry a firearm*;
>
> (3) is not the subject of any disciplinary action by the agency;
>
> (4) *meets standards, if any, established by the agency which require the employee to regularly qualify in the use of a firearm*;
>
> (5) is not under the influence of alcohol or another intoxicating or hallucinatory drug or substance; and
>
> (6) is not prohibited by Federal law from receiving a firearm. [Emphasis added.]

Sections 53.1-95.8, 53.1-98, and 53.1-109 each vest the superintendent and jail officers (guards) of local and regional jail authorities "[d]uring the term of their appointment … with the powers and authority of a conservator of the peace" within certain geographical boundaries and functions performed during the discharge of their duties. According to § 19.2-18, "[e]very conservator of the peace shall have authority to arrest without a warrant."[3] Since the superintendent and jail officers have statutory powers to arrest, it is my opinion that the first qualification is satisfied.[4]

Section 53.1-109.01 authorizes regional jail officers "to carry … weapons … in the course of [their] assigned duties" provided they have been designated by their superintendent and have completed the basic course in firearms. Should a regional jail officer satisfy the requirements of § 53.1-109.01, he is authorized to carry a firearm. Therefore, it is my opinion that the second qualification is satisfied.[5]

"Every person employed as a jailor or custodial officer under the provisions of Title 53.1 of the Code of Virginia, shall meet compulsory in-service training standards …."[6]

The compulsory in-service training standards include an annual qualification using the applicable firearms course.[7] Since a regional jail officer must qualify annually in the use of a firearm, it is my opinion that the fourth qualification is satisfied.[8]

Whether an officer meets the third,[9] fifth,[10] or sixth qualification[11] is a determination for the individual officer and his jail superintendent and is not a matter of state law.[12] I note, however, that should the officer satisfy these three remaining qualifications, it is my opinion that a local correctional officer would meet the definition of a "qualified law enforcement officer" for the purposes of the Law Enforcement Officers Safety Act of 2004. I should advise that the Act pertains to a qualified law enforcement officer's ability to carry a concealed firearm in a state other than Virginia.[13]

The second issue is whether a regional jail authority may generally prohibit its officers, or prohibit a particular officer, from carrying a concealed weapon absent a valid concealed handgun permit. Pursuant to § 53.1-106(B)(4), "[t]he [regional jail authority] shall have the power to … [a]ppoint a superintendent … and necessary jail officers therefor who shall serve at the pleasure of the [authority]." Since a local correctional officer serves at the pleasure of the regional jail authority, it follows that the authority may generally prohibit its officers, or prohibit a particular officer, from carrying a concealed weapon absent a valid concealed handgun permit.

CONCLUSION

Accordingly, it is my opinion that a local or regional jail officer[14] who is not part of a local police or sheriff's department, may meet the definition of a "qualified law enforcement officer" for purposes of the federal Law Enforcement Officers Safety Act of 2004. Further, it is my opinion that pursuant to state law a regional jail authority may prohibit its officers in general, or an officer in particular, from carrying a concealed weapon absent a valid concealed handgun permit.

[1]For purposes of this opinion, local or regional jail officers are those officers appointed pursuant to § 53.1-95.7(3) or § 53.1-106(B)(4).

[2]*See* Pub. L. No. 108-277, 118 Stat. 865 (codified at 18 U.S.C.A. §§ 926(B)-926(C) (West Supp. 2005)).

[3]The power to arrest without a warrant is limited to the instances set out in §§ 19.2-19 and 19.2-81. *See* VA. CODE ANN. § 19.2-18 (LexisNexis Repl. Vol. 2004).

[4]*See* 18 U.S.C.A. § 926B(c)(1) (West Supp. 2005).

[5]*See* 18 U.S.C.A. § 926B(c)(2).

[6]6 VA. ADMIN. CODE 20-30-20(B) (West 2003).

[7]*See* 6 VA. ADMIN. CODE 20-30-80 (West 2003).

[8]*See* 18 U.S.C.A. § 926B(c)(4).

[9]*See* 18 U.S.C.A. § 926B(c)(3) (providing that officer may not be subject of disciplinary action by agency).

[10]*See* 18 U.S.C.A. § 926B(c)(5) (providing that officer may not be under influence of alcohol or narcotics).

[11]*See* 18 U.S.C.A. § 926B(c)(6) (providing that officer may not be prohibited by Federal law from receiving firearm).

[12]For many years, Attorneys General have concluded that § 2.2-505, the authorizing statute for official opinions of the Attorney General, does not contemplate that such opinions be rendered on matters requiring factual determinations, rather than matters interpreting questions of law. *See* Op. Va. Att'y Gen.: 2003 at 21, 24; 2001 at 73, 74; *see also* Op. Va. Att'y Gen.: 1999 at 132, 132; 1986-1987 at 1, 6 (citing predecessor § 2.1-118); *accord* 1991 Op. Va. Att'y Gen. 122, 124.

[13]The Law Enforcement Officers Safety Act of 2004 addresses the carry of a "concealed firearm that has been shipped or transported … in interstate commerce of foreign commerce." 18 U.S.C.A. § 926(B).

[14]*See supra* note 1.

OP. NO. 05-025

MENTAL HEALTH GENERALLY: ADMISSIONS AND DISPOSITIONS IN GENERAL – ADMISSIONS.

Community services board petitioner in civil involuntary commitment proceeding may also prepare board's prescreening report for commitment hearing; independent examination is required in addition to prescreening report.

MR. GREGORY S. HANCOCK
SPECIAL JUSTICE, 29TH JUDICIAL CIRCUIT
JUNE 9, 2005

ISSUE PRESENTED

You ask whether a civil commitment petitioner may also conduct the prescreening evaluation required under § 37.1-67.3(H), which relates to the involuntary commitment of persons with mental illness.

RESPONSE

It is my opinion that a community services board petitioner in a civil involuntary commitment proceeding may also prepare the prescreening report required of the board by § 37.1-67.3(H) for the civil commitment hearing. An independent examination is also required in addition to the prescreening report.

APPLICABLE LAW AND DISCUSSION

Section 37.1-67.1(B) permits a magistrate to issue a temporary detention order for a person who is mentally ill upon the "sworn petition of any responsible person." Once a temporary detention order is executed, a civil commitment hearing before a judge or special justice must be held within a 48-hour period.[1] Prior to the commitment hearing, § 37.1-67.3(G) requires an examination of the subject of the detention order by a psychiatrist or licensed psychologist, or if neither is available, a qualified, licensed mental health professional. Section 37.1-67.3(G) restricts the person performing the examination by specifying that:

> The examiner shall not be related by blood or marriage to the person, shall not be responsible for treating the person, shall have no financial interest in the admission or treatment of the person, shall have no investment interest[2] in the hospital detaining or admitting the person under [Article 1], and, except for employees of state hospitals and of the U.S. Department of Veterans Affairs, shall not be employed by such hospital.

The examiner must state whether the subject person meets the commitment criteria and requires involuntary hospitalization or treatment.[3]

In addition to the examination required by § 37.1-67.3(G), before adjudicating a person mentally ill and ordering his commitment, § 37.1-67.3(H) directs the judge, or special justice, to require a prescreening report from the community services board that serves the political subdivision where the subject person resides.[4] Section 37.1-67.3(H) requires that the prescreening report state whether the person meets the commitment criteria[5] and whether there are less restrictive alternatives to institutional confinement. The report must also provide recommendations regarding the person's care and treatment.[6]

Although the General Assembly has qualified who may serve as the examiner under § 37.1-67.3(G), similar qualifications were not placed upon the community services board representative preparing the prescreening report. In fact, § 37.1-67.3 contains no restrictions regarding who may fulfill the role of prescreener.[7] Thus, I must presume that the General Assembly did not intend to exclude a petitioner from the community services board from conducting the prescreening evaluation required by § 37.1-67.3(H).[8] The independent examiner provides the necessary objectivity.

Finally, it should be noted that prior to any commitment pursuant to § 37.1-67.3(G) as discussed above, a person must be examined by a psychiatrist or psychologist, or if neither is available, by a qualified, licensed health care professional.[9] Such examiner may not have an interest in the commitment or treatment of the person being evaluated.[10] Absent this examination, the person cannot be committed.[11]

CONCLUSION

Accordingly, it is my opinion that a community services board petitioner in a civil involuntary commitment proceeding may also prepare the prescreening report required of the board by § 37.1-67.3(H) for the civil commitment hearing. An independent examination is also required in addition to the prescreening report.

[1] VA. CODE ANN. § 37.1-67.3(A) (LexisNexis Supp. 2004).

[2] "For purposes of [§ 37.1-67.3], investment interest means the ownership or holding of an equity or debt security, including, but not limited to, shares of stock in a corporation, interests or units of a partnership, bonds, debentures, notes, or other equity or debt instruments." Section 37.1-67.3(G).

[3] *Id.*

[4] Where the subject person has been sentenced and committed to the Department of Corrections and has been examined by a psychiatrist or clinical psychologist, a judge, or special justice, may adjudicate the case without a prescreening report. *See* § 37.1-67.3(H).

[5] The person must be "so seriously mentally ill that he is substantially unable to care for himself, an imminent danger to himself or others as a result of mental illness and in need of involuntary hospitalization or treatment." Section 37.1-67.3(H).

[6] *Id.*

[7] Prior to the issuance of a temporary detention order pursuant to § 37.1-67.1, the magistrate must first obtain an "evaluation by an employee of the local community services board or its designee who is skilled

in the assessment and treatment of mental illness and who has completed a certification program approved by the Department [of Mental Health, Mental Retardation and Substance Abuse Services]." Section 37.1-67.1(B) (LexisNexis Supp. 2004). Section 37.1-67.1(A) defines a designee of a community services board "as an examiner able to provide an independent examination of the person who is not related by blood or marriage to the person, who has no financial interest in the admission or treatment of the person, who has no investment interest in the hospital detaining or admitting the person under [Article 1] and …, who is not employed by such hospital." These restrictions are similar to those placed on an examiner under § 37.1-67.3(G), however, no such restrictions are placed upon a community services board employee performing an evaluation pursuant to § 37.1-67.1(B).

[8]When the General Assembly intends to enact a mandatory requirement, it, of course, knows how to express its intention. *See, e.g.*, Op. Va. Att'y Gen.: 2003 at 147, 149; *id.* at 60, 61; 1998 at 87, 88.

[9]*See* § 37.1-67.3(G).

[10]*Id.*

[11]*Id.*

OP. NO. 04-083

MILITARY AND EMERGENCY LAWS: EMERGENCY SERVICES AND DISASTER LAW.

CIVIL REMEDIES AND PROCEDURES: ACTIONS – MISCELLANEOUS PROVISIONS.

Formal declaration of emergency under Virginia Emergency Services Disaster Law of 2000 affords Medical Reserve Corps volunteers immunity for acts of negligence; no immunity for acts of willful misconduct. Common law Good Samaritan doctrine may provide limited immunity to Corps volunteers acting within confines of law. Federal Volunteer Protection Act of 1997 provides broad immunity, both before and during declared emergency, for volunteers' negligent acts provided they act within scope of their responsibilities; no immunity for claims of noneconomic damages, acts involving gross negligence or reckless misconduct, or awards of punitive damage. Whether Corps volunteers are agents of Commonwealth for purposes of sovereign immunity and workers' compensation protection is factual determination.

THE HONORABLE MITCHELL VAN YAHRES
MEMBER, HOUSE OF DELEGATES
JANUARY 13, 2005

ISSUES PRESENTED

You inquire concerning liability issues related to the activities of volunteers responding to emergency or disaster situations. Specifically, you inquire about the Medical Reserve Corps, which is a community-based organization with volunteers trained to respond to such situations. You ask whether state law protects volunteers from liability in the performance of their duties as part of an organized response to disaster situations. Additionally, you ask under what circumstances state law would protect such volunteers. Next, you ask whether volunteers working with state agencies in an exercise or response scenario are considered agents of the Commonwealth, and whether that designation would entitle the volunteers to sovereign immunity protection and worker's compensation benefits. Finally, you ask whether the volunteer members of the Medical Reserve Corps are protected when they respond pursuant to a local Incident Command System[1] prior to a gubernatorial declaration of emergency.

RESPONSE

It is my opinion that volunteer members of the Medical Reserve Corps are afforded immunity for their services upon a formal declaration[2] of emergency pursuant to the Commonwealth of Virginia Emergency Services and Disaster Law of 2000. The liability protections afforded by this act protect volunteers from liability for acts of negligence, but not for acts of willful misconduct. In the absence of a formal declaration, this broad immunity does not apply. The volunteer members of the Medical Reserve Corps may have limited immunity prior to the declaration of an emergency or disaster if they are acting within the narrow circumstances of the Good Samaritan law. The federal Volunteer Protection Act of 1997, however, provides broad immunity to volunteer members of the Medical Reserve Corps for their negligent acts when acting within the scope of their responsibilities both before and during a formal declaration of emergency. Such immunity does not extend to claims for noneconomic damages or for acts involving gross negligence or reckless misconduct, nor for awards of punitive damages.

I am unable to offer an opinion whether the members of the volunteer Medical Reserve Corps would be agents of the Commonwealth for purposes of sovereign immunity and worker's compensation protection. Ultimately, such a determination is fact dependant and must be made on a case-by-case basis. Finally, it is my opinion that the protection from the Virginia Emergency Services and Disaster Law of 2000 is applicable only upon a formal declaration of emergency.

BACKGROUND

You relate that the volunteer Medical Reserve Corps for the Commonwealth has been created to provide local assistance in emergency situations. The national Medical Reserve Corps is community-based and functions as a component of the Citizen Corps and the USA Freedom Corps, a national network of volunteers.[3] The Citizen Corps is organized under the direction of the federal Department of Homeland Security and is designed to provide assistance to their communities during emergencies.[4] The USA Freedom Corps is a "Coordinating Council housed at the White House and chaired by President George W. Bush … working to strengthen … service and help find opportunities for every American to [volunteer]."[5] The Governor has established the Virginia Corps as a "clearinghouse" to coordinate volunteer organizations.[6] The Virginia Citizen Corps, which is linked to the Virginia Corps, manages the Medical Reserve Corps at the local level.[7]

> Virginia's Medical Reserve Corps provides communities with medical volunteers who can assist local health professionals during a large-scale local emergency. This corps consists of practicing and retired health care professionals who volunteer to be on a medical reserve list. Volunteers assist medical response professionals during emergencies such as influenza epidemics, hazardous materials spills or acts of terrorism.[8]

Both the Virginia Corps and Virginia Citizens Corps are linked to the national Citizen Corps.[9]

APPLICABLE LAW AND DISCUSSION

There are currently several provisions of state and federal law designed to provide immunity to volunteers from liability arising out of their service. The Commonwealth of Virginia Emergency Services and Disaster Law of 2000[10] ("2000 Act"), § 8.01-225[11] ("Good Samaritan law"), and the federal Volunteer Protection Act of 1997[12] ("Volunteer Protection Act") provide varying levels of protection to volunteers. Sovereign immunity may provide additional protection, but may only be determined on a case-by-case basis.

The 2000 Act confers several forms of immunity upon volunteers during a disaster. The liability protection afforded thereunder goes into effect upon a formal declaration of emergency. Such protection would not apply to services performed by volunteers prior to the declaration. Section 44-146.23(a) of the 2000 Act provides:

> Neither the Commonwealth, nor any political subdivision thereof, nor federal agencies, nor other public or private agencies, nor, except in the cases of willful misconduct, public or private employees, nor representatives of any of them, engaged in any emergency services activities, while complying with or attempting to comply with [Chapter 3.2] or any rule, regulation, or executive order promulgated pursuant to the provisions of [Chapter 3.2], shall be liable for the death of, or any injury to, persons or damage to property as a result of such activities. The provisions of this section shall not affect the right of any person to receive benefits to which he would otherwise be entitled under [Chapter 3.2], or under the Workers' Compensation Act (§ 65.2-100 et seq.), or under any pension law, nor the right of any such person to receive any benefits or compensation under any act of Congress.

This provision grants immunity to public or private agencies and their employees when engaged in emergency services and complying with the 2000 Act. The 2000 Act does not define "public or private agencies," but the volunteer Medical Reserve Corps should be considered a "public or private agency" if it has been organized as a component of Citizen Corps, a federally created national volunteer program. "Emergency services" include "medical and health services" and "rescue" services.[13] Therefore, the volunteer Medical Reserve Corps must perform "medical and health services" or "rescue" services for the immunity provided by § 44-146.23(a) to apply. While § 44-146.23(a) provides immunity from liability "for the death of, or any injury to, persons or damage to property," the immunity will not apply in cases of "willful misconduct."

The 2000 Act also provides immunity to licensed or certified individuals responding to disasters. Specifically, § 44-146.23(c) provides:

> If any person holds a license, certificate, or other permit issued by any state, or political subdivision thereof, evidencing the meeting of qualifications for professional, mechanical, or other skills, the person may gratuitously render aid involving that skill in this Commonwealth during a disaster, and such person shall not be liable for negligently causing the death of, or injury to, any person or for the loss of, or damage to, the property of any person resulting from such gratuitous service.

The General Assembly has defined four types of disasters for which the immunity in § 44-146.23(c) would apply. First, § 44-146.16 provides that a "major disaster" is

> any natural catastrophe, including any: hurricane, tornado, storm, high water, wind-driven water, tidal wave, tsunami, earthquake, volcanic eruption, landslide, mudslide, snowstorm or drought, or regardless of cause, any fire, flood, or explosion, in any part of the United States, which, in the determination of the President of the United States is, or thereafter determined to be, of sufficient severity and magnitude to warrant major disaster assistance under the Strafford Act (P.L. 43-288 as amended) to supplement the efforts and available resources of states, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby and is so declared by him[.]

Second, § 44-146.16 defines a "man-made disaster" as

> any condition following an attack by any enemy or foreign nation upon the United States resulting in substantial damage of property or injury to persons in the United States and may be by use of bombs, missiles, shell fire, nuclear, radiological, chemical or biological means or other weapons or by overt paramilitary actions; terrorism, foreign and domestic; also any industrial, nuclear or transportation accident, explosion, conflagration, power failure, resources shortage or other condition such as sabotage, oil spills and other injurious environmental contaminations that threaten or cause damage to property, human suffering, hardship or loss of life[.]

Next, § 44-146.16 provides that a "natural disaster" "means any hurricane, tornado, storm, flood, high water, wind-driven water, tidal wave, earthquake, drought, fire or other natural catastrophe resulting in damage, hardship, suffering or possible loss of life." Finally, § 44-146.16 defines a "local emergency," in part, as

> the condition declared by the local governing body when in its judgment the threat or actual occurrence of an emergency or disaster is or threatens to be of sufficient severity and magnitude to

> warrant local government action to prevent or alleviate the damage, loss, hardship or suffering threatened or caused thereby; provided, however, that a local emergency arising wholly or substantially out of a resource shortage may be declared only by the Governor[.]

A "natural disaster" differs from a "major disaster" in that it does not require a Presidential declaration; rather, it requires a gubernatorial determination that a natural catastrophe resulted "in damage, hardship, suffering or possible loss of life."[14] The immunity provided in § 44-146.23(c) also only applies to negligent action by the volunteer.

The Good Samaritan law confers immunity upon volunteers in certain narrow situations. Unlike the 2000 Act, the Good Samaritan law applies regardless of whether the emergency is declared. Section 8.01-225(A)(1) provides that any person who:

> In good faith, renders emergency care or assistance, without compensation, to any ill or injured person at the scene of an accident, fire, or any life-threatening emergency, or en route therefrom to any hospital, medical clinic or doctor's office, shall not be liable for any civil damages for acts or omissions resulting from the rendering of such care or assistance.

The immunity provided by the Good Samaritan law only applies to the specific assistance listed therein. The Good Samaritan law also imparts immunity to individuals, who provide emergency obstetrical services in the absence of gross negligence,[15] emergency cardiopulmonary resuscitation or cardiac defibrillation at the scene or en route to a hospital, medical clinic, doctor's hospital, or other medical facility,[16] or operate an automated external defibrillator.[17] Further, the Good Samaritan law confers immunity in the "absence of gross negligence or willful misconduct" for the administration of smallpox vaccines by a health care provider to health care workers, or for injuries suffered by anyone who comes into contact with a vaccinated health care worker.[18] Finally, § 8.01-225.01 provides immunity in the "absence of gross negligence or willful misconduct" to any health care provider responding to a "man-made disaster" as defined in § 44-146.16 of the 2000 Act, who abandons a patient to respond to the disaster.[19] The immunity provided by § 8.01-225.01 is effective when "a state or local emergency has been or is subsequently declared."[20]

The Volunteer Protection Act was passed by Congress in 1997[21] and provides liability protection for volunteers regardless of whether an emergency exists.[22] The Volunteer Protection Act contains a preemptive clause applying the federal provisions over less protective state laws.[23] This liability protection only applies to volunteers who work without compensation for government or nonprofit organizations.[24] The protection afforded by the Volunteer Protection Act applies as long as the volunteer is acting within the scope of his responsibilities.[25] The protection provided by the Act is limited to economic damages; the volunteer is still potentially liable for noneconomic losses.[26] The Act's liability protection is further limited as injured individuals may

seek punitive damages against volunteers who act with "gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer."[27]

If the volunteer Medical Reserve Corps in question is a nonprofit organization organized and conducted for public benefit and primarily operated for health purposes, it will fall under the Volunteer Protection Act. 42 U.S.C.S. § 14505(4) defines a "nonprofit organization" as

> (A) any organization which is described in section 501(c)(3) of the Internal Revenue Code of 1986 [26 USCS § 501(c)(3)] and exempt from tax under section 501(a) of such Code [26 USCS § 501(a)] and which does not practice any action which constitutes a hate crime referred to in subsection (b)(1) of the first section of the Hate Crime Statistics Act (28 U.S.C.S. 534 note); or
>
> (B) any not-for-profit organization which is organized and conducted for public benefit and operated primarily for charitable, civic, educational, religious, welfare, or health purposes and which does not practice any action which constitutes a hate crime referred to in subsection (b)(1) of the first section of the Hate Crime Statistics Act (28 U.S.C.S. 534 note).

If training exercises, mock disasters, transportation to and from exercises and actual disaster situations are within the scope of the volunteer's duties, then the liability protection afforded by this section would apply.

You also inquire whether volunteers working with state agencies in an emergency are considered agents of the Commonwealth and, therefore, entitled to the benefits of sovereign immunity protection and worker's compensation. A 2003 opinion of the Attorney General concludes that whether nongovernmental personnel are entitled to sovereign immunity for acts or omissions is impacted by whether there has been a formal declaration of an emergency.[28] The 2003 opinion concluded that in the absence of a formally declared emergency and without specific legislation, the general test of whether sovereign immunity applies depends upon the capacity in which the private entity was acting and whether such acts are under the direction and control of the Commonwealth, based on the nature of and the state's interest in the function to be performed.[29] A determination of sovereign immunity depends upon the facts and circumstances of each case. You provide no facts upon which to make such a determination.

Regarding worker's compensation, volunteers generally are not entitled to such coverage because they are not employees of the Commonwealth.[30] Should the Department of Emergency Management, however, request that members of the volunteer Medical Reserve Corps respond to an incident, then, in that situation, the volunteers would be considered employees of the Department for purposes of worker's compensation.[31]

Finally, you inquire whether volunteers would be protected from liability when they respond prior to a gubernatorial declaration of emergency under a local incident command system. As previously noted, when a volunteer complies with the requirements of the Good Samaritan law and the Volunteer Protection Act, the liability protection associated with those laws would apply prior to a gubernatorial declaration. The liability protection associated with the 2000 Act is effective only upon a formal declaration[32] of emergency.

CONCLUSION

Accordingly, it is my opinion that volunteer members of the Medical Reserve Corps are afforded immunity for their services upon a formal declaration[33] of emergency pursuant to the Commonwealth of Virginia Emergency Services and Disaster Law of 2000. The liability protections afforded by this act protect volunteers from liability for acts of negligence, but not for acts of willful misconduct. In the absence of a formal declaration, this broad immunity does not apply. The volunteer members of the Medical Reserve Corps may have limited immunity prior to the declaration of an emergency or disaster if they are acting within the narrow circumstances of the Good Samaritan law. The federal Volunteer Protection Act of 1997, however, provides broad immunity to volunteer members of the Medical Reserve Corps for their negligent acts when acting within the scope of their responsibilities both before and during a formal declaration of emergency. Such immunity does not extend to claims for noneconomic damages or for acts involving gross negligence or reckless misconduct, nor for awards of punitive damages.

I am unable to offer an opinion whether the members of the volunteer Medical Reserve Corps would be agents of the Commonwealth for purposes of sovereign immunity and worker's compensation protection. Ultimately, such a determination is fact dependant and must be made on a case-by-case basis. Finally, it is my opinion that the protection from the Virginia Emergency Services and Disaster Law of 2000 is applicable only upon a formal declaration of emergency.

[1]For purposes of this opinion, I assume that the term "local Incident Command System" means "Incident Command System" as that term is used in the Commonwealth of Virginia Emergency Operations Plan. *See* Virginia Department of Emergency Management website, "Commonwealth of Virginia Emergency Operations Plan," Basic Plan, Volume 1, p.12, *at* http://www.vdem.state.va.us/library/eopvol1/eopvol1_a.pdf (defining "Incident Command System" as "[a]n open-ended organizational structure designed to effectively direct and control an in-the-field emergency response").

[2]For purposes of this opinion, a "formal declaration" means a Presidential, gubernatorial, or local governing body's declaration of emergency as described in §§ 44-146.16, 44-146.17, 44-146.21.

[3]*See* national Medical Reserve Corps website, "Supporting and Guiding Our Nation's Medical and Public Health Volunteers," *at* http://www.medicalreservecorps.gov/index.cfm (last visited Dec. 15, 2004).

[4]*See* Citizen Corps website "Programs & Partners," *at* http://www.citizencorps.gov/programs/ (last visited Dec. 15, 2004).

[5]*See* USA Freedom Corps website, "Overview," *at* http://www.usafreedomcorps.gov/content/about_usafc/overview/index.asp (last visited Dec. 15, 2004).

[6]*See* Virginia Corps website, "About VirginiaCORPS," *at* http://www.virginiacorps.org/About/index.htm (noting that Virginia Corps "serves as a central clearinghouse for volunteer opportunities across Virginia") (last visited Dec. 15, 2004).

[7]*See* Virginia Corps website, "Homeland Security," *at* http://www.virginiacorps.org/CitizenCorps/index.htm.

[8]*See* Virginia Corps website, "Medical Reserve Corps in Virginia," *at* http://www.virginiacorps.org/CitizenCorps/ MedCorps/MedReserveCorps.htm (last visited Dec. 15, 2004).

[9]*See supra* notes 6, 7.

[10]VA. CODE ANN. §§ 44-146.13 to 44-146.28:1 (LexisNexis Repl. Vol. 2002 & Supp. 2004).

[11]Section 8.01-225 provides immunity for persons offering good faith emergency care or assistance in certain situations. *See* Creasy v. United States, 345 F. Supp. 853, 855-56 (W.D. Va. 1986) (noting that enactment of § 8.01-225 supports conclusion that Virginia has accepted common law Good Samaritan doctrine).

[12]42 U.S.C.S. §§ 14501 to 14505 (Law Co-op. 2004).

[13]"*'Emergency services'* means the preparation for and the carrying out of functions, other than functions for which military forces are primarily responsible, to prevent, minimize and repair injury and damage resulting from natural or man-made disasters, together with all other activities necessary or incidental to the preparation for and carrying out of the foregoing functions. These functions include, without limitation, fire-fighting services, police services, medical and health services, rescue, engineering, warning services, communications, radiological, chemical and other special weapons defense, evacuation of persons from stricken areas, emergency welfare services, emergency transportation, emergency resource management, existing or properly assigned functions of plant protection, temporary restoration of public utility services, and other functions related to civilian protection. These functions also include the administration of approved state and federal disaster recovery and assistance programs[.]" Section 44-146.16 (LexisNexis Supp. 2004).

[14]Section 44-146.16.

[15]VA. CODE ANN. § 8.01-225(A)(2) (LexisNexis Supp. 2004).

[16]Section 8.01-225(A)(6).

[17]Section 8.01-225(A)(7).

[18]Section 8.01-225(E)(1)-(2) (expiring on July 1, 2005).

[19]Section 8.01-225.01 provides that:

"A. In the absence of gross negligence or willful misconduct, any health care provider who responds to a man-made disaster by delivering health care to persons injured in such man-made disaster shall be immune from civil liability for any injury or wrongful death arising from abandonment by such health care provider of any person to whom such health care provider owes a duty to provide health care when (i) a state or local emergency has been or is subsequently declared; and (ii) the provider was unable to provide the requisite health care to the person to whom he owed such duty of care as a result of the provider's voluntary or mandatory response to the relevant man-made disaster.

"B. In the absence of gross negligence or willful misconduct, any hospital or other entity credentialing health care providers to deliver health care in response to a man-made disaster shall be immune from civil liability for any cause of action arising out of such credentialing or granting of practice privileges if (i) a state or local emergency has been or is subsequently declared; and (ii) the hospital has followed procedures for such credentialing and granting of practice privileges that are consistent with the Joint Commission on Accreditation of Healthcare Organizations' standards for granting emergency practice privileges.

"C. For the purposes of this section:

"*'Health care provider'* means those professions defined as such in § 8.01-581.1; and

"*'Man-made disaster'* means the circumstances described in § 44-146.16.

"D. The immunity provided by this section shall be in addition to, and shall not be in lieu of, any immunities provided in other state or federal law, including, but not limited to, §§ 8.01-225 and 44-146.23."

[20]Section 8.01-225.01 (LexisNexis Supp. 2004).

[21]*See* Volunteer Protection Act of 1997, Pub. L. No. 105-19, 111 Stat. 218 (1997).

[22]42 U.S.C.S. § 14501(a), (b).

[23]42 U.S.C.S. § 14502(a).

[24]*See* 42 U.S.C.S. §§ 14503 (providing liability protection for volunteers of nonprofit organizations or governmental entities who meet certain criteria); 14505(6) (defining "volunteer").

[25]*See* 42 U.S.C.S. § 14503(a)(1), (e).

[26]42 U.S.C.S. § 14504(b) provides that:
"(1) In general. Each defendant who is a volunteer, shall be liable only for the amount of noneconomic loss allocated to that defendant in direct proportion to the percentage of responsibility of that defendant (determined in accordance with paragraph (2)) for the harm to the claimant with respect to which that defendant is liable. The court shall render a separate judgment against each defendant in an amount determined pursuant to the preceding sentence.
"(2) Percentage of responsibility. For purposes of determining the amount of noneconomic loss allocated to a defendant who is a volunteer under this section, the trier of fact shall determine the percentage of responsibility of that defendant for the claimant's harm."
42 U.S.C.S. § 14505(3) defines "noneconomic losses" as "losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium (other than loss of domestic service), hedonic damages, injury to reputation and all other nonpecuniary losses of any kind or nature."

[27]42 U.S.C.S. § 14503(a)(3). In addition, 42 U.S.C.S. § 14503(e)(1) provides the general rule that "[p]unitive damages may not be awarded against a volunteer in an action brought for harm based on the action of a volunteer acting within the scope of the volunteer's responsibilities to a nonprofit organization or governmental entity unless the claimant establishes by clear and convincing evidence that the harm was proximately caused by an action of such volunteer which constitutes willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed."

[28]*See* 2003 Op. Va. Att'y Gen. 133, 135.

[29]*Id.* at 135; *see also* Atkinson v. Sachno, 261 Va. 278, 541 S.E.2d 902 (2001) (holding that licensed physician providing consultant services for state agency was independent contractor excluded from sovereign immunity with regard to medical malpractice claim); *but see* Wesley v. Mercy Ambulance Corp., 37 Va. Cir. 354, 1995 Va. Cir. LEXIS 1112 (1995) (holding that ambulance service "employed" by city of Richmond was sufficiently under control of city to be covered by sovereign immunity).

[30]*See, e.g.*, VA. CODE ANN. § 65.2-101 (LexisNexis Supp. 2004) (providing that employee does not include "a member of a volunteer fire-fighting, lifesaving or rescue squad when engaged in activities related principally to participation as a member of such squad whether or not the volunteer continues to receive compensation from his employer for time away from the job").

[31]Section 65.2-101 provides that the term "employee" includes "[v]olunteer firefighters, volunteer lifesaving or rescue squad members, volunteer law-enforcement chaplains, auxiliary or reserve police, auxiliary or reserve deputy sheriffs, volunteer emergency medical technicians, members of volunteer search and rescue organizations and any other persons who respond to an incident upon request of the Department of Emergency Management, who shall be deemed employees of the Department of Emergency Management for the purposes of this title."

[32]*See supra* note 2.

[33]*Id.*

OP. NO. 05-003

MOTOR VEHICLES: TITLING, REGISTRATION OF MOTOR VEHICLES – STATE AND LOCAL MOTOR VEHICLE REGISTRATION.

Locality eliminating physical decal by entering into agreement with Commissioner of Department of Motor Vehicles where Commissioner refuses to issue or renew vehicle registration of any applicant owing local license fees may carry forward unpaid decal fee and collect it in subsequent years; such collection is subject to limitation of five years from December 31st of tax year for which assessment is made.

THE HONORABLE BARBARA O. CARRAWAY C.P.A.
TREASURER FOR CITY OF CHESAPEAKE
APRIL 26, 2005

ISSUES PRESENTED

You inquire concerning the effects of the city of Chesapeake eliminating the requirement of a physical decal to be placed on residents' motor vehicles while continuing to assess the "decal/license fee." First, you ask whether the unpaid decal fee may be carried forward to be collected in a future year. You also inquire concerning the statute of limitations for the collection of such a fee.

RESPONSE

It is my opinion that a locality eliminating the physical decal by entering into an agreement with the Commissioner of the Department of Motor Vehicles for collection of the decal fee may carry forward the unpaid decal fee and collect it from the locality's residents in subsequent years. It is further my opinion that such collection is subject to a limitation of five years from December 31st of the tax year for which the assessment is made.

BACKGROUND

You relate that the city of Chesapeake ("Chesapeake") currently imposes a requirement that residents obtain and display a local decal on the windshields of their motor vehicles, which evidences their payment of the local motor vehicle license tax or fee.[1] You also relate that under the current arrangement, a resident, who did not purchase a decal in 2004, but does purchase one in 2005 for the same vehicle is charged only the fee for the 2005 tax year.[2]

Additionally, you relate that some Virginia localities have eliminated the physical decal and carry forward unpaid balances for collection in subsequent years. You note that Chesapeake is considering the elimination of the physical decal for motor vehicles and your questions relate to that situation.

APPLICABLE LAW AND DISCUSSION

Virginia localities are authorized to impose "license fees or taxes"[3] on certain motor vehicles owned by their residents pursuant to § 46.2-752(A), which provides that:

> Except as provided in § 46.2-755, counties, cities, and towns *may levy and assess taxes and charge license fees on motor vehicles*, trailers, and semitrailers…. The amount of the license fee or tax imposed by any county, city, or town on any motor vehicle, trailer, or semitrailer shall not be greater than the amount of the license tax imposed by the Commonwealth on the motor vehicle, trailer,

> or semitrailer. *The license fees and taxes shall be imposed in such manner, on such basis, for such periods, and subject to proration for fractional periods of years, as the proper local authorities may determine*. [Emphases added.]

Typically, payment of the decal fee is evidenced by the locality's issuance of a physical decal, which is to be affixed to the windshield of the subject motor vehicle.[4] Subsection G of § 46.2-752 authorizes the locality to prescribe penalties for violations for failure to obtain *and display* the required decal. Section 46.2-752(J) authorizes the treasurer of any locality to "enter into an agreement with the Commissioner [of the Department of Motor Vehicles] whereby the Commissioner will refuse to issue or renew any vehicle registration of any applicant therefor who owes [the locality] any local vehicle license fees [decal fee] or delinquent tangible personal property tax."

This Office previously has concluded that any locality that by ordinance enforces payment of local motor vehicle license fees and taxes pursuant to § 46.2-752(G) must issue some form of license upon payment of the fee.[5] Further, the locality may prescribe the form of license or decal, which must be displayed on the subject vehicle.[6] As an alternative to § 46.2-752(G), a locality may enforce payment of vehicle license fees without requiring a decal provided that the locality enters into an agreement with the Commissioner of the Department of Motor Vehicles pursuant to § 46.2-752(J).[7] Therefore, a locality may in place of an ordinance pursuant to § 46.2-752(G) choose to compel payment of its motor vehicle license fee by agreement with the Commissioner.[8]

Assuming that Chesapeake eliminates the physical license decal, an agreement with the Commissioner of the Department of Motor Vehicles is required to collect the decal fee.[9] Should Chesapeake elect to eliminate its decal and enter into an agreement with the Commissioner, you ask whether Chesapeake may carry forward unpaid decal fees from previous years.

Section 46.2-752(A) clearly authorizes a locality to impose decal fees "in such manner, on such basis, *for such periods* … as the proper local authorities may determine."[10] (Emphasis added.) Moreover, in the event that Chesapeake has a collection agreement with the Department of Motor Vehicles pursuant to § 46.2-752(J), it is clear that the Department will refuse to issue a state registration until the single "applicant" "shall first satisfy … and present[s] evidence … that all such local vehicle license *fees* [including decal fees] and delinquent taxes or parking citations have been paid in full." (Emphasis added.) The use of the plural term "fees" in relation to the registration of a vehicle by a singular "applicant," § 46.2-752(J) clearly contemplates more than one vehicle license fee or tax.

Although § 46.2-752 does not specifically address your question, the authority of localities to carry forward or cumulate these taxes is found in the laws applicable to the imposition of local taxes, including a privilege or license tax as found in Title 58.1.[11] Specifically, § 58.1-3921 provides that "[t]he treasurer, after ascertaining

which of *the taxes and levies assessed at any time* in his county or city have not been collected, shall, within 60 days of the end of the fiscal year make out lists [of uncollectible taxes and delinquents]." (Emphasis added.)

The use of the phrase "any time" clearly indicates that the lists to be prepared by the local taxing officials are to include uncollectible taxes previously assessed and still outstanding. In the case of delinquent real estate taxes, this period can be twenty years.[12] Among the itemized lists which the treasurer is to prepare, is a "list of such of the taxes assessed on tangible personal property, machinery and tools and merchants' capital, *and other subjects of local taxation, other than real estate*, as he was unable to collect which are delinquent."[13] This is language of broad inclusion and appears to include the decal fee.[14] In addition, the statute provides for separate lists of "uncollected taxes" amounting to less than $20 each.[15] Thus, the statute contemplates uncollected delinquent taxes in relatively small amounts, such as those typically charged for a local vehicle license. Moreover, § 58.1-3933 provides that the local "governing body may require the treasurer to continue to collect [these] delinquent taxes on subjects other than real estate until the expiration of the applicable statute of limitations."

Assuming that the decal fee may be cumulated, you ask what statute of limitations would be applicable to the collection of such fee.[16] The limitation is found in § 58.1-3940(A), which provides that "[e]xcept as otherwise specifically provided, collection of local taxes shall only be enforceable for five years following December 31 of the year for which such taxes were assessed."

There are separate limitations periods that apply to real estate taxes[17] and "taxes or other charges that have been reduced to judgment or a judgment lien."[18] Additionally, § 58.1-3840(d) provides for "tolling" or stopping the running of the statute of limitations provided by § 58.1-3940 in certain situations involving bankruptcy. Thus, unless tolled or subject to the provisions affecting judgments and judgment liens, the general statute of limitations on collection of local taxes is applicable to vehicle license taxes or fees. Chesapeake would, therefore, be able to enforce collection of the local vehicle license taxes for "five years following December 31 of the year for which such taxes were assessed."[19]

CONCLUSION

Accordingly, it is my opinion that a locality eliminating the physical decal by entering into an agreement with the Commissioner of the Department of Motor Vehicles for collection of the decal fee may carry forward the unpaid decal fee and collect it from the locality's residents in subsequent years. It is further my opinion that such collection is subject to a limitation of five years from December 31st of the tax year for which the assessment is made.

[1]For purposes of this opinion, I will refer to the local motor vehicle license tax or fee as a "decal fee."

[2]For purposes of this opinion, I assume that Chesapeake's current ordinances governing the purchase and display of the decal do not carry forward any unpaid license taxes or fees. I do not express any view

regarding such an ordinance. This office historically has declined to render opinions interpreting local ordinances. *See, e.g.*, 1976-1977 Op. Va. Att'y Gen. 17, 17-18.

[3]*See* Town of Ashland v. Bd. of Supvrs., 202 Va. 409, 413, 117 S.E.2d 679, 682 (1961) (quoting Hunton v. Commonwealth, 166 Va. 229, 244, 183 S.E. 873, 879 (1936)) ("'The owner of an automobile in Virginia pays a tax for the privilege of operating his car. In a sense this tax affects the car, but it is universally conceded that this is a license or privilege tax and not a tax on the property concerned, to wit, the automobile.'"); Kilgour v. County Bd. of Supvrs., 195 Va. 562, 565, 79 S.E.2d 601, 603 (1954) (holding that county board of supervisors had authority to levy "license tax" on motor vehicles under former § 15-10); *see also* Op. Va. Att'y Gen.: 2002 at 227, 228; 1987-1988 at 431, 433; 1984-1985 at 216, 216. *Cf.* 1996 Op. Va. Att'y Gen. 186, 189 n.4 (concluding that term "fees," as used in § 16.1-69.48, would not include personal property taxes owed to locality on motor vehicles, because taxes are imposed and collected by locality and not by court).

[4]*See* 2002 Op. Va. Att'y Gen., *supra* note 3, at 229 (noting that locality has discretion to prescribe form of license, but form must be such that it may be displayed on vehicle).

[5]*Id.* at 227.

[6]*Id.*

[7]*Id.* at 229.

[8]*See* VA. CODE ANN. § 46.2-752(J) (LexisNexis Supp. 2004).

[9]*See* 2002 Op. Va. Att'y Gen., *supra* note 3, at 229.

[10]Section 46.2-752(A) also specifically mentions "proration for fractional *periods of years.*" (Emphasis added.) This denotes that localities are authorized to prescribe license fees or taxes for more than one year.

[11]*See* 1966-1967 Op. Va. Att'y Gen. 199, 203 (concluding that jurisdiction for any such action is not prescribed in Motor Vehicles Sales and Use Tax Act under consideration, and therefore, is controlled by laws generally applicable for collection of taxes by suit).

[12]*See* VA. CODE ANN. § 58.1-3940(B) (LexisNexis Repl. Vol. 2004).

[13]Section 58.1-3921(3) (LexisNexis Repl. Vol. 2004) (emphasis added).

[14]*See Town of Ashland*, 202 Va. at 413, 117 S.E.2d at 682 (noting motor vehicle license tax is "privilege tax" not tax on property).

[15]*See* § 58.1-3921(4)-(5) (LexisNexis Repl. Vol. 2004).

[16]This Office previously has concluded that the offense proscribed by an ordinance adopted pursuant to § 46.2-752(G) is not the failure to purchase a decal license, but is the operation of a vehicle without obtaining and displaying such decal on the motor vehicle. *See* 2002 Op. Va. Att'y Gen., *supra* note 3, at 228, and opinions cited therein. Any collection of taxes for prior years will require proof that a vehicle was operated upon the highway for the period any tax is to be collected.

[17]*See* § 58.1-3940(B) (imposing twenty-year limitation on collection of real estate taxes).

[18]Section 58.1-3940(C).

[19]Section 58.1-3940(A). A 2002 opinion of the Attorney General concluded that the five-year statute of limitations for collection of all local taxes under § 58.1-3940(A), including food and beverage taxes, begins to run on December 31 of year to which tax is attributable. *See* 2002 Op. Va. Att'y Gen. 320, 320.

OP. NO. 05-064

PUBLIC SERVICE COMPANIES: UTILITY FACILITIES ACT.

CONSTITUTION OF VIRGINIA: CORPORATIONS (POWERS AND DUTIES OF STATE CORPORATION COMMISSION).

Whether electric utility customer located in service territory of electric utility may obtain service from another electric utility through metering point in adjacent service territory is determination for State Corporation Commission.

THE HONORABLE TERRY G. KILGORE
MEMBER, HOUSE OF DELEGATES
DECEMBER 15, 2005

ISSUE PRESENTED

You ask whether the Pioneer Center for Business Opportunity ("Pioneer Center") located in Duffield, Virginia, which receives electric power service from the Powell Valley Electric Cooperative ("Powell Electric"), may construct a power line across the Clinch River to the service territory of American Electric Power ("American Power") and obtain electrical service from American Power instead of Powell Electric.

RESPONSE

It is my opinion that whether an electric utility customer located in the service territory of one electric utility may obtain service from another electric utility through a metering point in an adjacent service territory is a determination for the State Corporation Commission.

BACKGROUND

You relate that the Pioneer Center is a network of small business incubators in the LENOWISCO Planning District with a goal of starting and expanding small businesses. The Pioneer Center has concerns regarding Powell Electric's charges for electric service. Further, you note that the Pioneer Center believes it could obtain less expensive power from American Power, which has the service territory across the Clinch River from the Pioneer Center. You indicate that an electric meter would be installed in American Power's service territory. Additionally, a power line would be installed and run across the Clinch River from American Power's service territory to the Pioneer Center in Powell Electric's service territory. Finally, you note that American Power will not perform any part of this task, but will allow the Pioneer Center to locate the meter in, and purchase electricity from, its service territory.

APPLICABLE LAW AND DISCUSSION

The Utility Facilities Act[1] establishes the framework for the State Corporation Commission to grant certificates of public convenience and necessity that authorize utilities to provide exclusive service in designated territories. Section 56-265.3 of the Act prohibits a utility from providing service unless it obtains such a certificate. The Supreme Court of Virginia has interpreted § 56-265.4 to "prohibit[] a utility from providing service in another utility's certificated service territory unless the utility proves to the Commission's satisfaction that the other utility is incapable of providing adequate service, but only after the other utility is given a reasonable time and opportunity to remedy its inadequacy."[2]

Article IX, § 2 of the Constitution of Virginia provides that:

> Subject to such criteria and other requirements as may be prescribed by law, the [State Corporation] Commission shall have the power and be charged with the duty of regulating the rates, charges, and services and, except as may be otherwise authorized by this Constitution or by general law, the facilities of … electric companies.

The State Corporation Commission previously has adjudicated cases concerning which electric utility is entitled to serve a customer's load located on or near a service territory boundary. The Virginia Supreme Court, in affirming the Commission's most recent decision on this issue, summarized the Commission's precedent:

> In the *Prince George* Case, a new customer began construction of a mineral processing plant on a tract of land located wholly within the certificated service territory of Prince George Electric Cooperative (Prince George). The customer, however, desired electric power service from VEPCO, and it purchased a narrow strip of land, 4,380 feet long and 30 feet wide, that just extended into VEPCO's service territory. VEPCO delivered electric power service to the customer through the narrow corridor to a point of use located in Prince George's service territory.
>
> The Commission, after comparing the "point-of-use" and the "point-of-delivery" tests, concluded that the point-of-use test would best ensure the integrity of the certificated service territories. The Commission reasoned that the point-of-delivery test would destroy the essence of exclusive service territories by permitting customers, through manipulation of delivery points, to avoid receiving service from a utility that was allotted the territory in which the customer was located. In adopting the point-of-use test, however, the Commission made plain that the test is not absolute and stated the following:
>
>> While we do not here adopt any absolute test and will always consider the practical realities of each situation, we intend to ensure that our decisions enforce the Code's requirement of strong protection for the exclusive service territories of utilities in Virginia.
>
> In the *Kentucky Utilities* Case, Kentucky Utilities Company (Kentucky Utilities) served Sigmon Coal Company (Sigmon Coal) in Kentucky Utilities' exclusive service territory. Sigmon Coal installed facilities that allowed it to connect with Powell Valley Electric Cooperative (Powell Valley) at a single consolidated delivery point located in the adjacent service territory allotted to Powell Valley. Powell Valley and Sigmon Coal subsequently

> constructed additional facilities that enabled Sigmon Coal to discontinue all service from Kentucky Utilities.
>
> The Commission ruled that Kentucky Utilities should serve all of Sigmon Coal's facilities. The Commission concluded that, if Sigmon Coal had been "allowed to avoid its electric provider based on manipulation of its delivery point, the protection and certainty that the Utility Facilities Act was designed to provide to territorial grants would be diminished, if not significantly eroded."[3]

The Virginia Supreme Court also considered the State Corporation Commission's decision concerning which utility was entitled to provide service to a new, large museum facility.[4] Approximately two-thirds of the entire site on which the museum complex was located within Dominion Virginia Power's certificated service territory.[5] Additionally, however, approximately 95% of the main building was in Northern Virginia Electric Cooperative's (NOVEC) certificated service territory, and it was projected that over 95% of the electric service load would be located in NOVEC's certificated service territory.[6] The Supreme Court has affirmed the Commission's determination that Dominion was entitled to provide electric service to the museum complex.[7] The Court noted the Commission's observation that "[u]nlike the customer in *Prince George*, the [museum] did not manipulate its land purchase to reach into [Dominion Virginia Power's] service territory to place a meter."[8] As noted by the Court, however, the Commission has not adopted any absolute test for resolving service territory disputes, but instead the Commission considers the practical realities of each situation.[9] The Supreme Court clearly has stated that "the Commission, as the tribunal informed by experience, is required to exercise its broad discretion in order to fashion a fair, reasonable, and practical resolution of the issue" in cases such as this.[10]

Prior opinions of the Attorney General defer to the interpretation of the law by an agency charged with administering the law unless the agency interpretation clearly is wrong.[11] The Virginia Constitution grants broad powers and authority to the State Corporation Commission.[12] The Virginia Supreme Court notes that "[t]he Commission has the opportunity to know the ability and experience of the utility corporation, and the circumstances in the territory sought by it. We cannot sit as a board of revision to substitute our judgment for that of matters within the province of the Commission."[13] Prior opinions consistently conclude that the Attorney General declines to render official opinions when the request requires the interpretation of a matter reserved to another entity.[14]

CONCLUSION

Accordingly, it is my opinion that whether an electric utility customer located in the service territory of one electric utility may obtain service from another electric utility through a metering point in an adjacent service territory is a determination for the State Corporation Commission.

[1]VA. CODE ANN. §§ 56-265.1 through 56-265.9 (LexisNexis Repl. Vol. 2003 & Supp. 2005).

[2]N. Va. Elec. Coop. v. Va. Elec. & Power Co., 265 Va. 363, 368-69, 576 S.E.2d 741, 744 (2003).

[3]*Id.* at 369-70, 576 S.E.2d at 744-45 (citations omitted).

[4]*See id.* at 366-67, 576 S.E.2d at 742-43.

[5]*See id.* at 366, 576 S.E.2d at 742.

[6]*Id.*

[7]*Id.* at 372, 576 S.E.2d at 746.

[8]*Id.* at 371, 576 S.E.2d at 745 (alteration in original).

[9]*Id.* at 370-71, 576 S.E.2d at 744-45.

[10]*Id.* at 372, 576 S.E.2d at 746.

[11]*See* 1999 Op. Va. Att'y Gen. 3, 5 and opinions cited therein; *see also* 2002 Op. Va. Att'y Gen. 308, 311 (concluding that since Department of Taxation is agency responsible for matter relating to situs of gross receipts and apportionment, Attorney General must defer such determinations to Department).

[12]*See* VA. CONST. art. IX, § 2 (granting Commission power to regulate rates and service of electric companies); § 3 (granting Commission powers to administer oaths, compel witnesses, punish for contempt, and enforce compliance with orders); § 4 (providing that only Virginia Supreme Court has jurisdiction to review actions of Commission); *see also* VA. CODE. ANN. § 12.1-12 (Michie Repl. Vol. 1999) (authorizing Commission to regulate rates and service of electric companies); § 56-6 (LexisNexis Repl. Vol. 2003) (granting Commission authority to act as court of record for public service corporation grievances); § 56-35 (LexisNexis Repl. Vol. 2003) (granting Commission power and duty to supervise, regulate, and control public service companies).

[13]Va. Gas Distrib'n Corp. v. Washington Gas Light Co., 201 Va. 370, 375, 111 S.E.2d 439, 443 (1959).

[14]*See* Op. Va. Att'y Gen.: 2003 at 99, 102; 2002, *supra* note 11, at 312 n.21; 2001 at 65, 68; 1987-1988 at 69, 72.

OP. NO. 05-017

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

CRIMINAL PROCEDURE: ARREST.

Authority for officer to execute misdemeanor capias, not in his possession, provided that officer informs accused of existence of, and charges contained in, capias and delivers same to accused as soon as practicable.

THE HONORABLE GEORGE S. WEBB III
COMMONWEALTH'S ATTORNEY FOR MADISON COUNTY
APRIL 26, 2005

ISSUE PRESENTED

You ask whether a law enforcement officer has the authority to execute a misdemeanor capias, not in his possession, based upon an official dispatch from another county.

RESPONSE

It is my opinion that an officer has the authority to execute a misdemeanor capias, not in his possession, provided that the officer informs the accused of the existence of, and charges contained in, the capias and delivers the capias to the accused as soon thereafter as practicable.

BACKGROUND

You relate that the Greene County Sheriff's Office requested that the Madison County 911 Center assist in locating a suspect for execution of a capias. The 911 Center notified a deputy with the Madison County Sheriff's Department of the existence of the capias. You also relate that the 911 Center informed the deputy of the suspect's name, physical description, date of birth, and location. The deputy located and identified the suspect and informed him that a capias had been issued for him. Further, you relate that it is not clear whether the Deputy informed the suspect of the offense charged. Finally, after the deputy placed the suspect in custody, a deputy with the Greene County Sheriff's Department delivered the misdemeanor capias to the suspect.

APPLICABLE LAW AND DISCUSSION

Rule 3A:7(b) of the Rules of the Supreme Court of Virginia, pertaining to the execution of a capias, indicates that "[t]he capias shall be executed as provided in Rule 3A:4(c)." Thus, Rule 3A:4(c) specifically applies to the execution of a capias. Rule 3A:4(c) provides that

> If a [capias] has been issued but the officer does not have the [capias] in his possession at the time of the arrest, he shall (i) inform the accused of the offense charged and that a [capias] has been issued, and (ii) deliver a copy of the [capias] to the accused as soon thereafter as practicable.

Consequently, for the valid execution of a capias not in the possession of the officer, three criteria must be met. First, the officer must notify the accused of the issuance of the capias. Second, the officer must notify the accused of the offense being charged. Finally, the officer must, thereafter, deliver a copy of the capias to the accused as soon as practicable.

It is important to note that before 1984, Rule 3A:4(d)(2) read, in part:

> The officer shall deliver a copy of the [capias] to the accused at the time of the arrest unless the arrest is for a *felony* and the officer does not have the [capias] in his possession at the time of the arrest, in which case he shall (i) inform the accused of the offense charged and that a [capias] has been issued and (ii) deliver a copy of the [capias] to the accused as soon thereafter as practicable.[1]

In 1984, subsection (d) was deleted in its entirety and replaced by subsection (c) as quoted above.[2] Since the word "felony" was deleted, it is apparent that the intent of Rule 3A:4(c) is to grant an officer the authority to execute either a felony or misdemeanor capias not in his possession.

Further, § 19.2-81 permits county and city sheriffs, and their deputies, to "arrest, without a warrant, for an alleged misdemeanor not committed in his presence when the officer receives a radio message from his department or other law-enforcement agency within the Commonwealth that a warrant for such offense is on file." This Office consistently has treated capiases and warrants synonymously.[3] Therefore, it is my opinion that § 19.2-81 would authorize such an arrest for a misdemeanor capias, provided that the officer complies with Rule 3A:4(c).

CONCLUSION

Accordingly, it is my opinion that an officer has the authority to execute a misdemeanor capias, not in his possession, provided that the officer informs the accused of the existence of, and charges contained in, the capias and delivers the capias to the accused as soon thereafter as practicable.

[1] VA. SUP. CT. R. 3A:4(d)(2), Vol. 2 (Michie Repl. Vol. 1977) (emphasis added).

[2] *See* VA. SUP. CT. R. 3A:4 cmt. (Michie 1984 Added Vol.). A prior opinion of this Office concludes that a police officer could not execute a misdemeanor capias not in his possession. 1975-1976 Op. Va. Att'y Gen. 11. As noted herein, the subsequent change to Rule 3A:4, however, now compels a different result. Further, the previous opinion treated capiases and warrants synonymously. *Id*.

[3] *See* Op. Va. Att'y Gen.: 1985-1986 at 130; 1981-1982 at 20; 1975-1976, *supra* note 2, at 11.

OP. NO. 05-021

TAXATION: GENERAL PROVISIONS.

ADMINISTRATION OF GOVERNMENT: DATA COLLECTION & DISSEMINATION.

Design, establishment, and maintenance of secure data processing system containing confidential taxpayer information primarily is question of fact for local commissioner of revenue; commissioner should balance administrative discretion with statute governing secrecy of certain information obtained in performance of his duties and Government Data Collection and Dissemination Practices Act. Information contained on and access to such system is subject to secrecy. Design and construction of system without access to confidential data is not necessarily subject to secrecy provisions that prohibit commissioner from divulging certain information.

THE HONORABLE RAY ERGENBRIGHT
COMMISSIONER OF THE REVENUE FOR THE CITY OF STAUNTON
JUNE 14, 2005

ISSUES PRESENTED

You inquire concerning your responsibilities as a commissioner of the revenue to ensure the secrecy of taxpayer information in your custody that relates to the establishment and maintenance of a secure data processing system intended for your official use and for other permitted purposes. The specific situations concern a local commissioner's office that has the resources to establish its own internal system, and a commissioner that must use employees of the locality that are not under his supervision to create and maintain such a system.

RESPONSE

It is my opinion that the design, establishment, and maintenance of a secure data processing system containing confidential taxpayer information primarily is a question of fact to be determined by the local commissioner of the revenue. It is further my opinion that the commissioner should balance his administrative discretion with the prohibitions and restrictions contained in § 58.1-3 and the Government Data Collection and Dissemination Practices Act.[1] For purposes of these statutes, I note that the information contained on and the access to such a system is subject to secrecy. Finally, it is my opinion that the design and construction of the system without access to the confidential data is not necessarily subject to the secrecy provisions of § 58.1-3, which prohibits a commissioner from divulging certain information obtained in the performance of his duties.

APPLICABLE LAW AND DISCUSSION

You inquire concerning the proper and acceptable design, establishment, and maintenance of an in-house data processing system ("data system") to be used by a local commissioner of the revenue ("commissioner") in the discharge of his official responsibilities in the day-to-day administration of the office. You state that the vast majority of the data expected to be housed on such data system generally would be confidential taxpayer information governed by § 58.1-3.

Where permitted by applicable law, the commissioner may share certain information with other departments of the locality's government[2] and with members of the general public and others.[3] In addition to the requirements of § 58.1-3,[4] § 2.2-3801(2) of the Government Data Collection and Dissemination Practices Act defines "personal information."[5] The Act states that "[t]here shall be a clearly prescribed procedure to prevent personal information collected for one purpose from being used for another purpose."[6] Although there may be questions concerning the interplay of these statutes with the disclosure requirements of The Virginia Freedom of Information Act,[7] the Information Act's disclosure requirements generally are superceded by the secrecy provisions of § 58.1-3.[8]

Thus, the interplay of such statutes and the nature of the information contained in the commissioner's records requires that the data system be tailored to meet the statutory requirements for each category of information placed on the data system. Further, the administration of a data system must comply with the Government Data Collection and Dissemination Practices Act, particularly § 2.2-3803. I note, however, that § 2.2-3803(A)-(B) does not specify the methods for compliance, but leaves the method to the discretion of the "agency."[9] A 2003 amendment to the Act,[10] amends the definition of the term "agency" to include "constitutional officers."[11] The situation thus becomes a "facts and circumstances" decision to be made by each individual commissioner.[12] Commissioners, as constitutional officers, are vested with the authority and power to administer the operations of their offices in a manner and to the extent they, in their discretion, see fit.[13] For these reasons, it is virtually impossible to establish general rules for the guidance of the commissioners.

Therefore, the design and maintenance of a data system is a factual determination for the commissioner.[14]

It may be instructive, however, to observe the legal parameters within which these factual decisions must be made. Section 58.1-3 establishes a general principle that constitutional officers and other local tax and revenue officials must refrain from disclosing information about the transactions, property, income, or business of any taxpayer.[15] That general rule was originally enacted by the 1926 Session of the General Assembly,[16] and its application continues, "[e]xcept in accordance with a proper judicial order or as otherwise provided by law."[17] Prior opinions of the Attorney General, however, have construed these exceptions narrowly and consistently have concluded that most information concerning individual taxpayers may not be disclosed to other officials of the locality for purposes unrelated to the collection of taxes.[18]

In the first situation you present, the commissioner, or other appropriate local tax or revenue officer, has the in-house resources to design, establish, and maintain his own data system. Thus, there is no objection to the storage of confidential information on a data system that has been entered by, and the access limited to, the local revenue officer's personnel only.[19] A written admonition to these employees reminding them of their obligations under § 58.1-3 certainly is permissible.[20]

Moreover, with respect to the second scenario in which a commissioner must rely on the locality's general governmental data processing system, this Office previously has held that the use of such a system is permissible where the data entry personnel are *employees of the commissioner*,[21] even where such information is contained on a locality-owned data processing system. There, however, can be no "uncontrolled access to the data base which includes"[22] confidential taxpayer information, nor any "unrestricted access"[23] to the locality's system by the locality's non-revenue personnel.[24] By necessity, this means that the locality may design, build, and maintain a data system. The question, however, then becomes the ability of locality personnel that are not employed by the commissioner to enter or access such information, which may be only done pursuant to a specific statutory exemption.[25] It certainly would never permit "unrestricted access" by personnel of a locality that are not employed by the commissioner.[26]

In appropriate circumstances, personnel of a locality that are not employees of the commissioner may be permitted to design, build, and maintain a data system that includes the entry of confidential information under the theory that such information may be, or become, accessible by such employees pursuant to the "line of duty" disclosure exception to § 58.1-3.[27] The "line of duty" exception in § 58.1-3(A)(2) permits local tax or revenue officers to divulge taxpayer information to *other local tax or revenue officers or employees* necessary for the performance of the officers' or employees' duties.[28] Thus, where the duties of such locality's personnel not employed by the commissioner are incidental or complimentary to the commissioner's duties,

such access may be permissible under certain prescribed circumstances.[29] The noncommissioner employees, however, are obligated to protect the confidentiality of the information to the same extent as if they were employees of the local taxing official.[30]

In summary, both the content of, and the restrictions on access to, the information in question by local personnel not employed by the commissioner must be considered. It is not, however, a question of data system design, implementation, and maintenance where the protected information is not readily accessible to locality personnel not employed by the commissioner. For example, a commissioner's employees may enter all the confidential information after the data system is designed and built; or, the commissioner's employees may directly download the confidential information from other systems. Accordingly, these are matters that must be left to the discretion of the local commissioner to decide based on all of the facts and circumstances present in his locality.

CONCLUSION

Accordingly, it is my opinion that the design, establishment, and maintenance of a secure data processing system containing confidential taxpayer information primarily is a question of fact to be determined by the local commissioner of the revenue. It is further my opinion that the commissioner should balance his administrative discretion with the prohibitions and restrictions contained in § 58.1-3 and the Government Data Collection and Dissemination Practices Act.[31] For purposes of these statutes, I note that the information contained on and the access to such a system is subject to secrecy. Finally, it is my opinion that the design and construction of the system without access to the confidential data is not necessarily subject to the secrecy provisions of § 58.1-3, which prohibits a commissioner from divulging certain information obtained in the performance of his duties.

[1] VA. CODE ANN. §§ 2.2-3800 to 2.2-3809 (LexisNexis Repl. Vol. 2001 & Supp. 2004). Section 2.2-3808.2 expires July 1, 2005. *See* 2003 Va. Acts ch. 988, cl. 2, at 1564, 1564. Section 2.2-3808.3 is not set out in the *Code* and "shall not become effective unless reenacted by the 2005 Session of the General Assembly." *See* 2004 Va. Acts ch. 736, cl. 2, at 1066, 1067. The 2005 Session of the General Assembly did not reenact this provision.

[2] *See, e.g.*, VA. CODE ANN. § 58.1-3(D) (LexisNexis Repl. Vol. 2004).

[3] *See, e.g.*, § 58.1-3(A)(1), (3)-(4), (B), (D) (LexisNexis Repl. Vol. 2004); § 58.1-3.1 (LexisNexis Repl. Vol. 2004); *see also* § 58.1-3934 (LexisNexis Repl. Vol. 2004) (providing that "[s]uch governing body shall then have power to employ other delinquent tax collectors").

[4] A commissioner of the revenue "shall not divulge any information acquired by him in the performance of his duties with respect to any transactions, property, including personal property, income or business of any person, firm or corporation. Such prohibition specifically includes any copy of a federal return or federal return information required by Virginia law to be attached to or included in the Virginia return." Section 58.1-3(A).

[5] "'*Personal information'* means all information that describes, locates or indexes anything about an individual including his real or personal property holdings derived from tax returns … [or] financial transactions …. 'Personal information' shall not include routine information maintained for the purpose of internal office administration whose use could not be such as to affect adversely any data subject nor does the term include real estate assessment information." Section 2.2-3801(2) (LexisNexis Supp.2004).

[6]Section 2.2-3800(C)(9) (LexisNexis Supp. 2004).

[7]*See* §§ 2.2-3700 through 2.2-3714 (LexisNexis Repl. Vol. 2001 & Supp. 2004).

[8]*See* 1993 Op. Va. Att'y Gen. 221, 223 and opinions cited therein (noting that Freedom of Information Act does not require tax officials to reveal information whose disclosure is prohibited by § 58.1-3).

[9]*See* § 2.2-3803(A)-(B) (LexisNexis Supp. 2004); *see generally* 2002 Op. Va. Att'y Gen. 3.

[10]2003 Va. Acts ch. 272, at 294, 294-95 (amending and reenacting § 2.2-3801, including amendments to definition of "agency").

[11]Section 2.2-3801(6).

[12]*See* 1997 Op. Va. Att'y Gen. 167, 171 n.28 (noting that information disclosed should not exceed that which is necessary; determination of extent or format of disclosure depends on particular facts and circumstances).

[13]*See, e.g.*, Op. Va. Att'y Gen.: 2002 at 58, 60; 1987-1988 at 161, 162 (concluding that treasurer, as constitutional officer, is independent of control of local governing body and, except as abrogated by statute, retains complete discretion in day-to-day operations of office, personnel matters, and manner in which duties of office are performed); *see also* Op. Va. Att'y Gen.: 2004 at 52, 55 (noting that sheriff generally has discretion in day-to-day operations of his office); 1997 at 60, 61 (noting that prior opinions of Attorney General consistently conclude that absent constitutional or statutory provision to contrary, sheriff has exclusive control over day-to-day operations of his office and assignment of his personnel).

[14]*See* Op. Va. Att'y Gen.: 1987-1988 at 506, 507 (concluding that to extent that unrestricted access to commissioner's confidential data is problem, commissioner should examine what arrangements can be made to provide appropriate security for computer data files maintained by his office); 1982-1983 at 727, 728 (concluding that although determination of whether or not to compile and present certain data is within discretion of commissioner, once prepared, it is subject to requirements of statute).

[15]*See* 1997 Op. Va. Att'y Gen., *supra* note 12, at 168.

[16]*See* 1926 Va. Acts ch. 147, Item 6, at 252, 255 (enacting statute making it "unlawful for any member or ex-member of the [State tax] commission, or for any assessor or commissioner of the revenue, or for any employee or agent of the commission, to divulge any information acquired by him in respect to the transactions, property, income or business of any person, firm or corporation while in the performance of his duties under this act").

[17]Section 58.1-3(A).

[18]*See, e.g.*, Op. Va. Att'y Gen.: 1997, *supra* note 12, at 169 (concluding that treasurers in Southwest Virginia coalfield region may share with Virginia Coalfield Economic Development Authority names of coal, oil, and gas producers, and their respective contribution amounts, to enable Authority to determine constitution of its board of directors); 1993 at 59, 64-65 (concluding that § 15.1-163(B), requiring commissioner of revenue to provide information requested by governing body, is not in conflict with § 58.1-3; if conflict exists, superseding language in act amending § 15.1-163 would cause that section to prevail); 1987-1988, *supra* note 14, at 507-08 (concluding that commissioner of revenue is prohibited from granting local department of social services direct access to computer data files to verify information on applications for public assistance because social services is not authorized to view certain information on system); 1985-1986 at 311, 312 (concluding that commissioner of revenue may not grant county administrator or employees in administrator's office access, which is not authorized by statute, to property and income data in his files); 1973-1974 at 412 (concluding that under § 58-46, predecessor to § 58.1-3, county assessor and finance director may not give county public utilities commission information about taxpayers' property, except information entered on public assessment rolls or books); 1970-1971 at 18, 19 (concluding that despite charter provision authorizing city council to investigate conduct of city office or department, neither council nor city manager has right to examine records of city assessor made confidential by § 58-46, predecessor to § 58.1-3); 1963-1964 at 17, 18 (concluding that under § 58-46, commissioner of revenue may not divulge to board of supervisors information reported on individual personal property tax returns).

[19]*See* 1974-1975 Op. Va. Att'y Gen. 524, 525 (concluding that "line of duty" exemption contained in § 58-46, predecessor to § 58.1-3, does not prohibit dissemination of gross receipts reported by licensed businesses to local tax or revenue employees, provided that furnishing such information is for performance of their public duties). In the 1974 opinion, the employees of the Division of Data Processing were employees of the Department of Finance. *Id.* Therefore, the opinion concludes that as employees of a revenue officer, the commissioner could provide such information to them as necessary to make the computerization operable. *Id.* The employees of the Division were, however, prohibited from divulging information concerning the licensees. *Id.*

[20]*Id.*

[21]*See* Op. Va. Att'y Gen.: 1985-1986, *supra* note 18, at 311; 1974-1975, *supra* note 19, at 525.

[22]*See* 1985-1986 Op. Va. Att'y Gen., *supra* note 18, at 312.

[23]For the purposes of this opinion, the term "unrestricted access" means that there would be no restrictions or safeguards on the data that could be accessed. *See* 1987-1988 Op. Va. Att'y Gen., *supra* note 14, at 508 n.1.

[24]*See* 1985-1986 Op. Va. Att'y Gen., *supra* note 18, at 311; *see also* 1987-1988 Op. Va. Att'y Gen., *supra* note 14, at 506.

[25]*See* 1985-1986 Op. Va. Att'y Gen., *supra* note 18, at 312.

[26]*See* Op. Va. Att'y Gen.: 1987-1988, *supra* note 14, at 507; 1985-1986, *supra* note 18, at 312.

[27]*See, e.g.*, Op. Va. Att'y Gen.: 1999 at 185, 186; 1974-1975 at 523, 524 (interpreting "line of duty" provision in § 58-46, predecessor to § 58.1-3); *id.* at 524, 525 (interpreting § 58-46).

[28]*See* 1999 Op. Va. Att'y Gen., *supra* note 27, at 186.

[29]*Id.*

[30]*Id.* at 187 n.5; *see also* § 58.1-3(F).

[31]*See supra* note 1.

OP. NO. 05-027

TAXATION: LICENSE TAXES.

Authority for locality to impose greater threshold amount of gross receipts for purposes of BPOL tax than statutory minimum; locality may create subclassification of BPOL business classification and apply different threshold of gross receipts, provided threshold is greater than applicable statutory threshold and reasonable municipal policy exists to justify classifications.

MR. J. THOMPSON SHRADER
COUNTY ATTORNEY FOR AMHERST COUNTY
AUGUST 19, 2005

ISSUES PRESENTED

You ask whether a locality is permitted to increase the applicable statutory thresholds of gross receipts below which the business, professional and occupational license ("BPOL") tax contained in Chapter 37 of Title 58.1, §§ 58.1-3700 through 58.1-3735, may not be imposed. Additionally, you ask whether within a classification of business, such as retail sales, the locality may create a subclassification of that type of business and further increase the threshold of gross receipts for purposes of the BPOL tax for that subclassification.

RESPONSE

It is my opinion that a locality may impose a greater threshold amount of gross receipts for purposes of the BPOL tax than the statutory minimum. Further, it is my opinion that the locality may create a subclassification of a BPOL business classification and apply a different threshold of gross receipts, provided that the threshold applicable to such subcategory is greater than the applicable statutory threshold, and a reasonable municipal policy exists to justify the classifications.

BACKGROUND

You relate that the Board of Supervisors of Amherst County (the "county") is considering adopting a BPOL tax for businesses and professions within the county pursuant to Chapter 37. You state that for purposes of the threshold delineations contained in § 58.1-3706(A), the population of the county is between 25,000 and 50,000.

You note[1] that § 58.1-3706(A) prohibits the county from imposing the BPOL tax on businesses and professions having less than $50,000 in gross receipts. You state that the county's governing board is considering whether to increase the threshold of gross receipts. As part of that consideration, you note that the local governing body is concerned about imposing the BPOL tax upon gasoline stations[2] that generate a high-dollar, volume business, but have a low profit margin and derive the bulk of their net income from sales of incidental items.[3]

APPLICABLE LAW AND DISCUSSION

Section 58.1-3706(A) sets forth the applicable limitations on both the rates of license taxes and the minimum gross receipts thresholds required for imposition of the BPOL tax. These thresholds are tiered by locality population. As applied to the county, § 58.1-3706(A) reads, in pertinent part, as follows:

> Except as specifically provided in this section and except for the fee authorized in § 58.1-3703, no local license tax imposed pursuant to the provisions of [Chapter 37], …, or any other provision of [Title 58.1] or any charter, shall be imposed on any person whose gross receipts from a business, profession or occupation subject to licensure are *less than: ... (ii) $50,000 in any locality with a population of 25,000 but no more than 50,000*. Any business with gross receipts of more than $100,000, or $50,000, as applicable, may be subject to the tax at a rate not to exceed the rate set forth below for the class of enterprise listed[.] [Emphasis added.]

Section 58.1-3705 provides for "uniformity" of taxation stating that "[w]henever any county, city or town levies a license tax, the basis for such tax, whether it be gross receipts or otherwise, shall be the same for all persons engaged in the same business, trade, occupation or calling." It is significant that this language references "the same business, trade, occupation or calling," rather than "classification." Therefore, a

"distinct" business within a classification may be taxed on a different basis than other types of businesses within that classification.[4]

Section 58.1-3701 mandates that the Department of Taxation promulgate "guidelines for the use of local governments," which by their nature must amplify and clarify statutory provisions.[5] The Department has issued *Guidelines for Business, Professional and Occupational License Tax*[6] ("*2000 BPOL Guidelines*"), which pursuant to § 58.1-3701, are "accorded the weight of a regulation." Section 58.1-3701 specifically authorizes the Tax Commissioner "to issue advisory written opinions" interpreting the BPOL tax and the *2000 BPOL Guidelines*. A regulation issued by the Department "shall be sustained unless unreasonable or plainly inconsistent with applicable provisions of law."[7] Furthermore, "the Department's interpretation of a tax statute is entitled to great weight."[8] This Office consistently has deferred to the interpretation of the tax laws by the Tax Commissioner.[9]

You first ask whether a locality is permitted to increase the applicable statutory thresholds of gross receipts below which the BPOL tax may not be imposed. The *2000 BPOL Guidelines* address this situation, and § 2.1 specifically provides that:

> While localities must follow the exemptions, rates, classifications *and thresholds* as set forth in Chapter 37 (§ 58.1-3700 et seq.) of Title 58.1 of the *Code of Virginia*, their local ordinances may:
>
> A. Set tax rates at levels lower than those authorized by state law, or select the classifications to tax or not tax;
>
> B. *Establish subclassifications within the classifications set out in state law and provide for different rates or exemptions for such subclassifications, as long as no rate exceeds the maximum permitted by state law*;
>
> C. Establish graduated tax rates for any classification or subclassification so that the rate increases or decreases with volume, as long as no rate exceeds the statutory maximum for the classification under state law; and
>
> D. *Establish a threshold amount of gross receipts below which no tax will be imposed, or a maximum tax for any classification*.
>
> *Localities may establish classifications and subclassifications based upon reasonable distinctions in municipal policy, and through the establishment of classifications and subclassifications, localities may choose to exempt certain categories of taxpayers*. [Emphases added.]

Section 2.1(D) of the *2000 BPOL Guidelines* clearly permits a locality to "[e]stablish a threshold amount of gross receipts below which no tax will be imposed, or a maximum tax for any classification." A locality may set a threshold limit which is higher than the minimum set forth in § 58.1-3706(A),[10] but may not impose the

BPOL tax where gross receipts are less than the threshold amount applicable to that locality.[11] The Tax Commissioner has ruled that:

> § 3.1.1 of the 1997 BPOL Guidelines states that a locality may establish a threshold amount of gross receipts below which no tax will be imposed, a maximum tax for any classification and/or graduated tax rates for any classification so long as no rate exceeds the statutory maximum.[12]

Indeed, a locality could completely exempt a business from BPOL tax or even exclude certain categories of revenues from taxation.[13] Thus, both § 58.1-3706(A) and the *2000 BPOL Guidelines* permit a locality to increase the threshold amounts of gross receipts triggering the BPOL tax in the locality above the minimum threshold amounts shown in § 58.1-3706(A).

You next ask whether a locality may create a business subclassification, i.e., within retail sales, and increase the threshold of gross receipts for purposes of the BPOL tax for that subclassification.[14] Section 2.1(B) of the *2000 BPOL Guidelines* clearly contemplates the creation of "subclassifications within the classifications set out in state law." Additionally, § 2.1(B) states that the locality may "provide for different rates *or exemptions* for such subclassifications." (Emphasis added.) In appropriate circumstances, a locality may exempt a particular type of business from the BPOL tax or may exempt some category of the business's revenue.[15]

There is, however, an important caveat on a locality's discretion to exempt a subclassification of business or some category of its revenues. In considering this issue, the Attorney General previously has concluded:

> Although a locality has the legal authority to subclassify and exempt businesses from the gross receipts license tax, such discrimination in favor of a certain class must not be arbitrary. Discrimination must be based upon a reasonable distinction in municipal policy. Historically, local governments have been accorded wide latitude in making taxing classifications which in their judgment produce reasonable systems of taxation. Determination by a court of whether a classification creates an arbitrary separation requires a case-by-case analysis which depends upon the purpose and subject of the particular ordinance creating the class and the circumstances and conditions surrounding its passage. The governing body must consider the facts and determine that reasonable municipal policy justifies action favoring one subclassification of business over another.[16]

Therefore, a locality may, within a BPOL tax classification, create a subclassification of that type of business and apply a different threshold of gross receipts, provided the threshold is greater than the applicable threshold in § 58.1-3706(A) and "that such

discriminatory treatment is justified by reasonable municipal policies formulated to apply to all the subclassifications of businesses to which the policy of the governing body is applicable."[17] This, of course, is a factual determination to be made by the local governing body on a case-by-case basis in light of the surrounding circumstances.[18]

CONCLUSION

Accordingly, it is my opinion that a locality may impose a greater threshold amount of gross receipts for purposes of the BPOL tax than the statutory minimum. Further, it is my opinion that the locality may create a subclassification of a BPOL business classification and apply a different threshold of gross receipts, provided that the threshold applicable to such subcategory is greater than the applicable statutory threshold, and a reasonable municipal policy exists to justify the classifications.

[1]A 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." VA. CODE ANN. § 2.2-505(B) (LexisNexis Repl. Vol. 2001).

[2]For purposes of this opinion, I assume that you mean the term, "gasoline station," to include the retail sale of gasoline to consumers, including those that sell non-automotive items usually associated with convenience stores, such as food and sundries. I further assume that these vendors will not be engaged in more than one distinct type of business, which would be taxable under separate local BPOL classifications or subclassifications. I note that multiple businesses conducted by a person at a single location generally are required to obtain a separate license for each business, unless the locality's ordinance permits the taxpayer to elect otherwise. *See* VA. CODE ANN. § 58.1-3703.1(A)(1) (LexisNexis Supp. 2004); DEP'T TAX'N, 2000 GUIDELINES FOR BUSINESS, PROFESSIONAL AND OCCUPATIONAL LICENSE TAX (Jan. 1, 2000), § 2.9 and examples shown therein, *available at* http://www.tax.virginia. gov/site.cfm?alias=Publications [hereinafter "2000 BPOL GUIDELINES"].

[3]You indicate that the incidental items include the sales of food from their "convenience stores."

[4]*See* 1984-1985 Op. Va. Att'y Gen. 351, 352 n.1 (noting that research and development company was "distinct" business from other businesses within its classification).

[5]*See* Op. Va. Att'y Gen.: 2004 at 187, 187; 2002 at 293, 295; *id.* at 297, 298.

[6]*See* 2000 BPOL GUIDELINES, *supra* note 2.

[7]*See* § 58.1-205(2) (LexisNexis Repl. Vol. 2004).

[8]*See* LZM, Inc. v. Va. Dep't of Taxation, 269 Va. 105, 109, 606 S.E.2d 797, 799 (2005) (noting that interpretation of Department of Taxation, which is charged with responsibility of administering and enforcing tax laws, is entitled to great weight).

[9]*See, e.g.*, 2002 Op. Va. Att'y Gen. 293, 294 and opinions cited therein (noting that Attorneys General defer to interpretations of agency charged with administering law unless agency's interpretation clearly is wrong). The *2000 BPOL Guidelines* interpret the relevant license tax laws for the purposes of implementing those provisions at the local level. *Id.*

[10]*See* Tax Comm'r Priv. Ltr. Rul.: PD 97-277 (June 19, 1997), *available at* http://www.policylibrary.tax. virginia. gov/OTP/Policy.nsf; PD 97-2 (Jan. 13, 1997) (interpreting § 3.1.1 of the 1997 BPOL Guidelines), *available at* http://www.policylibrary.tax.virginia.gov/OTP/Policy.nsf. Since the Tax Commissioner's ruling, § 3.1.1 has been amended and renumbered as § 2.1. *See* 2000 BPOL GUIDELINES, § 2.1, *supra* note 2.

[11]*See* Tax Comm'r Priv. Ltr. Rul. PD 97-118 (Mar, 7, 1997) (ruling that under § 58.1-3706(A), locality may not levy license tax on licensable businesses whose gross receipts fall below applicable thresholds for locality), *available at* http://www.policylibrary.tax.virginia.gov/OTP/Policy.nsf.

[12]*See* Tax Comm'r Priv. Ltr. Rul. PD 97-2 (interpreting § 3.1.1, predecessor to § 2.1), *supra* note 10.

[13]*See* 1984-1985 Op. Va. Att'y Gen., *supra* note 4, at 352; *see also* 1989 Op. Va. Att'y Gen. 308, 309 (noting that imposition of license tax is permissive; no statute requires that particular business activity be taxed).

[14]There is no distinct or special treatment for BPOL tax purposes of "gasoline stations" in the *Code* or in the *2000 BPOL Guidelines*. For example, the Tax Commissioner has ruled: "[a]ssuming that a local ordinance provides for the levying of a license tax upon a service station and the service station's gross receipts equal or exceed the applicable thresholds, the service station must report its whole, entire, total receipts derived from the privilege of engaging in that activity for purposes of BPOL tax assessments. As a result, the service station may not deduct the cost of gasoline from its gross receipts when filing a BPOL tax return. Expenses and other costs of doing business are not deductible for purposes of the BPOL tax." Tax Comm'r Priv. Ltr. Rul. PD 97-118, *supra* note 11. Of course, under permissible circumstances, the county could choose not to subject "service stations" or "filling stations" to BPOL taxation or may even exempt their gasoline sales receipts. *See* 1984-1985 Op. Va. Att'y Gen., *supra* note 4, at 352.

[15]*See id*.

[16]*Id.* (citations omitted) (emphasis in original); *see also* Chesterfield Cablevision, Inc. v. County of Chesterfield, 241 Va. 252, 255-56, 401 S.E.2d 678, 680 (1991) (noting that legislature may, constitutionally, treat different subjects differently for taxation purposes if difference is real, if distinction has some relevance to legislative purpose, and treatment is not so disparate to be arbitrary).

[17]*See* 1984-1985 Op. Va. Att'y Gen., *supra* note 4, at 352.

[18]*Id.* (noting that governing body must consider facts and determine whether municipal policy justifies action favoring one subclassification of business over another).

OP. NO. 05-073

TAXATION: LOCAL OFFICERS – COMMISSIONERS OF THE REVENUE.

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

Commissioner of revenue may not enter into agreement with commissioner of revenue in adjacent locality to change taxing jurisdiction of landowner's property from one locality to other locality; any such agreement is void.

MR. J. THOMPSON SHRADER
AMHERST COUNTY ATTORNEY
DECEMBER 2, 2005

ISSUE PRESENTED

You ask whether a commissioner of the revenue may enter into an agreement with the commissioner of the revenue in an adjacent locality to change the taxing jurisdiction of a landowner's property from one locality to the other locality.

RESPONSE

It is my opinion that a commissioner of the revenue may not enter into an agreement with the commissioner of the revenue in an adjacent locality to change the taxing jurisdiction of a landowner's property from one locality to the other locality. It is further my opinion that any such agreement is void.

BACKGROUND

You advise that the boundary between Amherst County and Nelson County, as established by the General Assembly, is the Piney River. At the time the General

Assembly created Nelson County out of Amherst County a landowner's property was physically located in Nelson County.

You note that subsequent to the creation of Nelson County, the Piney River changed course such that the river now runs on the opposite side of the landowner's property. You note, however, that the location of the old riverbed currently is ascertainable. You also state that the landowner has advised you of the existence of a Civil War map that shows the Piney River in its current location.

You relate that no action has been taken by the governing bodies of Amherst County and Nelson County to resolve the boundary location issue. Since 1989, however, you relate that a landowner's property has been mapped and taxed in Amherst County at his request. Further, you note that the property has been mapped and taxed in Amherst County as a result of a 1989 agreement between the former Commissioners of the Revenue of Amherst and Nelson Counties ("1989 agreement"). Prior to the 1989 agreement, the landowner's property was mapped and taxed in Nelson County.

You advise that without knowing the cause for the change in course of the Piney River, you are unable to determine whether the present or the historic location of the river should serve as the current boundary between Amherst County and Nelson County. Furthermore, you conclude that the governing bodies of Amherst County and Nelson County must take action or initiate a friendly suit in the circuit court of either locality to resolve the issue. Therefore, you conclude that the 1989 agreement between the former Commissioners of the Revenue is *ultra vires*[1] and void because it exceeds the power granted to local constitutional officers by statute.[2]

APPLICABLE LAW AND DISCUSSION

The commissioner of the revenue is a constitutional officer whose duties "shall be prescribed by general law or special act" of the General Assembly.[3] 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.[4] An *ultra vires* act is one that is beyond the powers conferred upon a constitutional officer by law.[5] Such acts are void *ab initio*, from the beginning.[6]

Article VII, § 4 of the Constitution of Virginia directs the General Assembly to assign duties by general or special law to constitutional officers, including the commissioner of the revenue.[7] I am not aware of any statutory provision whereby the General Assembly authorizes a commissioner of the revenue to enter into an agreement with the commissioner of the revenue of an adjacent locality with regard to the location and taxing of property.[8]

Virginia follows the Dillon Rule of strict construction, which provides that "'municipal corporations have only those powers expressly granted, those necessarily or fairly implied therefrom, and those that are essential and indispensable.'"[9] Additionally, the powers of local governments "'are fixed by statute and are limited to those conferred expressly or by necessary implication.'"[10] Any doubt as to the existence of a power

must be resolved against the locality.[11] Accordingly, because local governments are subordinate creatures of the Commonwealth, they possess only those powers conferred upon them by the General Assembly.[12] These rules are also applicable to constitutional officers, such as county commissioners of the revenue.[13] Therefore, I must conclude that a commissioner of the revenue is not empowered to enter into an agreement with the commissioner of the revenue in an adjacent locality.

CONCLUSION

Accordingly, it is my opinion that a commissioner of the revenue may not enter into an agreement with the commissioner of the revenue in an adjacent locality to change the taxing jurisdiction of a landowner's property from one locality to other locality. It is further my opinion that any such agreement is void.

[1]The term "ultra vires" means "[u]nauthorized; beyond the scope of power allowed or granted … by law." BLACK'S LAW DICTIONARY 1559 (8th ed. 2004).

[2]A 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." VA. CODE ANN. § 2.2-505(B) (LexisNexis Repl. Vol. 2005).

[3]VA. CONST. art. VII, § 4.

[4]2000 Op. Va. Att'y Gen. 204, 205.

[5]*See supra* note 1.

[6]*Id.* at 5 (defining "*ab initio*"); *see also* Op. Va. Att'y Gen.: 1986-1987 at 315, 316 (concluding that city council's refund of personal property was void because it lacked authority); 1982-1983 at 66, 67 (concluding that town's contract for indebtedness beyond its charter limitations is void, at least to extent of excess).

[7]1987-1988 Op. Va. Att'y Gen. 517, 518.

[8]*Compare* 1974-1975 Op. Va. Att'y Gen. 538 (concluding that county treasurer may serve as billing and collection agent for public service authority).

[9]Commonwealth v. County Bd., 217 Va. 558, 574, 232 S.E.2d 30, 40 (1977) (quoting Bd. of Supvrs. v. Horne, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975)).

[10]*Id.* at 573-74, 232 S.E.2d at 40 (quoting *Horne*, 216 Va. at 117, 215 S.E.2d at 455).

[11]2A EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 10.19, at 369 (3d ed. 1996), *see also* 2002 Op. Va. Att'y Gen. 85, 87.

[12]*See* Gordon v. Bd. of Supvrs., 207 Va. 827, 153 S.E.2d 270 (1967) (finding that county board of supervisors did not abuse its discretion in voting to lend money to airport authority; power exercised by board was expressly implied from legislative act allowing local governing body to lend real property to any authority it created).

[13]1984-1985 Op. Va. Att'y Gen. 284, 284.

OP. NO. 04-095

TAXATION: PAYMENTS IN LIEU OF REAL PROPERTY TAXATION — TAXATION OF PUBLIC SERVICE CORPORATIONS.

COUNTIES, CITIES AND TOWNS: ELECTRIC AUTHORITIES ACT.

No authority for county to receive payment of service fee in lieu of property and other taxes unless entity is tax-exempt. County may only negotiate arrangement pursuant to Electric Authorities Act for defined 'authority.' No authority for county to arrange continuous stream of payments in lieu of local taxes from commercial entity; no arrangement for General Assembly to modify or abrogate.

MS. MELISSA ANN DOWD
HIGHLAND COUNTY ATTORNEY
APRIL 4, 2005

ISSUES PRESENTED

You ask whether an entity must be tax-exempt in order for a Virginia county to be able to negotiate an arrangement with that entity to pay the county a "service charge" in lieu of payment of local property and other taxes. You also inquire whether §§ 15.2-5423 and 58.1-3400 are the only statutes that would permit a locality to negotiate an arrangement with an entity to insure a fixed and continuing stream of revenue in lieu of taxes. Finally, you inquire whether a county may negotiate with a private for-profit entity to receive payments in lieu of local property and other taxes, and whether the General Assembly may, by subsequent legislation, modify or abrogate such an arrangement.

RESPONSE

It is my opinion that a county does not have the authority to negotiate an arrangement for payment of a service fee in lieu of property and other taxes unless the entity is tax-exempt. It is further my opinion that a county may only negotiate an arrangement pursuant to the Electric Authorities Act[1] for entities defined therein as an "authority." Finally, it is my opinion that there is no authority for a county to enter into an arrangement that would guarantee the county a continuous stream of payments in lieu of local taxes from a commercial entity. Therefore, there can be no potential arrangement subject for the General Assembly to modify or abrogate.

BACKGROUND

You relate that Highland New Wind Development, LLC (the "company") leases certain private property on Allegheny Mountain, on the western border of Highland County for the first known "wind farm" project in Virginia. The company intends to locate, build and operate a minimum of twenty-two commercial wind turbines and a substation for the transmission of electricity generated by the turbines. The company expects to produce no more than thirty-nine megawatts of electricity to be transmitted on an existing 69kv line in the County and the electricity will be added to the existing power grid.

You also advise that Highland County's taxing officials have determined that the company is not tax-exempt and will not be classified as an "authority"[2] under the Electric Authorities Act. Instead, you state that the Board of Supervisors of Highland County has received a letter from the Virginia State Corporation Commission advising the County that the Commission has tentatively determined that the property of the company will be valued by the Commission for purposes of local property taxation pursuant to § 58.1-2604.[3] As such, the County anticipates receiving real and personal property, as well as utility taxes from the company.

Because this will be the first such project in Virginia,[4] you note that Highland County believes that it is in the best interests of all parties to negotiate a constant amount, character, and continuation of local levies on the company by accepting a stream of "service fees" in lieu of local taxes.

APPLICABLE LAW AND DISCUSSION

Article X, § 1 of the Virginia Constitution establishes that in Virginia "[a]ll property, *except as hereinafter provided*, shall be taxed. All taxes shall be levied and collected under general laws and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax."[5] (Emphasis added.) Article X, § 6(a) of the Constitution sets forth a list of properties of certain entities that "shall be exempt from taxation, State and local, including inheritance taxes." Article X, § 6(b), (d)-(e) provides that certain property may be exempt or partially exempt from taxation, including certain real or personal property "used primarily for the purpose of abating or preventing pollution of the atmosphere or waters of the Commonwealth or for the purpose of transferring or storing solar energy."[6] Article X, § 6(f) requires that the exemptions of property from taxation be "strictly construed,"[7] unless the property was tax-exempt prior to the adoption of the present Constitution.[8] Therefore, only the properties specifically listed in § 6 may be relieved of the obligation to pay local property taxes.[9] Commercial wind turbines are not a solar energy source.[10]

The Virginia Constitution recognizes that localities may need to provide certain governmental services to tax-exempt properties. Thus, Article X, § 6(g) provides that "[t]he General Assembly *may by general law* authorize any county, city, town, or regional government to impose a service charge upon the owners of a class or classes of exempt property for services provided by such governments." (Emphasis added.)

Pursuant to the authority in Article X, § 6(g), the General Assembly has enacted the two sections that authorize localities to impose service fees on governmental and other tax-exempt property. The first, § 58.1-3400, provides that localities may impose service fees calculated pursuant to a statutory formula upon the owners of tax-exempt properties with the exception of certain specific properties that are not relevant to your question.[11] You indicate that the company's property is not owned by such a tax-exempt or governmental entity. Thus, it does not fall within the scope of organizations eligible to pay service fees in lieu of taxes under § 58.1-3400.

The second statute, § 15.2-5423, is a variation of the service fees in lieu of local property taxes concept. Section 15.2-5423 is a part of the Electric Authorities Act. The stated intent of that Act is "to authorize the creation of electric authorities *by localities of this Commonwealth, either acting jointly or separately,* in order to provide facilities for the generation and transmission of electric power and energy."[12] These authorities are defined to be "political subdivisions,"[13] and do not include private, for-profit enterprises, such as the company. Although "projects" owned by authorities are exempt from local property taxation, an authority

> shall, in lieu of property taxes, pay to any governmental body authorized to levy property taxes, the amount which would be

> assessed as taxes on real and personal property of a project if such project were otherwise subject to valuation and assessment by the State Corporation Commission, in the same manner as are public utility companies.[14]

Indeed, the company is precisely the type of private entity for which the taxes serve as the benchmark for determination of the service fees to be paid by authorities under the Act. Thus, there is no indication that the General Assembly intended anything other than for such companies to be subject to real and personal property taxation by localities.

Accordingly, neither of the two statutes, §§ 58.1-3400 and 15.2-5423, are applicable to the company. While there are other statutes that permit Virginia localities to impose fees in lieu of property taxes, these are applicable only to tax-exempt and governmental entities.[15] I am not aware of a statutory mechanism that would permit Highland County to relieve a for-profit commercial entity, such as the company, from local property and other tax obligations in exchange for payment of a continuous stream of service fees or any other charges payable to the County.[16]

CONCLUSION

Accordingly, it is my opinion that a county does not have the authority to negotiate an arrangement for payment of a service fee in lieu of property and other taxes unless the entity is tax-exempt. It is further my opinion that a county may only negotiate an arrangement pursuant to the Electric Authorities Act[17] for entities defined therein as an "authority." Finally, it is my opinion that there is no authority for a county to enter into an arrangement that would guarantee the county a continuous stream of payments in lieu of local taxes from a commercial entity. Therefore, there can be no potential arrangement subject for the General Assembly to modify or abrogate.

[1] *See* VA. CODE ANN. §§ 15.2-5400 to 15.2-5431 (LexisNexis Repl. Vol. 2004).

[2] Section 15.2-5402 defines authority as "a political subdivision and a body politic and corporate created, organized and existing pursuant to the provisions of [Chapter 54], or if the authority is abolished, the board, body, commission, department or officer succeeding to the principal functions thereof or to whom the powers given by this chapter shall be given by law."

[3] The Commission's letter to Highland County references the valuation procedures under §§ 58.1-2604 and 58.1-2606 for local real and tangible personal property of public service corporations. *See* letter from Robert S. Tucker, Director, Division of Public Service Taxation, State Corporation Commission, to Jerry Rexrode, Chairman, Highland County Board of Supervisors (Jan. 12, 2005) (on file with this Office). Senate Bill 1011 introduced by the 2005 session of the General Assembly, which would amend § 58.1-2606, to provide that generating equipment of "electric suppliers" utilizing wind turbines shall be taxed at a rate or rates, that when applied to "fair market value," would generate an amount of revenue equal to $3,000 per megawatt of production capacity, effective on January 1, 2006. *See* 2005 S.B. 1011, *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?051+ful+SB1011. Senate Bill 1011 was tabled in the Committee on Finance on February 21, 2005. *See id. at* http://leg1.state.va.us/cgi-bin/legp504.exe?ses=051&typ=bil&val=sb1011. For purposes of this opinion, I have assumed that the company is a for-profit, commercial public service corporation, classified as an "electric supplier" under § 58.1-2600.

[4]You relate that other states have enacted specific exemptions from local taxation for commercial wind farm projects.

[5]*See* DKM Richmond Assocs. v. City of Richmond, 249 Va. 401, 407, 457 S.E.2d 76, 80 (1995) (noting Commonwealth's general policy of taxing all property); Commonwealth v. Wellmore Coal Corp., 228 Va. 149, 153, 320 S.E.2d 509, 511 (1984) (noting Commonwealth's policy to distribute tax burden uniformly on all property).

[6]VA. CONST. art. X, § 6(d).

[7]*See Wellmore Coal*, 228 Va. at 153-54, 320 S.E.2d at 511 (holding that tax exemptions are strictly construed; where there is any doubt, doubt is resolved against exception), *cited in* 1972-1973 Op. Va. Att'y Gen. 444, 445.

[8]*See* Manassas Lodge No. 1380 v. County of Prince William, 218 Va. 220, 223, 237 S.E.2d 102, 105 (1977) (concluding that Article X, § 6(f) prescribes rule of strict construction to apply prospectively to exemptions established or authorized by 1971 Constitution); *see also* 2004 Op. Va. Att'y Gen. 44, 47 n.6.

[9]*See* 1995 Op. Va. Att'y Gen. 265, 266.

[10]"Sunlight—solar energy—can be used to generate electricity, provide hot water, and to heat, cool, and light buildings." U.S. Dep't of Energy, *Solar Energy Basics*, *at* http://www.eere.energy.gov/RE/solar_basics.html.

[11]*See, e.g.*, 1971-1972 Op. Va. Att'y Gen. 389, 391 (noting that service charge permitted by § 58-16.2, predecessor to § 58.1-3400, essentially is tax measured by value of property rather than by value of service rendered). *Compare* 1981-1982 Op. Va. Att'y Gen. 68, 68 (concluding that charge imposed by § 27-2.1 should bear reasonable relationship to actual cost of service rendered; charge bearing absolutely no relationship to actual cost incurred would be absurd and such construction is to be avoided) *and* 1981-1982 Op. Va. Att'y Gen. 381, 382-83 (noting that liability for service charge is not tax; General Assembly authorized service charge not tax). Section 58.1-3401(C), however, provides that "[i]n no event shall the service charge exceed twenty percent of the real estate tax rate of the county, city or town imposing the service charge."

[12]Section 15.2-5401 (emphasis added).

[13]For purposes of the Electric Authorities Act, " '[*a*]*uthority*' means a political subdivision and a body politic and corporate created, organized and existing pursuant to the provisions of this chapter, or if the authority is abolished, the board, body, commission, department or officers succeeding to the principal functions thereof or to whom the powers given by [Chapter 54] shall be given by law." Section 15.2-5402.

[14]*See* § 15.2-5423.

[15]*See, e.g.*, VA. CODE ANN. § 3.1-55 (Michie Repl. Vol. 1994) (authorizing produce market to pay sums in lieu of taxes to city or county); VA. CODE ANN. § 36-55.37(3) (LexisNexis Supp. 2004) (providing that Virginia Housing Development Authority may make payments in lien of taxes consistent with cost of supplying municipal services to housing developments).

[16]*See* text accompanying note 15. Highland County and the company could, however, enter into an agreement whereby the company might agree to make voluntary payments to the County; however, the consideration cannot be the relief of the company's local property tax obligations. *Cf.* § 36-55.37(3) (providing that Virginia Housing Development Authority may agree to make payments in lieu of taxes consistent with cost of supplying municipal services to and maintaining economic feasibility of housing developments, residential housing, or non housing buildings). While a locality may not exempt a commercial entity from property taxes, there may be more flexibility for instead exempting or partially exempting an entity from certain business taxes so long as constitutional requirements are met. *See* VA. CONST. art. X, § 6(j). I may not, however, offer an opinion in the absence of a definitive proposal. Such an opinion would merely be speculation.

[17]*See supra* note 1.

OP. NO. 05-070

TRADE AND COMMERCE: VIRGINIA CONSUMER PROTECTION ACT.

Car rental companies may not assess and collect nongovernmentally mandated 'vehicle licensing fee' as separate charge on consumer car rental transactions. Disclosure of unadvertised, nonmandatory charges for car rental transactions at point of sale does not constitute adequate disclosure pursuant to Virginia Consumer Protection Act of 1977.

THE HONORABLE MARTIN E. WILLIAMS
MEMBER, SENATE OF VIRGINIA
OCTOBER 12, 2005

ISSUES PRESENTED

You ask whether car rental companies doing business in Virginia may assess and collect a "vehicle licensing fee," which is not governmentally mandated, as a separately stated additional charge on consumer car rental transactions when it is not part of the advertised price of car rentals. You also ask whether the disclosure of the separate fee[1] at the time of the car rental contract transaction constitutes an adequate disclosure of the fee pursuant to the Virginia Consumer Protection Act of 1977.

RESPONSE

It is my opinion that car rental companies doing business in Virginia may not lawfully assess and collect a "vehicle licensing fee," which is not governmentally mandated, as a separately stated additional charge on consumer car rental transactions. It is further my opinion that the disclosure of separate and nonmandatory charges, which were not included in the advertised rental rates, at the point of sale for car rental transactions does not constitute adequate disclosure pursuant to the Virginia Consumer Protection Act of 1977.

BACKGROUND

You describe car rental companies doing business in Virginia that assess and collect mandatory "vehicle licensing fees" or other similar fees in addition to advertised rates and rental taxes required by § 58.1-2402. You state that certain disclosures in written rental agreements indicate that such mandatory fees are assessed and collected from consumers to recover the owner's average annual cost for licensing and registering of vehicles.

APPLICABLE LAW AND DISCUSSION

Chapter 17 of Title 59.1, §§ 59.1-196 through 59.1-207, comprises the Virginia Consumer Protection Act of 1977 ("Consumer Protection Act"). Section 59.1-198, in part, defines a "consumer transaction" as "[t]he advertisement, sale, lease, license or offering for sale, lease or license, of goods or services to be used primarily for personal, family or household purposes." Section 59.1-200(A)(8) prohibits suppliers in connection with consumer transactions from "[a]dvertising goods or services with intent not to sell them as advertised, or with intent not to sell at the price or upon the terms advertised." Section 59.1-200(A)(14) prohibits suppliers in connection with consumer transactions from "[u]sing any other deception, fraud, false pretense, false promise, or misrepresentation in connection with a consumer transaction."

You refer to situations in which consumers are charged "vehicle licensing fees" separate from the stated rental charge. You indicate that such fees are not governmentally mandated. In my opinion, a car rental company's use of terms such as "vehicle licensing fees," even with a disclosure in a written contract with a consumer, suggests that such fees are governmentally mandated. Such usage would have a tendency to mislead consumers. Therefore, I conclude that the use of the term "vehicle licensing fees" or similar terms would constitute a "deception, fraud, false pretense, false promise, or misrepresentation in connection with a consumer transaction"[2] and, thus, a violation of the Consumer Protection Act.[3]

You also refer to situations in which car rental companies assess or collect separate charges generally applicable to all car rentals where such charges are not included in the advertised daily, weekly, or other rental rates. Other states and the Federal Trade Commission, applying statutes similar to the Consumer Protection Act, have held that a point of sale disclosure is not sufficient to clarify deceptive media advertising.[4] When a company intends to charge nonmandatory fees, but advertises its car rental terms without reflecting or including the nonmandatory fees, such company violates § 59.1-200(A)(8). Further, it is my opinion that, consistent with authority in other states,[5] the disclosure of such nonmandatory fees at the point of sale in a written contract is deceptive media advertising. Therefore, such a point of sale disclosure in a consumer transaction is insufficient and a violation of the Consumer Protection Act.

CONCLUSION

Accordingly, is my opinion that car rental companies doing business in Virginia may not lawfully assess and collect a "vehicle licensing fee," which is not governmentally mandated, as a separately stated additional charge on consumer car rental transactions. It is further my opinion that the disclosure of separate and nonmandatory charges, which were not included in the advertised rental rates, at the point of sale for car rental transactions does not constitute adequate disclosure pursuant to the Virginia Consumer Protection Act of 1977.

[1]You provide an example of a disclosure of a "vehicle licensing fee" that states: "VLF means vehicle license fee, which is the per day recovery of the owner's average annual cost for licensing and registering the vehicles."

[2]VA. CODE ANN. § 59.1-200(A)(14) (LexisNexis Supp. 2005).

[3]"A tax recoupment surcharge is not a tax. The state has not imposed this charge on the car rental transaction. The tax recoupment surcharge is overhead, no different from other overhead expenses. While the Task Force understands the arguments advanced by the rental car companies making this charge, these arguments do not alter the basic deception … involved in advertising one price and charging another." *Final Report and Recommendations of the National Association of Attorneys General Task Force on Car Rental Industry Advertising and Practices* [Adopted March 14, 1989], Antitrust & Trade Reg. Rep. (BNA) No. 1407, at 2.5(c) (March 16, 1989).

[4]*See*, *e.g.*, Resort Car Rental Sys., Inc. v. Fed. Trade Comm'n, 518 F.2d 962, 964 (9th Cir.1975) (holding that under Federal Trade Act, public is under no duty to inquire about truth in advertising; Act is violated when public is induced into contract through deception, even where buyer becomes fully informed before

entering into contract); Prata v. Superior Court, 111 Cal. Rptr. 2d 296, 309, 2001 Cal. App. LEXIS 675, *34-35 (Cal. Ct. App. 2001) (noting fact that disclosures and credit agreement issued, which stated "details" of promotion may have explained that promotion was, in fact, not as advertised, does not ameliorate deceptive nature of advertising); Chern v. Bank of Am., 127 Cal. Rptr. 110, 116, 544 P.2d 1310, 1316 (1976) (holding that under statute proscribing false advertising and deceptive practices, statement is false or misleading if members of public are likely to be deceived; intent of dissemination and knowledge of customer are irrelevant; holding that practice of quoting "per annum" rate on basis of 360-day year was false and misleading advertising); Missouri *ex rel.* Webster v. Areaco Inv. Co., 756 S.W.2d 633, 635-36 (1988) (interpreting statute prohibiting deception, fraud, false pretense and promise, or misrepresentation, court held that statute is violated even where final sales papers contain no misrepresentation or even correct prior misrepresentations); Robinson v. Avis Rent A Car Sys., Inc., 106 Wash. App. 104, 114-16, 22 P.3d 818, 824-25 (2001) (noting that quoting car rental price that does not include airport concession fee that is also charged would have capacity to deceive purchasing public, absent disclosure of fee; also noting that time for disclosure is when rental fee is quoted, not later at car rental counter when customers sign rental agreement containing information about concession fee; plaintiffs failed to establish nondisclosure); State v. Amoco Oil Co., 97 Wis. 2d 226, 237, 293 N.W.2d 487, 493 (1980) (interpreting statute requiring price to be paid in combination sale must state total price, court noted that point of sale price disclosures decrease consumer's opportunity to evaluate offer to detect high priced dealer or price manipulation, and total price must be stated in advertisement).

[5]*See id.*

OP. NO. 05-006

WELFARE (SOCIAL SERVICES): GENERAL PROVISIONS — LICENSURE AND REGISTRATION PROCEDURES.

For purposes of social services, 'foster care placement' does not apply to Kidsave International Summer Miracles program. No opinion whether Kidsave may need to be licensed on other basis.

THE HONORABLE WILLIAM J. HOWELL
SPEAKER, HOUSE OF DELEGATES
MAY 10, 2005

ISSUE PRESENTED

You ask whether the definition of "foster care placement" in § 63.2-100, which contains the definitions relating to social services, applies to the Kidsave International Summer Miracles program.

RESPONSE

It is my opinion that the definition of "foster care placement" in § 63.2-100 does not apply to the Kidsave International Summer Miracles program. I offer no opinion on whether Kidsave may need to be licensed on some other basis.

BACKGROUND

You advise that Kidsave International ("Kidsave") operates a program called "Summer Miracles." In this program, orphans from other countries travel to the United States in the company of their legal guardians. These orphans stay with host families in the United States for approximately six weeks and return to their home countries at the end of the visit. You indicate that the Virginia Department of Social Services[1] imposes a number of requirements on the Summer Miracles program, including one

that Kidsave must manage the children as if they were part of the Virginia Foster Care program. You relate that Kidsave believes that the Department does not have the authority to impose such statutory requirements. It is my understanding that Kidsave does not have agreements or entrustments with any local boards of social services or child-placing agencies.

Finally, you note that some host families subsequently adopt the child that they have hosted; however, the adoption process is separate from the Summer Miracles program.

APPLICABLE LAW AND DISCUSSION

Section 63.2-100 defines the term "foster care placement" as the

> placement of a child through (i) an agreement between the parents or guardians and the local board or the public agency designated by the community policy and management team where legal custody remains with the parents or guardians or (ii) an entrustment or commitment of the child to the local board or licensed child-placing agency.

These children are already in a foster care placement in their native countries. Thus, it appears they are not entering foster care placement when they come to Virginia since they already have legal guardians. Based on the information you have provided, it does not appear that the children coming into Virginia as part of the Kidsave Summer Miracles program are placed in foster care.

While I conclude that children coming into Virginia as part of the Kidsave Summer Miracles program are not being placed in foster care, there may be other factors present, which would necessitate that the Department require Kidsave to be licensed as a child-placing agency. My opinion is limited solely to the issue of whether the children coming into Virginia as part of the Kidsave program are being placed in foster care. I offer no opinion on whether Kidsave may need to be licensed on some other basis.

CONCLUSION

Accordingly, it is my opinion that the definition of "foster care placement" in § 63.2-100 does not apply to the Kidsave International Summer Miracles program. I offer no opinion on whether Kidsave may need to be licensed on some other basis.

[1] *See* VA. CODE ANN. § 63.2-200 (LexisNexis Repl. Vol. 2002 (creating Department of Social Services).

Name Index

The Name Index consists of an alphabetical listing of individuals to whom opinions in this report are rendered and the corresponding opinion numbers. This index will be helpful in locating opinions that are cross-referenced in this report.

NAME	OP. NO.	PAGE
Bryant, Harvey L.	05-037	71
Byron, Kathy J.	05-023	62
Callahan, Vincent F. Jr.	05-038	35
Carraway, Barbara O.	05-003	137
Cox, M. Kirkland	04-094	44
Cuccinelli, Ken	05-069	103
Davis, Mark S.	05-055	88
Dowd, Melissa Ann	04-095	159
Ergenbright, Ray	05-021	147
Farthing, Scot S.	05-011	54
Flaherty, Colonel W. Steven	05-056	23
Frederick, Jeffrey M.	05-046	50
Green, Barry R.	05-068	75
Hancock, Greogory S.	05-025	127
Hannett, Gordon E.	05-040	9
Hart, H. Lee	04-087	13
Howell, William J.	05-006	166
Hurt, Robert	05-016	86
Jensen, Jean R.	05-050	97
Jett, Charles E.	05-026	124
Joyce, Robert N. Jr.	05-049	18
Kilgore, Terry G.	05-030, 05-064	114, 141
Landes, R. Steven	05-045	17
Lee, Michael W.	05-002	73
Lingamfelter, L. Scott	05-044	27
Louderback, Allen L.	05-024	95
Marrs, Bradley P.	04-093	59
Marshall, Danny W. III	04-090	91
McCabe, Robert J.	05-012	69
McMahon, Martin M.	05-057	117
Nebiker, Robert A.	05-029	3
O'Bannon, John M. III M.D.	05-061	42
Phillips, Clarence E. (Bud)	05-008	107
Pishko, Bernard A.	05-028	32
Shrader, J. Thompson	05-027, 05-073	152, 157
Stanaway, Robin P.	05-022	25
Steele, Phillip C.	05-047	112
Thompson, Henry A. Sr.	05-036	121
Valentine, Michael J.	05-013	79
Van Yahres, Mitchell	05-033, 04-083	84, 129
Webb, George S. III	05-017	145
Williams, Martin E.	05-070	164
Wolfe, Michael D.	05-065	82
Worthington, Judy L.	05-054	78

Statutory and Constitutional Provisions

and

Rules of Court

This index provides a numerical listing of statutory and constitutional provisions and rules of court cited in opinions within this report. Unless otherwise noted, opinions issued January through June cite Virginia law effective through the 2004 Session of the General Assembly, and opinions issued July through December cite Virginia law effective through the 2005 Session of the General Assembly.

ACTS OF ASSEMBLY

PAGE

Acts of 1926
Ch. 147 151

Acts of 1968
Ch. 479 ..... 16, 17

Acts of 1975
Ch. 495 13

Acts of 1985
Ch. 510 ..... 84, 88

Acts of 1987
Ch. 710 88

Acts of 1989
Ch. 500 111

Acts of 1992
Ch. 73 124

Acts of 1997
Ch. 587 49

Acts of 1998
Ch. 801 62
Ch. 872 84

Acts of 2000
Ch. 334 22
Ch. 787 13
Ch. 1070 13

Acts of 2001
Ch. 844 13

Acts of 2003
Ch. 272 151
Ch. 988 150

Acts of 2004
Ch. 736 150
Ch. 1000 62

Acts of 2005
Ch. 178 ..... 48, 49, 50
Ch. 732 ..... 23, 24
Ch. 951 18

CODE OF VIRGINIA

PAGE

Code of 1950
§ 1-200 106
Tit. 2.1, §§ 2.1-1 to 2.1-817 13
§ 2.1-118 127
§ 2.1-341 16
§ 2.1-342 16
§ 2.1-639.4(4) 8
§ 2.1-639.4(5) 8
Tit. 2.2, §§ 2.2-100 to 2.2-5803 13
§ 2.2-505 ....15, 127
§ 2.2-505(B) 114, 120, 156, 159
§ 2.2-2104 5
§ 2.2-2402(B) 96
§ 2.2-2802 ....10, 11, 12
§ 2.2-2813(B) 4, 5, 7
§§ 2.2-3100 to 2.2-3131 3
§ 2.2-3100 ....7, 8
§ 2.2-3101 ....5, 7, 8
§ 2.2-3103 ....5, 7, 8, 86
§ 2.2-3103(1) 3, 6, 7, 8
§ 2.2-3103(1), (3), (5)-(6) 3, 5, 7
§ 2.2-3103(3) 6
§ 2.2-3103(4) 8
§ 2.2-3103(5) 6, 8
§ 2.2-3103(6) 6
§ 2.2-3106(A) 3, 6, 7
§ 2.2-3106(A), (B) 7
§ 2.2-3112(A)(1) 3, 6, 7
§ 2.2-3112(A)(2)-(3) 8
§ 2.2-3112(A)(2)-(4) 8
Tit. 2.2, ch. 37, §§ 2.2-3700 to 2.2-3714 16
§§ 2.2-3700 to 2.2-3714 151
§ 2.2-3700(B) 15, 17
§ 2.2-3701 16
§ 2.2-3704 16
§§ 2.2-3800 to 2.2-3809 150
§ 2.2-3800(C)(9) 151
§ 2.2-3801 151
§ 2.2-3801(2) 148, 150
§ 2.2-3801(6) 151
§ 2.2-3803 148
§ 2.2-3803(A)-(B) 148, 151

CODE OF VIRGINIA

PAGE

§ 2.2-3808.2 150
§ 2.2-3808.3 150
§§ 2.2-4300 to 2.2-4377 3
Art. 6, §§ 2.2-4367 to 2.2-4377 ..... 6, 8, 9
§ 2.2-4367 9
§ 2.2-4368 8
§ 2.2-4369 ..... 5, 6, 8
§ 2.2-4369(3)-(4) 3, 7
§ 2.2-4370 9
§ 3.1-55 163
§ 6.1-363.24 107
§ 6.1-469 107
§§ 8.01-195.1 to 8.01-195.9 111
§ 8.01-195.2 25
§ 8.01-225 ..... 131, 136
§ 8.01-225(A)(1) 133
§ 8.01-225(A)(2) 136
§ 8.01-225(A)(6) 136
§ 8.01-225(A)(7) 136
§ 8.01-225(E)(1)-(2) 136
§ 8.01-225.01 ..... 133, 137
§ 8.01-225.01(A)-(D) 136
§ 8.01-335(B) 91
§ 8.01-389 22
§ 8.01-389(A) 19, 20
§ 8.01-389(D) 22
§ 8.01-390 ..... 20, 22
§ 8.01-391 ..... 19, 20, 21
§ 8.01-391(B) 20
§ 8.01-391(C), (F) 19
§ 8.01-410 ..... 90, 91
§ 8.01-607 91
§ 8.01-609 91
§ 8.01-614 91
§ 9.1-101 ..... 25, 26
Tit. 9.1, ch. 7, §§ 9.1-700 to 9.1-706 ..... 23, 24
§§ 9.1-700 to 9.1-704 ..... 23, 24
§ 9.1-700 ..... 23, 24
§ 9.1-701(A) 24
§ 9.1-702 24
§ 9.1-704(A) 24
§ 9.1-706 ..... 23, 24, 25

CODE OF VIRGINIA

PAGE

§ 9.1-1000 ..... 25, 26, 27
§ 10.1-1190 ..... 96, 97
§§ 10.1-2100 to 10.1-2115 62
§ 10.1-2116 62
§ 12.1-12 145
§ 15-10 141
Tit. 15.1, §§ 15.1-1 to 15.1-1705 49
§ 15.1-18.2(b)(5) 69
§ 15.1-163 151
§ 15.1-163(B) 151
§ 15.1-466(A)(4) 120
§ 15.1-466(A)(e) 120
§ 15.1-491 58
§ 15.1-493 58
§ 15.1-510 ..... 56, 58, 59
Tit. 15.2 ..... 43, 49, 55, 158
Tit. 15.2, §§ 15.2-100 to 15.2-6321 49
Tit. 15.2, ch. 5 52
§§ 15.2-500 to 15.2-541 53
§ 15.2-730 49
§§ 15.2-900 to 15.2-975 ..... 49, 86
Tit. 15.2, ch. 9, art. 1, §§ 15.2-900 to 15.2-926.2 52
§ 15.2-900 ..... 122, 123, 124
§ 15.2-901 49
§ 15.2-905 53
§ 15.2-905(A) 52
§ 15.2-905(B) 53
§ 15.2-929 58
§§ 15.2-1100 to 15.2-1132 ..... 49, 86
§ 15.2-1104 49
§§ 15.2-1200 to 15.2-1249 86
§ 15.2-1200 ..... 56, 57, 59, 122, 123
§ 15.2-1300 68
§ 15.2-1300(A) 122, 123, 124
§ 15.2-1425 49
§ 15.2-1427 51
§ 15.2-1427(F) 51
§ 15.2-1429 49
§ 15.2-1605.1 86
§ 15.2-1626 11
§ 15.2-1627(B) 86
§ 15.2-1809 111

CODE OF VIRGINIA

PAGE

§ 15.2-2200 58
§ 15.2-2204 56
§ 15.2-2209 49
Tit. 15.2, ch. 22, art. 6, §§ 15.2-2240 to 15.2-2279 119
§ 15.2-2241 ..... 119, 120
§ 15.2-2242 ..... 119, 120
§ 15.2-2242(A)(3) 119
§ 15.2-2252 52
§ 15.2-2270 54
§ 15.2-2271 54
§ 15.2-2272 54
Tit. 15.2, ch. 22, art. 7, §§ 15.2-2280 to 15.2-2316 55
§ 15.2-2280 ..... 55, 59
§ 15.2-2281 59
§ 15.2-2283 57
§ 15.2-2285 ..... 56, 58
§ 15.2-2285(A) 58
§ 15.2-2285(B) 58
§ 15.2-2285(C) 58
§ 15.2-2286 ..... 56, 58
§ 15.2-2286(A)(3) 56
§ 15.2-2286(A)(7) 58
§ 15.2-2307 ..... 60, 61, 62
Tit. 15.2, ch. 24, §§ 15.2-2400 to 15.2-2413 64
§ 15.2-2400 ..... 62, 64, 65, 68
§ 15.2-2402(1) 66, 67
§ 15.2-2402(1)-(4) 66
§ 15.2-2403 ..... 64, 69
§ 15.2-2403(1) 64, 69
§ 15.2-2403(6) 69
§ 15.2-2403(8) 69
§ 15.2-2404 ..... 66, 69
§ 15.2-2405 66
§ 15.2-3534 ..... 35, 41
§§ 15.2-5400 to 15.2-5431 ..... 162, 163
§ 15.2-5401 163
§ 15.2-5402 ..... 162, 163
§ 15.2-5423 ..... 160, 161, 162, 163
Tit. 16.1 72
§ 16.1-69.40 79
§ 16.1-69.48 141
§ 16.1-159 73

CODE OF VIRGINIA

PAGE

§ 16.1-228 94
§ 16.1-236.1 ..... 75, 77, 78
§ 16.1-236.1(A) 76
§ 16.1-242 ..... 72, 73
§ 16.1-243(1)(a) 74, 75
§ 16.1-243(B)(1) 75
§ 16.1-249(B) 70
§ 16.1-249(D) 70
§ 16.1-250 74
§ 16.1-250(A) 74
§ 16.1-250(G) 75
§ 16.1-272(A)(2) 70, 71
§ 16.1-278.8(A)(14) 73
§ 16.1-284 73
§ 16.1-291(A), (E) 72
§ 16.1-291(E) 73
Tit. 17.1, ch 1, §§ 17.1-100 to 17.1-131 79
§ 17.1-123(A) 79
§ 17.1-124 79
Tit. 17.1, ch. 2, §§ 17.1-200 to 17.1-291 79
§ 17.1-208 79
§ 17.1-213 79
§ 17.1-411 84
Tit. 17.1, ch. 5, §§ 17.1-500 to 17.1-524 79
§ 17.1-513.2 91
§ 17.1-606 84
Tit. 18.2 83
§ 18.2-57.2 ..... 79, 80, 81
§ 18.2-57.3 ..... 79, 80, 81
§ 18.2-96 19
§ 18.2-104 19
§ 18.2-251 81
§ 18.2-268.3 83
§ 18.2-268.3(D) 83
§ 18.2-268.4 83
§ 18.2-286 ..... 112, 113, 114
§ 18.2-308(B)(7) 27
§ 18.2-310 114
§ 18.2-371 94
Tit. 19.1, §§ 19.1-1 to 19.1-400 13
Tit. 19.2 82
Tit. 19.2, §§ 19.2-1 to 19.2-392 13

CODE OF VIRGINIA

PAGE

§ 19.2-18 ..... 125, 126
§ 19.2-19 126
§ 19.2-81 ..... 126, 147
Tit. 19.2, ch. 9, §§ 19.2-119 to 19.2-152.7 83
§ 19.2-124 ..... 82, 83
§ 19.2-156 ..... 10, 11, 12, 13
§ 19.2-163.01 86
§ 19.2-163.01(A)(13) 86
§ 19.2-163.01(B) 86
§ 19.2-163.04(t) 86
§ 19.2-163.3 86
§ 19.2-165 79
§ 19.2-187 22
§ 19.2-230 87
§ 19.2-266.2 ..... 87, 88
§ 19.2-303.2 81
Tit. 19.2, ch. 22 ..... 112, 114
Tit. 19.2, ch. 22, §§ 19.2-369 to 19.2-386 ..... 83, 113
§ 19.2-369 113
§ 19.2-380 114
Tit. 19.2, ch. 22.1, §§ 19.2-386.1 to 19.2-386.14 83
Tit. 19.2, ch. 22.2, §§ 19.2-386.15 to 19.2-386.31 83
§ 19.2-386.29 ..... 112, 113, 114
Tit. 19.2, ch. 23.1, §§ 19.2-392.1 to 19.2-392.4 83
§ 19.2-392.2 80
§ 19.2-392.2(G) 83
Tit. 19.2, ch. 25, § 19.2-398 84
§ 19.2-398 ..... 87, 88
§§ 19.2-399 to 19.2-409 88
§ 19.2-399 87
§§ 19.2-400 to 19.2-409 87
§ 20-96 90
§ 20-107.3 90
§ 22.1-3 ..... 45, 50
§ 22.1-3(1) 49
§ 22.1-5 ..... 46, 48, 49, 50
§ 22.1-5(A) 45, 49
§ 22.1-5(A)(2) 45
§ 22.1-5(A), (B), (D) 50
§ 22.1-5(B) 49
§ 22.1-5(C) 50
§§ 22.1-88 to 22.1-124 50

CODE OF VIRGINIA

PAGE

§ 22.1-88 50
§ 22.1-95 50
Tit. 22.1, ch. 14, art. 1, §§ 22.1-254 to 22.1-269.1 92
§ 22.1-254 ..... 92, 93
§ 22.1-254(A) 92
§ 22.1-254(B)(1) 94
§ 22.1-254(C)(2) 94
§ 22.1-254(G) 93
§ 22.1-254(H) 95
§ 22.1-258 ..... 92, 93, 94
§ 22.1-262 94
§ 22.1-264.1 ..... 48, 50
§ 22.1-267 95
§ 22.1-279.3 93
§ 22.1-279.3(D) 94
§ 22.1-279.3(G)(1)-(2) 95
Tit. 23, ch. 25, §§ 23-296 to 23-298 96
§ 23-296 ..... 96, 97
§ 23-298 96
§ 23-298(A)(7) 97
§ 23-298(A)(9) 97
Tit. 24 103
Tit. 24.1 103
Tit. 24.2 103
§ 24.2-103(A) 103
§ 24.2-226 13
§ 24.2-227 13
§ 24.2-228.1 ..... 11, 13
§ 24.2-228.1(B) 11
Tit. 24.2, ch. 7, §§ 24.2-700 to 24.2-713 103
§§ 24.2-701 to 24.2-705.2 100
§ 24.2-706 ..... 97, 98, 99, 100, 101, 102
§ 24.2-707 ..... 97, 98, 101
§§ 24.2-900 to 24.2-930 103
§ 24.2-900 106
§§ 24.2-914 to 24.2-928 106
§ 24.2-923(A) 105
§ 24.2-928 105
§ 24.2-928(A)-(B) 107
§ 24.2-929(A) 105, 107
§ 24.2-929(A)(4) 107
§§ 24.2-941 to 24.2-944 104

CODE OF VIRGINIA

PAGE

§ 24.2-941 106
§ 24.2-943 105
§ 24.2-943(C) 105, 107
§ 24.2-944 105
§ 24.2-944(G) 105, 107
§ 27-2.1 163
Tit. 29.1 114
§ 29.1-100 114
§ 29.1-509 ..... 107, 108, 110, 111
§ 29.1-509(A) 110, 111
§ 29.1-509(A)-(E) 108
§ 29.1-509(B) 111
§ 29.1-509(B), (C) 108, 110, 111, 112
§ 29.1-509(D) 110, 111, 112
§ 29.1-509(E) 108, 110, 111
§ 29.1-521.2 114
§ 29.1-521.2(A) 112, 113, 114
§ 29.1-524 113
Tit. 30, ch. 13, §§ 30-100 to 30-129 117
§ 30-100 117
§ 30-101 117
§ 30-103(5) 117
§ 30-103(6) 117
§ 30-105 116
§ 30-105(A)-(E) 115
§ 30-108 117
§ 30-149 88
§ 32.1-138.14 107
§ 33.1-72.1 ..... 117, 118, 119, 120
§ 33.1-72.1(A) 120
§ 33.1-72.1(B) 119
§ 33.1-72.1(B), (E) 118
§ 33.1-72.1(E), (F) 120
§ 36-55.37(3) 163
§§ 36-97 to 36-119.1 124
§ 36-105 ..... 123, 124
§ 36-105(A) 122, 123
§ 37.1-67.1 128
§ 37.1-67.1(A) 129
§ 37.1-67.1(B) 127, 129
§ 37.1-67.3 128
§ 37.1-67.3(A) 128

CODE OF VIRGINIA

PAGE

§ 37.1-67.3(G) 127, 128, 129
§ 37.1-67.3(H) 127, 128
§§ 44-146.13 to 44-146.28:1 136
§ 44-146.16 ..... 132, 133, 135, 136
§ 44-146.17 135
§ 44-146.21 135
§ 44-146.23(a) 131
§ 44-146.23(c) 131, 132, 133
§ 46.2-752(A) 138, 139, 141
§ 46.2-752(G) 139, 141
§ 46.2-752(J) 139, 141
Tit. 51.1 27
§ 51.1-156 27
§ 51.1-209 27
§ 51.1-210 27
§ 51.1-220 27
§ 51.1-308 27
§ 51.1-505(A) 27
§ 51.1-506 27
Tit. 51.1, ch. 11, §§ 51.1-1100 to 51.1-1140 26
§ 53.1-95.7(3) 126
§ 53.1-95.8 125
§ 53.1-98 125
§ 53.1-106(B)(4) 126
§ 53.1-109 125
§ 53.1-109.01 125
§ 53.1-221 89
§ 53.1-221(A) 89
§ 53.1-221(B) 89
§ 53.1-222 90
§ 53.1-223 90
§ 54.1-2400(2) 7
§ 55-226.2(E) 107
§ 56-6 145
§ 56-35 145
§ 56-235.8(G)(2) 107
§§ 56-265.1 to 56-265.9 145
§ 56-265.3 142
§ 56-265.4 142
§ 56-593(B)(1) 107
§ 58-16.2 163
§ 58-46 ..... 151, 152
§ 58-769.2 41

CODE OF VIRGINIA

PAGE

Tit. 58.1 ..... 33, 139, 158
§ 58.1-3 ..... 148, 149, 151, 152
§ 58.1-3(A) 150, 151
§ 58.1-3(A)(1), (3)-(4), (B), (D) 150
§ 58.1-3(A)(2) 149
§ 58.1-3(D) 150
§ 58.1-3(F) 152
§ 58.1-3.1 150
§ 58.1-202(10) 40, 41
§ 58.1-205(2) 156
§ 58.1-1820(2) 40
§ 58.1-1825 40
§ 58.1-2402 164
§ 58.1-2600 162
§ 58.1-2604 ..... 160, 162
§ 58.1-2606 162
Tit. 58.1, ch. 31, art. 1, §§ 58.1-3100 to 58.1-3122.2 158
§ 58.1-3201 ..... 38, 41
§§ 58.1-3210 to 58.1-3218 ..... 35, 41
§§ 58.1-3229 (not set out in Code) to 58.1-3244 ..... 35, 41
§ 58.1-3253 41
§ 58.1-3270 41
§ 58.1-3321 33
§ 58.1-3370 41
§ 58.1-3371 41
§ 58.1-3373 41
§ 58.1-3379(A) 41
§ 58.1-3379(C) 41
§ 58.1-3400 ..... 160, 161, 162, 163
§ 58.1-3401(C) 163
Tit. 58.1, ch. 37 153
Tit. 58.1, ch. 37, §§ 58.1-3700 to 58.1-3735 152
§ 58.1-3701 154
§ 58.1-3703.1(A)(1) 156
§ 58.1-3705 153
§ 58.1-3706(A) 153, 154, 155, 156
§ 58.1-3840(d) 140
§ 58.1-3921 139
§ 58.1-3921(3) 141
§ 58.1-3921(4)-(5) 141
§ 58.1-3933 140
§ 58.1-3934 150
§ 58.1-3940 140

CODE OF VIRGINIA

PAGE

§ 58.1-3940(A) 140, 141
§ 58.1-3940(B) 141
§ 58.1-3940(C) 141
§ 58.1-3980(A) 41
§ 58.1-3981 41
§ 58.1-3984(A) 41
§ 58.1-3984(B) 41
Tit. 59.1, ch. 17, §§ 59.1-196 to 59.1-207 164
§ 59.1-198 164
§ 59.1-200(A)(8) 164, 165
§ 59.1-200(A)(14) 164, 165
§ 62.1-44.22 107
§ 63.2-100 ..... 166, 167
§ 63.2-200 167
§ 65.2-101 137

CONSTITUTION OF VIRGINIA

Constitution of 1902

Art. XIII, § 168 ..... 35, 401
Art. XIII, § 169 ..... 35, 40

Constitution of 1971

Art. I, § 16 28
Art. II, § 5(c) 115
Art. VI, § 1 88
Art. VII, § 2 ..... 47, 50
Art. VII, § 3 49
Art. VII, § 4 ..... 13, 16, 78, 158, 159
Art. VIII, § 1 45
Art. VIII, § 2 ..... 45, 48
Art. VIII, § 7 45
Art. IX, § 2 ..... 142, 145
Art. IX, § 3 145
Art. IX, § 4 145
Art. X 35, 40
Art. X, § 1 ..... 32, 33, 37, 69, 161
Art. X, § 2 ..... 33, 36, 37
Art. X, §§ 1, 2 ..... 33, 35, 37, 40
Art. X, §§ 1, 2, 6(b) 35, 40
Art. X, § 6(a) 161
Art. X, § 6(b) 33, 37
Art. X, § 6(b), (d)-(e) 161
Art. X, § 6(d) 163

CONSTITUTION OF VIRGINIA

PAGE

Art. X, § 6(f) 161, 163
Art. X, § 6(g) 161
Art. X, § 6(j) 163

Rules of Supreme Court of Virginia

Va. Sup. Ct. R. 3A:4 147
Va. Sup. Ct. R. 3A:4(c) 146, 147
Va. Sup. Ct. R. 3A:4(d)(2) 146, 147
Va. Sup. Ct. R. 3A:7(b) 146
Va. Sup. Ct. R. pt. 8, R. 8:14(d) 82

Subject Index

The Subject Index consists of an alphabetical listing of main and secondary headnotes that are associated with the opinions included in this report. The headnotes are primarily derived from the Titles (topical), Chapters and Articles (descriptive) contained within the *Code of Virginia* that correspond with the particular laws about which opinions have been rendered.

ADMINISTRATION OF GOVERNMENT **PAGE**

Data Collection & Dissemination. Design, establishment, and maintenance of secure data processing system containing confidential taxpayer information primarily is question of fact for local commissioner of revenue; commissioner should balance administrative discretion with statute governing secrecy of certain information obtained in performance of his duties and Government Data Collection and Dissemination Practices Act. Information contained on and access to such system is subject to secrecy. Design and construction of system without access to confidential data is not necessarily subject to secrecy provisions that prohibit commissioner from divulging certain information 147

Government Data Collection and Dissemination Practices Act does not specify methods for compliance for administration of systems including personal information, but leaves methods to discretion of 'agency' 147

Locality may design, build, and maintain data system; locality personnel that are not employed by commissioner of revenue may not enter or access such information unless there is specific statutory exemption 147

Department of Law – General provisions (official opinions of Attorney General). Attorney General declines to render official opinions when request requires interpretation of matter reserved to another entity 141

Attorney General declines to render opinions that involve determinations of fact rather than questions of law 59

Attorney[s] General defers [defer] to interpretation of law by agency changed with administering law, unless agency interpretation is clearly wrong 117, 141, 152

Attorney General consistently has deferred to interpretation of tax laws by Tax Commissioner 152

Attorney General's construction of Constitution and statutes is [of most] persuasive [character] and [is] entitled to [considerable weight] due consideration 13

Attorneys General decline to render opinions interpreting local ordinances..... 137

Attorneys General have concluded that § 2.2-505 does not contemplate that opinions be rendered on matters requiring factual determinations, rather than matters interpreting questions of law 124

Whether Corps volunteers are agents of Commonwealth for purposes of sovereign immunity and workers' compensation protection is factual determination 129

State agency is entity that serves as subordinate or auxiliary body to fulfill state purpose, is dependant upon state appropriations, and is subject to state control to great degree 95

ADMINISTRATION OF GOVERNMENT **PAGE**

State and Local Government Conflict of Interests Act. Act applies to state and local government officers and employees 3

Act restricts private financial activities of officers of state governmental agencies when there is close relationship between officers' private financial activities and official duties 3

No violation of Conflict Act or Procurement Act for member of health regulatory board to vote for his board to contract with organization that administers licensure examinations; no violation to vote for board to become member of such organization, provided any reimbursement of allowable expenses to board member is consistent with Conflict Act. Violation of Conflict Act and Procurement Act for board member to vote to contract with or to join organization where there is existing arrangement that organization will employ board member subsequent to his board service or for board member to accept payment of monies in excess of allowable per diem payments and travel reimbursement allowances 3

Reimbursement in excess of statutory per diem would be considered accepting money or other thing of value for services performed 3

State Authorities, Boards. Commissions, Councils, Foundations and Other Collegial Bodies — General Provisions. Reimbursement of allowable expenses incurred by board members must be limited to per diem payments established by statutes and to travel expenses allowable under state law and travel regulations..... 3

State Officers and Employees – General Provisions. Absent notice required by § 2.2-2802, vacancy in office does not arise, and body authorized by law to fill vacancies in such office may not appoint temporary replacement 9

Commonwealth's attorney is not required to relinquish his office when involuntarily recalled to active military duty. Commonwealth's attorney has sole discretion to appoint assistant to perform duties of his office during such absence. Should Commonwealth's attorney resign and circuit court appoint acting Commonwealth's attorney, such attorney may act in place of and otherwise perform duties and exercise powers of regular Commonwealth's attorney 9

No violation of Conflict Act or Procurement Act for member of health regulatory board to vote for his board to contract with organization that administers licensure examinations; no violation to vote for board to become member of such organization, provided any reimbursement of allowable expenses to board member is consistent with Conflict Act. Violation of Conflict Act and Procurement Act for board member to vote to contract with or to join organization where there is existing arrangement that organization will employ board member subsequent to his board service or for board member to accept payment of monies in excess of allowable per diem payments and travel reimbursement allowances 3

ADMINISTRATION OF GOVERNMENT **PAGE**

Reimbursement of allowable expenses incurred by board members must be limited to per diem payments established by statutes and to travel expenses allowable under state law and travel regulations 3

Virginia Freedom of Information Act. Act does not require tax officials to reveal information whose disclosure is prohibited by § 58.1-3 147

Act is to liberally construed, which promotes citizen awareness of government's activities and allows citizens to witness governmental operations; Act specifically requires that exemptions be strictly construed 13

All official records are subject to disclosure unless they are specifically exempted.. 13

Disclosure requirements of Act generally are superceded by secrecy provisions of § 58.1-3 147

Finance office of Culpeper County is public body subject to disclosure requirements of Act 13

Information disclosed should not exceed that which is necessary; determination of extent or format of disclosure depends on particular facts and circumstances..... 147

Names and identities of individual donors making voluntary donations to sheriff's office may not be kept confidential and must be disclosed to citizens of Commonwealth and Commonwealth's attorney 13

Purpose of Act is to promote public policy of conducting business of government in public eye 13

Records kept by sheriff's office in transaction of public business would constitute official records subject to disclosure unless specifically exempted by Act 13

Sheriff's office is public body subject to disclosure requirements of Act 13

Special fund accounts are official records of sheriff's office subject to public disclosure requirements of Act 13

Virginia Public Procurement Act – Ethics in Public Contracting. No violation of Conflict Act or Procurement Act for member of health regulatory board to vote for his board to contract with organization that administers licensure examinations; no violation to vote for board to become member of such organization, provided any reimbursement of allowable expenses to board member is consistent with Conflict Act. Violation of Conflict Act and Procurement Act for board member to vote to contract with or to join organization where there is existing arrangement that organization will employ board member subsequent to his board service or for board member to accept payment of monies in excess of allowable per diem payments and travel reimbursement allowances 3

2005 APPROPRIATION ACT **PAGE**

Department of Housing and Community Development. 2005 Appropriation Act requires that existing Artisans Center of Virginia participate in development of Shenandoah Valley regional art center to extent Center is willing to participate ... 17

Requirement that Artisans Center of Virginia participate in development of regional art center may not be imposed upon Center because it is private non-profit entity ... 17

CIVIL REMEDIES AND PROCEDURE

Actions – Miscellaneous Provisions. Good Samaritan law applies regardless of whether emergency is declared; immunity applies only to specific assistance listed ... 129

When volunteer complies with requirements of Good Samaritan law and Volunteer Protection Act of 1997, liability protection associated with those laws would apply prior to gubernatorial declaration of emergency ... 129

Actions – Tort Claims Against the Commonwealth of Virginia. Liability of Commonwealth or its agencies is limited by Virginia Tort Claims Act ... 107

Evidence – Compelling Attendance of Witnesses, etc. Any party to civil action in any circuit court may take deposition of inmate, which may be admissible in evidence ... 88

Authority of court to order transportation of convict or prisoner in correctional or penal institution to appear as witness in civil action also applies to inmates who initiate civil proceedings ... 88

Evidence – Laws, Public Records, and Copies of Original Records as Evidence. Authenticated copies of judicial records are admissible into evidence; copy of authenticated copy is not sufficient ... 18

Authentication is merely process of showing that document is genuine ... 18

Authentication is prerequisite to admission of copy because, without authentication, court would have no means to judge its genuineness ... 18

Copy of authenticated document does not contain original certificates of attestation and does not provide evidentiary basis sufficient to support finding that it is what is claimed ... 18

Documents introduced into evidence are not admissible where nothing shows that certifying officer was document's custodian ... 18

Strict compliance standard applied to authentication of documents as evidence 18

Writing may not be admitted into evidence until requirements for authenticating record have been met ... 18

Written attestation by court clerk that document was certified copy of court record was sufficient to authenticate and certify document ... 18

CIVIL REMEDIES AND PROCEDURE **PAGE**

General Provisions as to Civil Cases. Convicts are not civilly dead in Virginia..... 88

Even when court determines that prisoner should not personally appear in civil case, Commonwealth may not preclude prisoner from asserting civil claim 88

Modern view is that prisoners, after judgments of conviction and while incarcerated, have right to bring civil actions 88

CLERKS
(*See also* COURTS OF RECORD: Circuit Courts — Clerks, Clerks' Offices and Records)

Appeal of determination of bond from general district court to circuit court is civil in nature; fees and costs for appeal should be calculated, taxed, and collected as civil proceeding..... 82

Although it is longstanding practice of clerks to assist circuit courts in preparation of sketch orders, no statute compels this practice 78

Circuit court clerk required to preserve recording or transcripts of criminal trials 78

Circuit court clerk's statutory duties do not extend to preparation of sketch orders in criminal cases..... 78

Comprehensive list of statutory duties placed upon circuit court clerks demonstrates that when General Assembly intends to require clerks' offices to perform task, it knows how to express its intention 78

COMMISSIONERS OF THE REVENUE

Although determination of whether or not to compile and present certain data is within discretion of commissioner, once prepared, it is subject to requirements of statute 147

Constitutional officers are subject to Dillon Rule and possess only powers conferred upon them by statute 157

Commissioner of revenue may not enter into agreement with commissioner of revenue in adjacent locality to change taxing jurisdiction of landowner's property from one locality to other locality; any such agreement is void 157

Design, establishment, and maintenance of secure data processing system containing confidential taxpayer information primarily is question of fact for local commissioner of revenue; commissioner should balance administrative discretion with statute governing secrecy of certain information obtained in performance of his duties and Government Data Collection and Dissemination Practices Act. Information contained on and access to such system is subject to secrecy. Design and construction of system without access to confidential data is not necessarily subject to secrecy provisions that prohibit commissioner from divulging certain information.....147

COMMISSIONERS OF THE REVENUE **PAGE**

Fact that lands of one or few taxpayers are assessed at differing percentages of fair market value is not, *per se*, violation of legal requirements; redress may be had at locality's board of equalization, from commissioner of revenue, or by judicial appeal. Material, systematic, and intentional discrimination against individual taxpayers or group of taxpayers may violate Virginia and federal constitutional requirements 35

Information disclosed should not exceed that which is necessary; determination of extent or format of disclosure depends on particular facts and circumstances.....147

To extent that unrestricted access to commissioner's confidential date is problem, commissioner should examine what arrangements can be made to provide appropriate security for computer data files maintained by his office 147

COMMONWEALTH OF VIRGINIA EMERGENCY SERVICES AND DISASTER LAW OF 2000
(*See* MILITARY AND EMERGENCY LAWS – Emergency Services and Disaster Law)

COMMONWEATLH PUBLIC SAFETY

Department Of Criminal Justice Services – General Provisions. Retired law-enforcement officer may compel employing department or agency to issue photo identification card.....25

Retired law-enforcement officer, whether retired for service or disability, may request photo identification card from employing department or agency; no authority for department or agency to specify type of retirement 25

Overtime Compensation for Law Enforcement, etc. Amendments imposed by Chapter 732 of 2005 Acts of Assembly do not impact Department of State Police or other state law-enforcement agencies; § 9.1-706 continues to preserve sovereign immunity of Commonwealth and its agencies.....23

Any claim for money damages brought by individuals against Commonwealth or its agencies without its consent is barred.....23

Since Commonwealth and its agencies fall outside of definition of employer, they cannot be bound by provisions 23

Retired Law Enforcement Identification. Department or agency issuing photo identification card may combine that card with proof that retired law-enforcement officer may carry concealed handgun 25

Retired law-enforcement officer may compel employing department or agency to issue photo identification card 25

Retired law-enforcement officer, whether retired for service or disability, may request photo identification card from employing department or agency; no authority for department or agency to specify type of retirement 25

COMMONWEALTH'S ATTORNEYS **PAGE**

As constitutional officer, Commonwealth's attorney solely is responsible for employing assistant Commonwealth's attorneys 9

Authenticated copies of judicial records are admissible into evidence; copy of authenticated copy is not sufficient 18

Authority for officer to execute misdemeanor capias, not in his possession, provided that officer informs accused of existence of, and charges contained in, capias and delivers same to accused as soon as practicable 145

Campaign Finance Disclosure Act and Disclosure Requirements for Political Campaign Advertisements place duty for enforcement on State Board of Elections, general registrars and local electoral boards, and, in some cases, enforcement with assistance of appropriate Commonwealth's attorney 103

Commonwealth's attorney is constitutional officer and Compensation Board must authorize employment of assistant Commonwealth's attorneys 9

Commonwealth's attorney is not required to relinquish his office when involuntarily recalled to active military duty. Commonwealth's attorney has sole discretion to appoint assistant to perform duties of his office during such absence. Should Commonwealth's attorney resign and circuit court appoint acting Commonwealth's attorney, such attorney may act in place of and otherwise perform duties and exercise powers of regular Commonwealth's attorney 9

Game laws establish procedure used to forfeit firearm used by person convicted of shooting firearm in or across road or street. Court convicting such violator may declare forfeiture of firearm used in crime. Commonwealth's attorney of county or city wherein forfeiture was incurred must file an information to enforce forfeiture in his circuit court 112

No authority for locality to supplement salaries of public defender or his staff 84

No statute prevents Commonwealth's attorney from overseeing and managing office via use of Internet, electronic mail, or long distance telephone calls 9

Proper venue for juvenile detention hearing is place where proceeding has been commenced 73

CONFLICT OF INTERESTS ACT, STATE AND LOCAL GOVERNMENT
(*See* ADMINISTRATION OF GOVERNMENT)

CONSERVATION

Chesapeake Bay Preservation Act. Landowner who has secured rezoning of properties for specific use before effective date of subsequent amendment to zoning ordinance and has pursued project committing and expending significant resources has obtained vested right; whether landowner incurs extensive obligations or substantial expenses is factual determination for county, subject to review by courts. Amendments to existing Act zoning ordinance only affect landowner after amendments are adopted by local ordinance 59

CONSTITUTION OF THE UNITED STATES **PAGE**

Amendment I. Amendment embodies fundamental restraints on power of government....27

Amendment I (Establishment Clause). Clause does not prohibit students from organizing privately sponsored baccalaureate service off school grounds.....27

Amendment I (Freedom of Speech Clause). Fairfax County Public Schools instruction prohibiting principals and other staff members from speaking at private baccalaureate events as private citizens violates First Amendment rights of free speech.....27

No constitutional requirement for separation of church and state.....27

Public bodies must distinguish between speech made in capacity as public employee and speech made in capacity as private citizen.....27

Religious expression is form of free speech protected by First Amendment.....27

Amendment IV. Absent good cause, motions seeking to suppress evidence based on violations of Fourth, Fifth, and Sixth Amendments must be made in writing.....86

Amendment V. Absent good cause, motions seeking to suppress evidence based on violations of Fourth, Fifth, and Sixth Amendments must be made in writing.....86

Amendment VI. Absent good cause, motions seeking to suppress evidence based on violations of Fourth, Fifth, and Sixth Amendments must be made in writing.....86

Amendment XIV. Amendment applies restraints of First Amendment not only to laws of Congress, but to policies, practices, and decisions of state and local government.....27

Amendment XIV (Equal Protection Clause). Fact that lands of one or few taxpayers are assessed at differing percentages of fair market value is not, *per se*, violation of legal requirements; redress may be had at locality's board of equalization, from commissioner of revenue, or by judicial appeal. Material, systematic, and intentional discrimination against individual taxpayers or group of taxpayers may violate Virginia and federal constitutional requirements.....35

Taxpayer whose property is assessed at true market value has right to have assessment reduced to percentage of that value at which others are taxed to meet uniformity requirement of Virginia Constitution and Equal Protection Clause of United States Constitution.....35

Article VI (Supremacy Clause). Even if Congress does not intend enactment of federal statutory scheme to preempt state law in area, congressional enactments in same field override state laws with which they conflict.....97

Federal law preempts or supplants conflicting state law either by express statutory language or other clear indication that Congress intended to legislate exclusively in area.....97

Supremacy Clause (*see supra* Article VI)

CONSTITUTION OF VIRGINIA **PAGE**

Bill of Rights (freedom of speech). Fairfax County Public Schools instruction prohibiting principals and other staff members from speaking at private baccalaureate events as private citizens violates First Amendment rights of free speech 27

Guarantees free exercise of religion 27

Constitution of Virginia endows General Assembly ultimate authority over local governing bodies, including power to give local governing bodies authority to enact specific ordinances. General Assembly has authority to empower local governing body to impose civil penalty or enact ordinance against nonresident students to recover cost of educating such student 44

Constitution provides in mandatory terms that legislature shall establish and maintain public free schools; there is neither mandate nor inhibition in provisions regarding regulation thereof. Legislature, therefore, has power to enact any legislation regarding conduct, control, and regulation of free public schools 44

Corporations (Powers and duties of State Corporation Commission). Constitution grants broad powers and authority to Commission 141

Whether electric utility customer located in service territory of electric utility may obtain service from another electric utility through metering point in adjacent service territory is determination for Commission 141

Local Government (county and city officers). As general rule, duties of local constitutional officers and their deputies are regulated and defined by statute 9

Commissioner of revenue may not enter into agreement with commissioner of revenue in adjacent locality to change taxing jurisdiction of landowner's property from one locality to other locality; any such agreement is void 157

Commissioners of revenue, as constitutional officers, are vested with authority and power to administer operations of their offices in manner and to extent then, in their discretion, see fit 147

Commonwealth's attorney is not required to relinquish his office when involuntarily recalled to active military duty. Commonwealth's attorney has sole discretion to appoint assistant to perform duties of his office during such absence. Should Commonwealth's attorney resign and circuit court appoint acting Commonwealth's attorney, such attorney may act in place of and otherwise perform duties and exercise powers of regular Commonwealth's attorney 9

Constitutional officers, such as commissioners of revenue, are subject to Dillon Rule and possess only powers conferred upon them by statute 157

Sheriff is constitutional officer whose duties shall be prescribed by general law or special act 13

No requirement that copy of county ordinances be filed with clerk of circuit court 50

CONSTITUTION OF VIRGINIA **PAGE**

Taxation and Finance. Commonwealth's policy is to distribute tax burden uniformly on all property 159

Taxation and Finance (assessments). Fact that lands of one or few taxpayers are assessed at differing percentages of fair market value is not, *per se*, violation of legal requirements; redress may be had at locality's board of equalization, from commissioner of revenue, or by judicial appeal. Material, systematic, and intentional discrimination against individual taxpayers or group of taxpayers may violate Virginia and federal constitutional requirements 35

Sections governing uniformity of taxation and assessment must be construed together; distributes burden of taxation, so far as practical, evenly and equitably 32, 35

Violation of uniformity of taxation provision of Constitution of Virginia for locality to impose progressive tax rate on residential real estate based upon assessed value....32, 35

Where it is impossible to secure both standard of true value and uniformity and equality, latter requirement is to be preferred as just and ultimate purpose of law; uniformity is viewed as paramount objective of taxation of property 32, 35

Taxation and Finance (exempt property). Constitution recognizes that localities may need to provide certain governmental services to tax-exempt properties .. 159

Exemptions of property from taxation are to be strictly construed, unless property was tax-exempt prior to adoption of present Constitution..... 159

Rule of strict construction applies prospectively to exemptions established or authorized by 1971 Constitution..... 159

Tax exemptions are strictly construed; where there is any doubt, doubt is resolved against exception..... 159

Taxation and Finance (uniformity of taxation). Fact that lands of one or few taxpayers are assessed at differing percentages of fair market value is not, *per se*, violation of legal requirements; redress may be had at locality's board of equalization, from commissioner of revenue, or by judicial appeal. Material, systematic, and intentional discrimination against individual taxpayers or group of taxpayers may violate Virginia and federal constitutional requirements 35

Locality must impose single uniform rate of taxation on residential property within its borders.....32, 35

Property owners are entitled to have same yardstick which measured market value of other properties applied to their property 35

Sections governing uniformity of taxation and assessment must be construed together; distributes burden of taxation, so far as practical, evenly and equitably 32, 35

CONSTITUTION OF VIRGINIA **PAGE**

Taxpayer whose property is assessed at true market value has right to have assessment reduced to percentage of that value at which others are taxed to meet uniformity requirement of Virginia Constitution and Equal Protection Clause of United States Constitution 35

Violation of uniformity of taxation provision of Constitution of Virginia for locality to impose progressive tax rate on residential real estate based upon assessed value 32, 35

Where it is impossible to secure both standard of true value and uniformity and equality, latter requirement is to be preferred as just and ultimate purpose of law; uniformity is viewed as paramount objective of taxation of property 32, 35

CONSUMER PROTECTION ACT OF 1977, VIRGINIA
(*See* Trade and Commerce — Virginia Consumer Protection Act)

COUNTIES, CITIES AND TOWNS

Dillon Rule. Any doubt as to existence of power must be resolved against locality.....44, 157

Commonwealth follows rule of strict construction of determination of powers of local governing bodies 62

Commonwealth follows strict construction of statutory provisions and its corollary that powers of county boards of supervisors are fixed by statute and are limited to those powers conferred expressly or by necessary implication 54

Corollary rule is that authority and powers of county boards of supervisors are fixed by statute and are limited to those conferred expressly or by necessary implication 50, 62

Local governing bodies [municipal corporations] have only those powers [that are] expressly granted, those [that are] necessarily or fairly implied [there]from expressly granted powers, and those [that are] essential and indispensable 44, 50, 54, 62, 157

Local governments possess [and can exercise] only those powers conferred upon them [expressly granted] by General Assembly[, those necessarily or fairly implied therefrom, and those that are essential and indispensable] 84, 157

Localities and other political subdivisions have only those powers expressly granted to them by statute and those necessarily implied from their expressly granted powers.....42

Powers of local government are fixed by statute and are limited to those conferred expressly or by necessary implication.....157

Rule is applicable to determine [in first instance], from express words or by implication, whether power exists at all. If power cannot be found, inquiry is at an end 44, 50, 54, 62, 84

There are occasions when mechanical application of Rule is inappropriate 42

COUNTIES, CITIES AND TOWNS **PAGE**

Electric Authorities Act. No authority for county to receive payment of service fee in lieu of property and other taxes unless entity is tax-exempt. County may only negotiate arrangement pursuant to Electric Authorities Act for defined 'authority.' No authority for county to arrange continuous stream of payments in lieu of local taxes from commercial entity; no arrangement for General Assembly to modify or abrogate 159

General Powers and Procedures of Counties. General authority granted counties to regulate traditional aspects of public health and safety is broadly construed; broad construction is particularly appropriate when ordinance relates to power expressly recognized 54

No authority for locality to pass site ordinance restricting or requiring specific requirements of undesirable industries or businesses before locating within locality. Adoption of zoning ordinance is only method for locality to generally control location of such industries or businesses. General police power of county does not solely authorize board of supervisors to pass site ordinance in conjunction with distance requirement from water source 54

No authority for locality to supplement salaries of public defender or his staff..... 84

General Powers and Procedures of Counties – Miscellaneous Powers. Authority for county to enforce Uniform Statewide Building Code in any town located within county with population of less than 3,500, provided that town has not elected, or contracted with another authorized governmental entity, to enforce Code. County may bring suit against public nuisance located anywhere within county, including any town 121

Incorporated town continues to be integral part of county, subject to jurisdiction of county authorities and to taxation for general county purposes 121

General Powers of Local Governments. General Assembly envisions symbiotic relationship between school board and city, whereby school board manages and maintains school system and city provides requisite local funding 44

Local government and local school board are separate and distinct governmental agencies of Commonwealth 44

No authority for locality to supplement salaries of public defender or his staff.. 84

Unrealistic, inefficient, and unnecessary to require General Assembly to define every aspect of each mechanism available to local government to carry out powers granted to it 42

When locality exercises implied power, that exercise must be reasonable and consistent with legislative intent and may not unduly burden any constitutional right 42

COUNTIES, CITIES AND TOWNS **PAGE**

General Powers of Local Government – Miscellaneous Powers. Powers of county boards of supervisors are fixed by statute and are limited to those powers conferred expressly or by necessary implication 50

General Powers of Local Governments – Public Health and Safety, Nuisances. Authority for county to enforce Uniform Statewide Building Code in any town located within county with population of less than 3,500, provided that town has not elected, or contracted with another authorized governmental entity, to enforce Code. County may bring suit against public nuisance located anywhere within county, including any town 121

Incorporated town continues to be integral part of county, subject to jurisdiction of county authorities and to taxation for general county purposes 121

No requirement for county with county executive form of government to file ordinances with clerk of circuit court; no violation of Constitution of Virginia for failure to file. Citizen must receive notice before such county may remove objects causing nuisance 50

Governing Bodies of Localities – Ordinances and Other Actions by the Local Governing Body. No requirement for county with county executive form of government to file ordinances with clerk of circuit court; no violation of Constitution of Virginia for failure to file. Citizen must receive notice before such county may remove objects causing nuisance 50

Joint Actions by Localities – Joint Exercise of Power. Authority for county to enforce Uniform Statewide Building Code in any town located within county with population of less than 3,500, provided that town has not elected, or contracted with another authorized governmental entity, to enforce Code. County may bring suit against public nuisance located anywhere within county, including any town 121

Incorporated town continues to be integral part of county, subject to jurisdiction of county authorities and to taxation for general county purposes 121

Local Constitutional Officers, etc. Commonwealth's attorney is not required to relinquish his office when involuntarily recalled to active military duty. Commonwealth's attorney has sole discretion to appoint assistant to perform duties of his office during such absence. Should Commonwealth's attorney resign and circuit court appoint acting Commonwealth's attorney, such attorney may act in place of and otherwise perform duties and exercise powers of regular Commonwealth's attorney 9

While powers and duties of constitutional officer are those proscribed by statute, except as limited by law, constitutional officer is free to discharge his prescribed powers and duties in manner he deems appropriate 13

COUNTIES, CITIES AND TOWNS **PAGE**

Local Constitutional Officers, etc. – Sheriff. Sheriff is constitutional officer whose duties shall be prescribed by general law or special act 13

Sheriff may raise funds and accept donations for law enforcement operations to be undertaken by his office 13

No principle of law prevents or inhibits local government employer from assisting with purchase program offered by Dell, Inc., to local government employees 42

Planning, Subdivision of Land and Zoning – Land Subdivision and Development. Authority for Department of Transportation to prohibit county from participating in rural addition program when county's subdivision ordinance does not require that all subdivision streets meet standards that qualify roads for acceptance into secondary system of state highways 117

Authority for localities to permit private streets in subdivisions and to prescribe standards for their construction..... 117

Locality may effectively prohibit private streets in subdivisions by imposing mandatory dedication requirements and requiring that construction conform to Department of Transportation secondary highway standards..... 117

No requirement for county with county executive form of government to file ordinances with clerk of circuit court; no violation of Constitution of Virginia for failure to file. Citizen must receive notice before such county may remove objects causing nuisance 50

Political subdivision may be considered state agency for limited purposes..... 107

Powers of Cities and Towns. General Assembly envisions symbiotic relationship between school board and city, whereby school board manages and maintains school system and city provides requisite local funding 44

No authority for locality to supplement salaries of public defender or his staff..... 84

No authority for municipality, city, or town to enact ordinance imposing civil or criminal penalty against parent for providing false residential information to enroll child in local school system and requiring parent to pay tuition or educational costs for such child. General Assembly may enact such enabling authority for municipality, city, or town. Authority for local school system to adopt policy holding parent liable for tuition or educational costs for nonresident child 44

Power of municipality must be exercised pursuant to express grant..... 44

Planning, Subdivision of Land and Zoning. In land use statutes, General Assembly has undertaken to achieve delicate balance between individual property rights of its citizens and health, safety, and general welfare of public as promoted by reasonable restrictions on such rights 54

COUNTIES, CITIES AND TOWNS **PAGE**

No authority for locality to pass site ordinance restricting or requiring specific requirements of undesirable industries or businesses before locating within locality. Adoption of zoning ordinance is only method for locality to generally control location of such industries or businesses. General police power of county does not solely authorize board of supervisors to pass site ordinance in conjunction with distance requirement from water source 54

To enact zoning ordinance or adopt amendment to ordinance, locality must: initiate proposal by adopting written resolution stating underlying purpose; refer proposal to local planning commission for review; and commission must give public notice, conduct public hearing, and report recommendations to governing body 54

Zoning is valid exercise of police power of Commonwealth 54

Planning, Subdivision of Land and Zoning – Zoning. Fact that changes in ordinance are pending or contemplated by legislative body, which may preclude certain activities, does not undermine landowner's good faith reliance on significant governmental act 59

Landowner benefiting from significant governmental act must also rely in good faith on that act 59

Landowner generally has no property right in anticipated use of land because owner has no vested property rights in continuation of parcel's zoning status ... 59

Landowner who has secured rezoning of properties for specific use before effective date of subsequent amendment to zoning ordinance and has pursued project committing and expending significant resources has obtained vested right; whether landowner incurs extensive obligations or substantial expenses is factual determination for county, subject to review by courts. Amendments to existing Chesapeake Bay Preservation Act zoning ordinance only affect landowner after amendments are adopted by local ordinance 59

Under common law, rezoning of property may not have been deemed significant government act for purposes of vesting; under amended vesting statute, rezoning of property for specific use or density satisfies one of criteria to prove vesting 59

Whether landowner incurs extensive obligations or substantial expenses is factual determination for county, subject to review by courts 59

Police Power. In exercise of local government police power, court has held that locality may: require municipal permit for purchase of handguns; regulate smoking in public areas; regulate topless dancing; regulate operation of massage salons; regulate use of 'common towels'; prohibit lotteries and numbers games; restrict keeping of vicious dogs; and regulate or prohibit operation of pool rooms 54

Ordinance enacted under general police power bear real and substantial relationship to health, safety, or general welfare of city's inhabitants 54

COUNTIES, CITIES AND TOWNS **PAGE**

Police Power (contd.)

Ordinance must have clear, reasonable and substantial relation to public health, safety, morals, or welfare, and must be reasonably appropriate for police power objective sought to be obtained 54

Police power of locality constitutes general, not complete, grant of police power of Commonwealth to localities 54

Regardless of how legitimate purpose underlying exercise of police power is, power may not be used to regulate property interests unless means employed are reasonable suited to achieve stated goal 54

Zoning is valid exercise of police power of Commonwealth 54

Taxes & Assessments for Local Improvements – Service Districts. Assessments for local improvements are based on maxim that person receiving benefit should bear burden apportionately 62

Authority for local governing bodies to create service district to construct, maintain, and operate facilities and equipment required to, and to employ and fix compensation of technical, clerical, or other force to, test water, remove debris, control weeds, and maintain navigational aids on Smith Mountain Lake. No authority for board of supervisors of one county to adopt ordinance to form service district that encompasses portion of other counties. Properties within service district may be assessed fixed dollar amount for local improvements; such assessments may not be in excess of peculiar benefits resulting from improvements to owner's property within district. Service district may not be loosely described and must have well-defined geographical boundary, not general description. Local government may only exclude section, district, or zone that is specifically identified within service district 62

Service district is creature of statute and has no authority to change in any way mold in which it was fashioned by General Assembly; it may not alter fact that it is governmental agency 62

Service districts are creatures of statute and function within ambit of powers conferred by General Assembly 62

Special assessments for local improvements are generally distinguished from general tax levies and service charges because special assessments are intended to impose just share of costs of improvements on adjacent property that is enhanced in value 62

Two or more localities must enact concurrent ordinances to create service districts within such localities 62

COUNTIES, CITIES AND TOWNS **PAGE**

Title 15.2 is silent on many aspects of employer/employee relationship in local government; failure to grant specific statutory authority does not [necessarily] indicate legislative opposition to local authority for that purpose 42

COURTS NOT OF RECORD

Appeal of determination of [bail] bond from general district court to circuit court is civil in nature; fees and costs for appeal should be calculated, taxed, and collected as civil proceeding 82

Courts are provided for purpose of putting end, and speedy end, to controversies, and not as forum for endless litigation 88

District Courts. Jury trials are not available in general district courts 112

No authority to transfer forfeiture proceedings from circuit court to general district court 112

Jurisdiction and Procedure, Criminal Matters. Jury trials are not available in general district courts 112

No authority to transfer forfeiture proceedings from circuit court to general district court 112

Juvenile and Domestic Relations Courts – Immediate Custody, Arrest, Detention and Shelter Care. Intent of General Assembly to permit juveniles tried and convicted as adults, who are again charged with commission of felony offenses, to be housed with adult inmates 69

Juvenile convicted as adult may be housed in adult jail facility pending transfer to Department of Juvenile Justice 69

Juvenile transferred for trial as adult and convicted by circuit court should be treated as adult for all purposes 69

Juvenile and Domestic Relations Courts – Jurisdiction and Venue. Detention hearing is integral step in prosecution of juvenile delinquency proceeding 73

Detention hearings are by their very nature preadjudication proceedings 73

Jurisdiction, practice, and procedure of juvenile courts are entirely statutory 73

Juvenile court retains jurisdiction over probationer who has reached age twenty-one prior to probation revocation hearing 71

Juvenile detention case must be commenced in jurisdiction where offense occurred, and detention hearing must be held within 72 hours after child has been taken into custody 73

COURTS NOT OF RECORD **PAGE**

Juvenile and Domestic Relations Courts—Jurisdiction and Venue (contd.)

Juvenile may only be committed on conviction of felony offense, misdemeanor if juvenile has prior felony offense, or fourth misdemeanor offense 71

No authority for to transfer venue for juvenile detention hearing to another location within court's judicial district 73

Petition for violation of probation should be brought in juvenile court; if violation is found, court may dispose of it pursuant to § 16.1-291(E)..... 71

Probation violation does not constitute separate offense that may be counted toward number of misdemeanors required for commitment..... 71

Probation violation is not Class 1 misdemeanor if committed by adult 71

Probation violation is not prosecution in sense of adjudication and disposition of new offense; it simply is continuation of proceeding begun in juvenile court 71

Proper venue for juvenile detention hearing is place where proceeding has been commenced 73

Term 'proceeding' is broad enough to cover any act, measure, step or all steps in course taken in conducting litigation, civil or criminal 71

Juvenile and Domestic Relations Courts – Organization and Personnel. Judge may make selection of state-operated court services unit director from any new list of eligible persons or any previously submitted list 75

List of eligible persons for state-operated court services unit director must consist of two or more names 75

'List of eligible persons' for state-operated court services unit directors is individuals submitted by Director of Department of Juvenile Justice to judges; such list is only list from which judges may appoint director. Should list be unsatisfactory, judges may request, without limitation, that new lists be developed using process for initial list 75

No limit on number of new lists of eligible persons for state-operated court services unit director that may be requested..... 75

Until judge appoints director of state-operated court services unit, unit may be managed by acting director assigned by Department of Human Resource Management..... 75

When Department of Juvenile Justice follows state personnel hiring policies, judges have no part in determination of list of eligible persons for position of state-operated court services unit director 75

COURTS NOT OF RECORD **PAGE**

Juvenile and Domestic Relations Courts – Transfer and Waiver. Intent of General Assembly to permit juveniles tried and convicted as adults, who are again charged with commission of felony offenses, to be housed with adult inmates 69

Juvenile convicted as adult may be housed in adult jail facility pending transfer to Department of Juvenile Justice 69

Juvenile transferred for trial as adult and convicted by circuit court should be treated as adult for all purposes 69

COURTS OF RECORD

Appeal of determination of [bail] bond from general district court to circuit court is civil in nature; fees and costs for appeal should be calculated, taxed, and collected as civil proceeding..... 82

Circuit Courts. Circuit court clerk's statutory duties do not extend to preparation of sketch orders in criminal cases 78

Court may, for good cause shown, and in interest of justice, permit motions or objections to be raised before trial at later time 86

Defense objections to be raised before trial are applicable only to proceedings in circuit courts..... 86

Delaying divorce petition brought by incarcerated complainant until his release is inadvisable; where transportation of incarcerated complainant is inappropriate, authorized alternatives are available 88

Divorce is civil matter properly brought in circuit court 88

Jurisdiction for proceeding for forfeiture of firearm is circuit court where conviction occurred..... 112

No authority to transfer forfeiture proceedings from circuit court to general district court 112

Problems associated with transportation are insufficient grounds to dismiss divorce petition brought by incarcerated complainant otherwise entitled to assert his civil claim and present evidence 88

Where prisoner's claim falls within jurisdictional limits of circuit court, he may bring claim there; court has discretion to enter transportation order or obtain testimony by alternate means..... 88

Clerks, Clerks' Offices and Records. Although it is longstanding practice of clerks to assist circuit courts in preparation of sketch orders, no statute compels this practice 78

COURTS OF RECORD **PAGE**

Clerks, Clerks' Offices and Records (contd.)

Circuit court clerk's statutory duties do not extend to preparation of sketch orders in criminal cases 78

Comprehensive list of statutory duties placed upon circuit court clerks demonstrates that when General Assembly intends to require clerks' offices to perform task, it knows how to express its intention 78

Courts are provided for purpose of putting end, and speedy end, to controversies, and not as forum for endless litigation 88

General Assembly has not required circuit court clerks to perform other duties as may be prescribed by judge 78

General Provisions. Circuit court clerk's statutory duties do not extend to preparation of sketch orders in criminal cases 78

CRIMES AND OFFENSES GENERALLY

Crimes Against the Person – Assaults and Bodily Woundings. Deferred finding of guilt is considered conviction for purposes of application of assault and battery against a family or household member in subsequent proceedings 79

General Assembly expressly granted trial courts authority to defer judgment in cases involving persons charged with first offense of assault and battery against a family or household member and in no other way 79

Granting 'general continuance' of person charged with first offense of assault and batter against family or household member employs unauthorized manner and undermines clear intent of General Assembly, which is to afford first time offenders only one chance to avoid conviction 79

No authority for courts to grant 'general continuance' as alternative to plea or finding of guilt for an adult charged with first offense of assault and batter against family or household member 79

Crimes Involving Health and Safety – Dangerous Use of Firearms or Other Weapons. Game laws establish procedure used to forfeit firearm used by person convicted of shooting firearm in or across road or street. Court convicting such violator may declare forfeiture of firearm used in crime. Commonwealth's attorney of county or city wherein forfeiture was incurred must file an information to enforce forfeiture in his circuit court 112

Crimes Involving Health and Safety – Other Illegal Weapons. Deferred finding of guilt is considered conviction for purposes of concealed weapon statute during defendant's term of probation 79

CRIMES AND OFFENSES GENERALLY **PAGE**

Department or agency issuing photo identification card may combine that card with proof that retired law-enforcement officer may carry concealed handgun 25

No authority for department or agency to designate individual as 'disabled' on written proof of consultation or favorable review required for retired law-enforcement officer to carry concealed handgun 25

CRIMINAL PROCEDURE

Arrest. Authority for officer to execute misdemeanor capias, not in his possession, provided that officer informs the accused of existence of, and charges contained in, capias and delivers same to accused as soon as practicable 145

Capiases and warrants are treated synonymously 145

Bail and Recognizances – Bail. Appeal of determination of bond from general district court to circuit court is civil in nature; fees and costs for appeal should be calculated, taxed, and collected as civil proceeding 82

Appellate issues relating to bail are routinely handled separately from issues in criminal prosecution and are often subject of separate petitions for appeal 82

Bail proceeding is not integral part of guilt-innocence determination; rather, it is ancillary to criminal prosecution 82

Bond forfeiture proceedings, which have lower burden of proof that shifts to defendant once Commonwealth establishes *prima facie* case, are treated as civil in nature 82

Disability of Judge; Appointed Counsel, etc. Commonwealth's attorney is not required to relinquish his office when involuntarily recalled to active military duty. Commonwealth's attorney has sole discretion to appoint assistant to perform duties of his office during such absence. Should Commonwealth's attorney resign and circuit court appoint acting Commonwealth's attorney, such attorney may act in place of and otherwise perform duties and exercise powers of regular Commonwealth's attorney 9

Disability of Judge; Appointed Counsel, etc. – Indigent defense. No authority for locality to supplement salaries of public defender or his staff 84

Disability of Judge; Appointed Counsel, etc. – Recording Evidence and Incidents of Trial. Circuit court clerk required to preserve recording or transcripts of criminal trials 78

Circuit court clerk's statutory duties do not extend to preparation of sketch orders in criminal cases 78

CRIMINAL PROCEDURE **PAGE**

Enforcement of Forfeiture. Forfeiture proceedings, which generally are result of criminal conduct and convictions, are civil in nature 82

Expungement of Criminal Records. Expungement proceedings, which are based upon dismissal of criminal charges, are civil in nature 82

Forfeitures in Drug Cases. Forfeiture proceedings, which generally are result of criminal conduct and convictions, are civil in nature 82

Miscellaneous Forfeiture Provisions. Forfeiture proceedings, which generally are result of criminal conduct and convictions, are civil in nature 82

Trial and its Incidents – Miscellaneous Provisions. Court may, for good cause shown, and in interest of justice, permit motions or objections to be raised before trial at later time 86

Defense objections to be raised before trial are applicable only to proceedings in circuit courts 86

DATA COLLECTION AND DISSEMINATION ACT, GOVERNMENT
(*See* ADMINISTRATION OF GOVERNMENT: Data Collection & Dissemination)

DEFINITIONS

Ab initio 157

Additional government services 62

Agency 23, 147

Area 62

Assessment 35

Assessment ratio 35

Authenticate 18

Authentication 18

Authority 159

Candidate 75

Child in need of supervision 91

Consumer transaction 164

Cooperate 17

Cooperation 17

Copy 18

Decal fee 137

Designee of a community services board 127

DEFINITIONS **PAGE**

Domestic violence (context) 79
Eligible 75
Eligible candidate 75
Eligible persons 75
Emergency services 129
Employee 129
Employer 23
Fee 107
Firearm 112
Formal declaration 129
Foster care placement 166
Gasoline station 152
Government agency 3
Health care provider 129
Investment interest 127
Land 107
Landowner 107
Law-enforcement employee 23
List 75
List of eligible persons 75
Local Incident Command System 129
Locality 44, 84
Major disaster 129
Man-made disaster 129
May (discretionary) 112
Natural disaster 129
Noneconomic losses (Volunteer Protection Act of 1997) 129
Nonprofit organization (Volunteer Protection Act of 1997) 129
Officer (state and local government) 3
Personal information 147
Personal interest in contract 3, 114
Personal interest in transaction 3, 114
Political subdivisions 159

DEFINITIONS **PAGE**

Premises 107
Private streets 117
Proceeding 71
Public employee 3
Public or private agency 129
Qualified law enforcement officer (Law Enforcement Officers Safety Act of 2004 (federal)) 124
Records 18
Requisite 97
Residence (for purpose of free school admission) 44
Rural addition program 117
Shall – directory, not mandatory 9, 121
Shall – mandatory 17, 25, 62, 121
Should – directory 121
Specify 62
State agency 95
Sunlight—solar energy 159
Ultra vires 157
Unrestricted access 147
Vehicle license fee 164
Within 62

DOMESTIC RELATIONS

Divorce, Affirmation and Annulment. Delaying divorce petition brought by incarcerated complainant until his release is inadvisable; where transportation of incarcerated complainant is inappropriate, authorized alternatives are available 88

Divorce is civil matter properly brought in circuit court 88

Problems associated with transportation are insufficient grounds to dismiss divorce petition brought by incarcerated complainant otherwise entitled to assert his civil claim and present evidence 88

EDUCATION

Compulsory School Attendance. Authority of parent is to be given great weight, law assumes that parental knowledge and support will be given for legitimate reasons; law does not confer right of repeated or sustained absenteeism in pupils even with parental knowledge or support 91

EDUCATION **PAGE**

Bona fide religious belief does not include political, sociological, or philosophical views or personal moral code 91

School board attendance procedures and policies should not conflict with state law or regulations of State Board of Education 91

School board may employ attendance officers, who are charged with enforcement of provisions of compulsory attendance law 91

School board may excuse from attendance at school student who, together with parents, conscientiously oppose attendance by reason of bona fide religious belief 91

Compulsory School Attendance – Discipline. Parents have responsibility to ensure student's compliance with compulsory school attendance law 91

School board has authority to establish policies and procedures to enforce compulsory attendance law. Parent's awareness and support of child's absence from school does not allow repeated absenteeism, tardiness, or early departures 91

System of Public Schools; General Provisions. Constitution provides in mandatory terms that legislature shall establish and maintain public free schools; there is neither mandate nor inhibition in provisions regarding regulation thereof. Legislature, therefore, has power to enact any legislation regarding conduct, control, and regulation of free public schools 44

Discretion for local school board, except in limited circumstances, to admit nonresident students free of tuition 44

General Assembly envisions symbiotic relationship between school board and city, whereby school board manages and maintains school system and city provides requisite local funding 44

Local government and local school board are separate and distinct governmental agencies of Commonwealth 44

Local school board is public quasi corporation that exercises limited powers and functions of public nature granted to them expressly or by necessary implication of law, and none other 44

Local school board must charge tuition for nonresidents who are temporarily living in Commonwealth and are admitted to attend public schools 44

No authority for municipality, city, or town to enact ordinance imposing civil or criminal penalty against parent for providing false residential information to enroll child in local school system and requiring parent to pay tuition or educational costs for such child. General Assembly may enact such enabling authority for municipality, city, or town. Authority for local school system to adopt policy holding parent liable for tuition or educational costs for nonresident child 44

EDUCATION **PAGE**

System of Public Schools; General Provisions (contd).

Presumption that child residing with natural parent is entitled to free admission to schools of local government in which natural parent lives 44

Residence, for purpose of free admission to local public schools, must be *bona fide* residence and not merely superficial for sole purpose of attending school 44

EDUCATIONAL INSTITUTIONS

Frontier Culture Museum of Virginia. American Frontier Culture Foundation, Inc., may deconstruct, remove, and reconstruct Zirkle Mill on property adjacent to Museum 95

Any contractual arrangements entered into by Museum must be approved by Attorney General 95

Authority for Board of Trustees to acquire structures to fulfill purpose of Museum, but only with consent of Governor 95

Governor must consent to acquisition of Zirkle Mill by Museum. American Frontier Culture Foundation, Inc., may acquire, deconstruct, and remove Mill without such consent. Governor must approve reconstruction of Mill on property owned by Commonwealth under control of Museum 95

Museum is agency of Commonwealth 95

ELECTIONS

Absentee voting. Intent of voter statement is to preserve integrity of absentee voting process in every election and prevent possible voter fraud by requiring such statement 97

No conflict between federal Voting Rights Act of 1965 and specific requirement for completion of voter statement on absentee ballot; federal act would not preempt Commonwealth from requiring such statement. Authority for State Board of Elections to adopt standards and instructions for use by local election officials to determine what constitutes error or omission in completion of such statement 97

Voter statement protects legitimate and compelling interest of Commonwealth that is applied on nondiscriminatory basis 97

Campaign Finance Disclosure Act. Act and Disclosure Requirements for Political Campaign Advertisements clearly confer certain rights and obligations upon citizens and entities of Commonwealth and enforcement of such obligations on certain governmental entities 103

Act and Disclosure Requirements for Political Campaign Advertisements place duty for enforcement on State Board of Elections, general registrars and local

ELECTIONS **PAGE**

electoral boards, and in some cases, enforcement with assistance of appropriate Commonwealth's attorney 103

General Assembly clearly authorizes civil penalties in both Act and Disclosure Requirements for Political Campaign Advertisements to proscribe conduct which, though not criminal in nature, is in violation of statutory requirements..... 103

Private right of action does not exist for private individuals and entities to enforce provisions of Act and Disclosure Requirements for Political Campaign Advertisements 103

Rights and obligations conferred by Act and Disclosure Requirements for Political Campaign Advertisements did not exist in common law and were created through statutory scheme..... 103

Willful violations of Act and Disclosure Requirements for Political Campaign Advertisements to be treated as criminal acts punishable as Class 1 misdemeanors 103

Disclosure for Political Campaign Ads. Campaign Finance Disclosure Act and Disclosure Requirements for Political Campaign Advertisements clearly confer certain rights and obligations upon citizens and entities of Commonwealth and enforcement of such obligations on certain governmental entities..... 103

Campaign Finance Disclosure Act and Disclosure Requirements for Political Campaign Advertisements place duty for enforcement on State Board of Elections, general registrars and local electoral boards, and in some cases, enforcement with assistance of appropriate Commonwealth's attorney..... 103

General Assembly clearly authorizes civil penalties in both Campaign Finance Disclosure Act and Disclosure Requirements for Political Campaign Advertisements to proscribe conduct which, though not criminal in nature, is in violation of statutory requirements 103

Private right of action does not exist for private individuals and entities to enforce provisions of Campaign Finance Disclosure Act and Disclosure Requirements for Political Campaign Advertisements..... 103

Rights and obligations conferred by Campaign Finance Disclosure Act and Disclosure Requirements for Political Campaign Advertisements did not exist in common law and were created through statutory scheme 103

Willful violations of Campaign Finance Disclosure Act and Disclosure Requirements for Political Campaign Advertisements to be treated as criminal acts punishable as Class 1 misdemeanors 103

Federal Voting Rights Act of 1965 clearly preempts states' power to restrict registration and voting 97

ELECTIONS **PAGE**

General Provisions and Administration – State Board of Elections. Decision of Board regarding interpretation of election laws will be entitled to great weight.... 97

Fundamental objective of Board is to provide overall supervision and coordination of election activities throughout Commonwealth and to obtain uniformity in local election practices and proceedings and purity in all elections 97

General Assembly has given wide discretion to Board to carry out its administrative responsibilities with regard to absentee ballots 97

[FEDERAL] VOLUNTEER PROTECTION ACT OF 1997
(*See* VOLUNTEER PROTECTION ACT OF 1997, [FEDERAL])

FREEDOM OF INFORMATION
(*See* ADMINISTRATION OF GOVERNMENT: Virginia Freedom of Information Act)

GAME, INLAND FISHERIES AND BOATING

Wildlife and Fish Laws – General Provisions. Duty of care and liability statute is designed to encourage landowners to open their lands for public recreational use..... 107

Landowners receiving fee for use of their property from political subdivision are covered by indemnification provisions of § 29.1-509(E). Political subdivisions are not indemnified except when they enter into arrangement with agency of Commonwealth. Political subdivisions that control private property by lease or contract to provide free public recreational use are entitled to reduced liability under § 29.1-509(B) and (C)..... 107

Political subdivision that leases or manages lands intended for public recreation use may be considered landowner for purposes of reduced standard of care.... 107

Wildlife and Fish Laws – Hunting and Trapping. Game laws establish procedure used to forfeit firearm used by person convicted of shooting firearm in or across road or street. Court convicting such violator may declare forfeiture of firearm used in crime. Commonwealth's attorney of county or city wherein forfeiture was incurred must file an information to enforce forfeiture in his circuit court 112

Use of word 'may' indicates that forfeiture of firearm is discretionary with convicting court 112

GENERAL ASSEMBLY

Amendment. Presumption that General Assembly has knowledge of Attorney General's interpretation of statutes, and its failure to make corrective amendments evinces legislative acquiescence in Attorney General's interpretation 13

GENERAL ASSEMBLY **PAGE**

Constitution provides in mandatory terms that legislature shall establish and maintain public free schools, there is neither mandate nor inhibition in provisions regarding regulation thereof. Legislature, therefore, has power to enact any legislation regarding conduct, control, and regulation of free public schools 44

Enactment. When General Assembly intends to enact mandatory requirement, it knows how to express its intention..... 9, 127

When legislative enactment limits manner in which something may be done, enactment also evinces interest that it shall not be done another way..... 79

General Assembly Conflicts of Interests Act. Legislator bears initial burden to determine whether business opportunity is being offered to influence him in official capacity, and if so, legislator must decline such opportunity 114

Legislator should exercise caution in any representation where opportunity could be construed as being afforded to influence his official capacity 114

No violation of Act for current member of General Assembly to act as attorney for or represent clients for compensation before executive agencies of Commonwealth in administrative law proceedings or legal matters..... 114

Purpose of Act is to assure citizens that judgment of members of General Assembly will not be compromised or affected by inappropriate conflicts..... 114

General Assembly knows how to create private cause of action and how to preserve private cause of action when that is its intention 103

Intent of General Assembly to permit juveniles tried and convicted as adults, who are again charged with commission of felony offenses, to be housed with adult inmates 69

Mandate. When General Assembly intends to enact mandatory requirement, it knows how to express its intention..... 127

Requirement. When General Assembly intends statute to impose requirements, it knows how to express its intention 78

Taxation. Legislature may, constitutionally, treat different subjects differently for taxation purposes if difference is real, if distinction has some relevance to legislative purpose, and treatment is not so disparate to be arbitrary 152

When General Assembly intends statute to impose mandatory requirements, it knows how to express its intention..... 103

When General Assembly uses two different terms in same act, presumption that it means two different things..... 84

GENERAL PROVISIONS **PAGE**

Common Law, Statutes and Rules of Construction
(*see also* STATUTORY CONSTRUCTION)

Common Law, Statutes and Rules of Construction. Common law continues in full force except as altered by General Assembly 103

Good Samaritan doctrine applies regardless of whether emergency is declared..... 129

Virginia has accepted common law Good Samaritan doctrine 129

GOOD SAMARITAN DOCTRINE
(*See* GENERAL PROVISIONS – **Common Law, Statutes and Rules of Construction)**

GOVERNMENT DATA COLLECTION AND DISSEMINATION ACT
(*See* ADMINISTRATION OF GOVERNMENT: **Data Collection & Dissemination)**

HIGHWAYS. BRIDGES AND FERRIES

Commonwealth Transportation Board, etc. – Secondary System of State Highways. Authority for Department of Transportation to prohibit county from participating in rural addition program when county's subdivision ordinance does not require that all subdivision streets meet standards that qualify roads for acceptance into secondary system of state highways 117

Department of Transportation's administrative interpretation concerning what constitutes adequate control of subdivision streets under § 33.1-72.1 is entitled to great deference 117

Implicit requirement that subdivision ordinance must control all subdivision street development to necessary standards for acceptance into Department of Transportation's secondary road system 117

No authority to make exceptions for local subdivision ordinances that control development of some subdivision streets but fail to control other such streets.....117

Purpose of § 33.1-72.1 is to husband limited financial resources of Department of Transportation and spend them where they will be of greater benefit to public....117

HOUSING

Uniform Statewide Building Code. Authority for county to enforce Code in any town located within county with population of less than 3,500, provided that town has not elected, or contracted with another authorized governmental entity, to enforce Code. County may bring suit against public nuisance located anywhere within county, including any town..... 121

IMMUNITY **PAGE**

Formal declaration of emergency under Disaster Law affords Medical Reserve Corps volunteers immunity for acts of negligence; no immunity for acts of willful misconduct. Common law Good Samaritan doctrine may provide limited immunity to Corps volunteers acting within confines of law. Federal Volunteer Protection Act of 1997 provides broad immunity, both before and during declared emergency, for volunteers' negligent acts provided they act within scope of their responsibilities; no immunity for claims of noneconomic damages, acts involving gross negligence or reckless misconduct, or awards of punitive damage. Whether Corps volunteers are agents of Commonwealth for purposes of sovereign immunity and workers' compensation protection is factual determination 129

Sovereign. Absent formally declared emergency and without specific legislation, general test of whether sovereign immunity applies depends upon capacity in which private entity was acting and whether such acts are under direction and control of Commonwealth, based on nature of and state's interest in function to be performed 129

[Federal] LAW ENFORCEMENT OFFICERS SAFETY ACT OF 2004

Act pertains to qualified law enforcement officer's ability to carry concealed firearm in state other than Virginia 124

Local or regional jail officer who is not part of local police or sheriff's department may meet definition of 'qualified law enforcement officer' for purposes of federal Act. Regional jail authority may generally prohibit its officers, or prohibit particular officer, from carrying concealed weapon absent valid concealed handgun permit..... 124

Whether officer meets certain qualifications of Act is determination for individual officer and his jail superintendent and not matter of state law 124

MENTAL HEALTH GENERALLY

Admissions and Dispositions in General – Admissions. Community services board petitioner in civil involuntary commitment proceeding may also prepare board's prescreening report for commitment hearing; independent examination is required in addition to prescreening report 127

General Assembly did not intend to exclude petitioner, who is member of community services board, for temporary detention order from conduction prescreening evaluation required by § 37.1-67.3(H) 127

MILITARY AND EMERGENCY LAWS

Emergency Services and Disaster Law. Disaster Law grants immunity to public or private agencies and their employees when engaged in emergency services and complying with Law 129

MILITARY AND EMERGENCY LAWS **PAGE**

Emergency Services and Disaster Law (contd.)

General Assembly has defined three types of disaster to which immunity would apply: 'major disaster'; 'man-made disaster'; and 'natural disaster' 129

Liability protection afforded by Disaster Law goes into effect upon Presidential or gubernatorial declaration of emergency; protection would not apply to services performed by volunteers prior to declaration..... 129

Medical Reserve Corps volunteers must perform 'medical and health services' or 'rescue' services for immunity protection to apply..... 129

Presidential or gubernatorial declaration of emergency under Disaster Law affords Medical Reserve Corps volunteers immunity for acts of negligence; no immunity for acts of willful misconduct. Common law Good Samaritan doctrine may provide limited immunity to Corps volunteers acting within confines of law. Federal Volunteer Protection Act of 1997 provides broad immunity, both before and during declared emergency, for volunteers' negligent acts provided they act within scope of their responsibilities; no immunity for claims of noneconomic damages, acts involving gross negligence or reckless misconduct, or awards of punitive damage. Whether Corps volunteers are agents of Commonwealth for purposes of sovereign immunity and workers' compensation protection is factual determination 129

Military Laws of Virginia. Commonwealth's attorney is not required to relinquish his office when involuntarily recalled to active military duty. Commonwealth's attorney has sole discretion to appoint assistant to perform duties of his office during such absence. Should Commonwealth's attorney resign and circuit court appoint acting Commonwealth's attorney, such attorney may act in place of and otherwise perform duties and exercise powers of regular Commonwealth's attorney 9

MOTOR VEHICLES

Titling, Registration of Motor Vehicles – State and Local Motor Vehicle Registration. Locality eliminating physical decal by entering into agreement with Commissioner of Department of Motor Vehicles where Commissioner refuses to issue or renew vehicle registration of any applicant owing local license fees may carry forward unpaid decal fee and collect it in subsequent years; such collection is subject to limitation of five years from December 31st of tax year for which assessment is made 137

Locality has discretion to prescribe form of license, but form must be displayed on vehicle 137

Locality may enforce payment of local motor vehicle license fees without requiring decal provided that locality enters into agreement with Commissioner of Department of Motor Vehicles to refuse to issue or renew vehicle registration of any applicant owing any local vehicle license fees 137

MOTOR VEHICLES **PAGE**

Locality that adopts ordinance to enforce payment of local motor vehicle license fee must issue some form of license upon payment of fee 137

Motor vehicle license tax is privilege tax not tax on property..... 137

Ordinance proscribing operation of vehicle without obtaining or displaying local motor vehicle license decal is not a failure to purchase decal, but failure to obtain or display decal 137

Unless tolled or subject to provisions affecting judgments and judgment liens, general statute of limitations on collection of local taxes is applicable to vehicle license taxes or fees 137

PRISONS AND OTHER METHODS OF CORRECTION

Local Correctional Facilities – Jail Authorities. Local or regional jail officer who is not part of local police or sheriff's department may meet definition of 'qualified law enforcement officer' for purposes of federal Law Enforcement Officers Safety Act of 2004. Regional jail authority may generally prohibit its officers, or prohibit particular officer, from carrying concealed weapon absent valid concealed handgun permit 124

Superintendent and jail officers have statutory powers to arrest 124

Local Correctional Facilities – Regional Jails and Jail Farms. Local correctional officer serves at pleasure of regional jail authority 124

Local or regional jail officer who is not part of local police or sheriff's department may meet definition of 'qualified law enforcement officer' for purposes of federal Law Enforcement Officers Safety Act of 2004. Regional jail authority may generally prohibit its officers, or prohibit particular officer, from carrying concealed weapon absent valid concealed handgun permit..... 124

Superintendent and jail officers have statutory powers to arrest 124

PUBLIC OFFICIALS

It is presumed that public officials will discharge their duties in accordance with law 103

PUBLIC PROCUREMENT ACT, VIRGINIA
(*See* ADMINISTRATION OF GOVERNMENT)

PUBLIC SERVICE COMPANIES

Utility Facilities Act. Act prohibits utility from providing service in another utility's certified service territory unless the utility proves to State Corporation Commission's satisfaction that other utility is incapable of providing adequate service, but only after other utility is given reasonable time and opportunity to remedy inadequacy..... 141

PUBLIC SERVICE COMPANIES **PAGE**

Utility Facilities Act (contd.)

Act prohibits utility from providing service unless it obtains certificate of public convenience and necessity 141

State Corporation Commission, as tribunal informed by experience, is required to exercise its broad discretion in order to fashion fair, reasonable, and practical resolution of service territory issues 141

State Corporation Commission compares 'point-of-use' and 'point-of-delivery' tests to determine which test would best ensure integrity of certificated service territories 141

State Corporation Commission has not adopted absolute test for resolving service territory disputes, instead Commission considers practical realities of each situation 141

Whether electric utility customer located in service territory of electric utility may obtain service from another electric utility through metering point in adjacent service territory is determination for State Corporation Commission 141

RULES OF SUPREME COURT OF VIRGINIA

Criminal Practice and Procedure. Authority for officer to execute misdemeanor capias, not in his possession, provided that officer informs accused of existence of, and charges contained in, capias and delivers same to accused as soon as practicable 145

Juvenile and Domestic Relations District Courts – Continuances. Continuances were not intended to be granted to avoid giving full effect to statute or to evade trial 79

To extent that any conflict or variance exists between rule of Supreme Court and statute, terms of statute must prevail 79

SHERIFFS

Absent constitutional or statutory provision to contrary, sheriff has exclusive control over day-to-day operations of his office and assignment of his personnel 147

Juvenile convicted as adult may be housed in adult jail facility pending transfer to Department of Juvenile Justice 69

Local or regional jail officer who is not part of local police or sheriff's department may meet definition of 'qualified law enforcement officer' for purposes of federal Law Enforcement Officers Safety Act of 2004. Regional jail authority may generally prohibit its officers, or prohibit particular officer, from carrying concealed weapon absent valid concealed handgun permit 124

SHERIFFS **PAGE**

Names and identities of individual donors making voluntary donations to sheriff's office may not be kept confidential and must be disclosed to citizens of Commonwealth and Commonwealth's attorney 13

Retired law-enforcement officer, whether retired for service or disability, may request photo identification card from employing department or agency; no authority for department or agency to specify type of retirement..... 25

Sheriff generally has discretion in day-to-day operations of his office 147

Sheriff's office is public body subject to disclosure requirements of Virginia Freedom of Information Act..... 13

STATE AND LOCAL GOVERNMENT CONFLICT OF INTERESTS ACT
(*See* ADMINISTRATION OF GOVERNMENT)

STATEWIDE BUILDING CODE, UNIFORM
(*See* HOUSING)

STATUTORY CONSTRUCTION

Absurdity. Statutes should not be interpreted to produce absurd results or irrational consequences..... 121

Additions. One may not add language to statute [that] General Assembly has not seen fit to include 23

Administrative agency. Attorney General defers to interpretation of law by agency changed with administering law, unless agency interpretation is clearly wrong 117, 141

Construction of statute by state official charged with its administration is entitled to great weight..... 97

Deference to decision of agency charged by General Assembly with statewide administration of such system is appropriate unless decision clearly is wrong..... 97

Great deference should be given to administrative interpretation of statutes by agency changed with such responsibility..... 117

Interpretation given to statute by state agency charged with its administration is entitled to great weight..... 97

Interpretation of department charged with responsibility of administering and enforcing laws is entitled to great weight 152

Ambiguity. Reading of entire statutory provision as whole influences proper construction of any apparently ambiguous individual provisions 97

STATUTORY CONSTRUCTION **PAGE**

Ambiguity (contd.)

When language of statute is clear and unambiguous, courts must accept plain meaning and not resort to extrinsic evidence or rules of construction 25

Where no ambiguity exits in statute, statute is not to be construed but is to be given effect in accordance with its plain meaning and intent 25

Amendment. Presumption that General Assembly has knowledge of Attorney General's interpretation of statutes, and its failure to make corrective amendments evinces legislative acquiescence in Attorney General's interpretation 13

Authority. Questions of implied legislative authority are resolved by analyzing legislative intent 44, 84

Clarity. When language of statute is clear and unambiguous, courts must accept plain meaning and not resort to extrinsic evidence or rules of construction 25

Common law. Common law continues in full force except as altered by General Assembly ...103

Conflict. To extent that any conflict or variance exists between rule of Supreme Court and statute, terms of statute must prevail 79

When one statute speaks to subject generally and another deals with element of that subject specifically, statutes will be harmonized, if possible, and if they conflict, more specific statute prevails 112

Definition. Absent statutory definition, words are given their ordinary meaning.... 71, 75

When particular word in statute is not defined therein, word must be given its ordinary meaning 62

Dillon Rule. Any doubt as to existence of power must be resolved against locality 157

Commonwealth follows rule of strict construction of determination of powers of local governing bodies 62

Commonwealth follows strict construction of statutory provisions and its corollary that powers of county boards of supervisors are fixed by statute and are limited to those powers conferred expressly or by necessary implication 54

Constitutional officers possess only those powers conferred upon them by General Assembly 157

Corollary rule is that authority and powers of county boards of supervisors are fixed by statute and are limited to those conferred expressly or by necessary implication 50, 62

Corollary rule is that where grant of power is silent upon its mode of execution, method of exercise clearly contrary to legislative intent, or inappropriate to ends sought to be accomplishment by grant, would be unreasonable 62

STATUTORY CONSTRUCTION **PAGE**

In determining legislative intent, rule is clear that where power is conferred and mode of its execution is specified, no other method may be selected; any other means would be contrary to legislative intent, and, therefore, unreasonable 62

Local governing bodies [governments] [municipal corporations] have only those powers [that are] expressly granted, those [that are] necessarily or fairly implied [there]from expressly granted powers, and those [that are] essential and indispensable 44, 50, 54, 62, 157

Local governments possess [and can exercise] only those powers conferred upon them [expressly granted] by General Assembly[, those necessarily or fairly implied therefrom, and those that are essential and indispensable] 84, 157

Localities and other political subdivisions have only those powers expressly granted to them by statute and those necessarily implied from their expressly granted powers 42

Powers of local government are fixed by statute and are limited to those conferred expressly or by necessary implication 157

Rule applies to constitutional officers 157

Rule is applicable to determine [in first instance], from express words or by implication, whether power exists at all. If power cannot be found, inquiry is at an end 44, 50, 54, 62, 84

There are occasions when mechanical application of Rule is inappropriate 42

Where this is reasonable doubt whether legislative power exists, that doubt must be resolved against local governing body 44

Directory. Statute directing mode of proceeding by public officers is deemed directory, and precise compliance is not deemed essential to validity of proceedings, unless so declared by statute 9

Enactment. When legislative enactment limits manner in which something may be done, enactment also evinces interest that it shall not be done another way 79

Entirety. Full force and effect must be given to every provision of statutory law 97

Fullest possible effect must be given to legislation intent embodied in entire statutory enactment 54

Fundamental rule requires that entire body of legislation and statutory scheme be viewed to determine true intention of each part 54

Meaning of word takes color and expression from purport of entire phrase of which it is part, and it must be construed to harmonize with context as whole... 97

Reading of entire statutory provision as whole influences proper construction of any apparently ambiguous individual provisions 97

STATUTORY CONSTRUCTION **PAGE**

Exclusion. *Expressio unius est exclusio alterius* 50, 62

Mention of one thing in statute implies exclusion of another 23

Statute that limits method by which something shall be done indicates legislative intent that it not be done otherwise 50

When General Assembly includes specific language in one section of act, but omits language from another section, presumption that exclusion of language was intentional 84

When statute contains given provision with reference to one subject, omission of such provision from similar statute dealing with related subject is significant to show existence of different legislative intent 84

Where statute speaks in specific terms, implication arises that omitted terms were not intended to be included within scope of statute 23

Expressio unius est exclusio alterius 23, 50, 62

General vs. specific. When faced with choice between specific and general statute, former is controlling 112

When one statute speaks to subject generally and another deals with element of that subject specifically, statutes will be harmonized, if possible, and if they conflict, more specific statute prevails 112

When statutes provide different procedures on same subject matter, general gives way to specific 112

Harmony. Meaning of word takes color and expression from purport of entire phrase of which it is part, and it must be construed to harmonize with context as whole 97

Statutes are construed with view toward harmonizing them with other statutes 84

Virginia Code is one body of law and statute should be interpreted so it harmonizes with other statutes 23

When one statute speaks to subject generally and another deals with element of that subject specifically, statutes will be harmonized, if possible, and if they conflict, more specific statute prevails 112

Implied power. When locality exercises implied power, that exercise must be reasonable and consistent with legislative intent and may not unduly burden any constitutional right 42

In pari materia. If two statutes are in pari materia and have certain irreconcilable provisions, later enactment amends earlier statute 9

STATUTORY CONSTRUCTION **PAGE**

Intent. Generally, words and phrases used in statute should be given their ordinary and usually accepted meaning unless different intention is fairly manifest 18

Statute directing mode of proceeding by public officers is deemed directory, and precise compliance is not deemed essential to validity of proceedings, unless so declared by statute..... 9

Irrationality. Statutes should not be interpreted to produce absurd results or irrational consequences..... 121

Irreconcilable. If two statutes are in pari materia and have certain irreconcilable provisions, later enactment amends earlier statute..... 9

Legislative intent. Corollary to Dillon Rule is that where grant of power is silent upon its mode of execution, method of exercise clearly contrary to legislative intent, or inappropriate to ends sought to be accomplishment by grant, would be unreasonable 62

Courts [consistently] refuse to imply powers that General Assembly clearly did not intend to convey..... 44, 84

Fullest possible effect must be given to legislation intent embodied in entire statutory enactment 54

Fundamental rule requires that entire body of legislation and statutory scheme be viewed to determine true intention of each part..... 54

General Assembly knows how to create private cause of action and how to preserve private cause of action when that is its intention 103

In determining legislative intent, rule is clear that where power is conferred and mode of its execution is specified, no other method may be selected; any other means would be contrary to legislative intent, and, therefore, unreasonable 62

Intent of General Assembly must be determined from words contained in statute....17, 107

Legislature may, constitutionally, treat different subjects differently for taxation purposes if difference is real, if distinction has some relevance to legislative purpose, and treatment is not so disparate to be arbitrary..... 152

Look to legislation adopted and bills rejected to determine legislative intent..... 44

Manifest intention of legislature, clearly disclosed by its language, must be applied..... 62, 71

Much can be inferred from absence of statutory provisions or language, particularly when comparing related statutes..... 84

STATUTORY CONSTRUCTION **PAGE**

Legislative intent (contd.)

No legislative intent to change meaning or purpose of statute may be gleaned by recodification 86

One may not add language to statute [that] General Assembly has not seen fit to include 23

Overriding goal [Primary objective] of statutory interpretation [construction] is to discern [ascertain] and give effect to legislative intent 17, 50, 54, 62, 97

Plain and unambiguous language of statute must be given effect; to do otherwise would be to say that General Assembly did not mean what it actually has stated 79

Questions of implied legislative authority are resolved by analyzing legislative intent 44, 84

Statute must be construed with reference to its subject matter, object sought to be attained, and legislative purpose in enacting it 86

Statute specifying [that limits] method by which something shall be done indicates a legislative intent that it not be done otherwise 50, 62

To determine intent, look both to legislation adopted and bills rejected by General Assembly 84

When General Assembly intends [statute to impose [mandatory] requirements] to enact mandatory requirement, it knows how to express its intention 9, 78, 103, 127

When General Assembly uses two different terms in same act, presumption that it means two different things 84

When language of statute is unambiguous, one is bound by plain meaning of language and may not assign construction that General Assembly did not mean what it said 17

When legislative enactment limits manner in which something may be done, enactment also evinces intent that it shall not be done another way 79

When locality exercises implied power, that exercise must be reasonable and consistent with legislative intent and may not unduly burden any constitutional right 42

When statute contains given provision with reference to one subject, omission of such provision from similar statute dealing with related subject is significant to show existence of different legislative intent 84

When statute is expressed in plain and unambiguous terns, whether general or limited, legislature is assumed to mean what it plainly has expressed, and not room is left for construction 62

STATUTORY CONSTRUCTION **PAGE**

Where grant of power is silent upon mode of execution, method of exercise clearly contrary to legislative intent, or inappropriate to ends sought to be accomplished by grant, would be unreasonable 50

Where power is conferred and mode of execution is specified, no other method may be selected; any other means would be contrary to legislative intent and, therefore, unreasonable 50

Limitations. Corollary to rule is that powers of county boards of supervisors are fixed by statute and are limited to those powers conferred expressly or by necessary implication 50

Statute that limits method by which something shall be done indicates legislative intent that it not be done otherwise 50

Noscitur a sociis. It is known by its associates 97

Meaning of word takes color and expression from purport of entire phrase of which it is part, and it must be construed to harmonize with context as a whole..... 97

Omission. When General Assembly includes specific language in one section of act, but omits language from another section, presumption that exclusion of language was intentional 84

When statute contains given provision with reference to one subject, omission of such provision from similar statute dealing with related subject is significant to show existence of different legislative intent..... 84

Where statute speaks in specific terms, implication arises that omitted terms were not intended to be included within scope of statute 23

Ordinary meaning. Absent statutory definition, words are given their ordinary meaning..... 71

Generally, words and phrases used in statute should be given their ordinary and usually accepted meaning unless different intention is fairly manifest 18

Term not defined in statute must be given its common, ordinary meaning 97

When particular word in statute is not defined therein, word must be given its ordinary meaning 62

Penal statute. Equity will not enter injunction merely because penal statute has been violated..... 103

Injunction is appropriate relief where violation of penal statute results in special damage to property rights which would be difficult to quantify..... 103

Penal statute does not automatically create private right of action..... 103

STATUTORY CONSTRUCTION **PAGE**

Plain meaning. Plain and unambiguous language of statute must be given effect; to do otherwise would be to say that General Assembly did not mean what it actually has stated 79

Take words as written and give them their plain meaning 71

When language of statute is clear and unambiguous, courts must accept plain meaning and not resort to extrinsic evidence or rules of construction 25

When language of statute is unambiguous, one is bound by plain meaning of language and may not assign construction that General Assembly did not mean what it said 17

When statute is expressed in plain and unambiguous terns, whether general or limited, legislature is assumed to mean what it plainly has expressed, and not room is left for construction 62

Where statute is unambiguous, plain meaning is to be accepted without resort to rules of statutory interpretation 50, 62

Private right of action. Generally, private right of action cannot be implied from statutory provisions because when statute creates right and provides remedy for vindication of that right, then that remedy is exclusive unless statute says otherwise 103

Prospective laws. Laws are presumed to be prospective in operation and retrospective laws are considered odious in nature 44

Public officials. It is presumed that public officials will discharge their duties in accordance with law 103

Purpose. No legislative intent to change meaning or purpose of statute may be gleaned by recodification 86

Statute must be construed with reference to its subject matter, object sought to be attained, and legislative purpose in enacting it 86

Retrospective laws. Laws are presumed to be prospective in operation and retrospective laws are considered odious in nature 44

Same subject. When statutes provide different procedures on same subject matter, general gives way to specific 112

'Shall.' Generally implies that General Assembly intends its terms to be mandatory, rather than permissive or directive 62

Generally [is used in imperative or mandatory sense] indicates that procedures are intended to be mandatory 17, 62

Ordinarily, but not always, implies that provisions are mandatory 25

STATUTORY CONSTRUCTION **PAGE**

'Shall,' in statute requiring action by public official, is directory and not mandatory unless statute manifests contrary intent 9, 121

'Shall' vs. 'should.' Word 'shall' primarily is mandatory, whereas word 'should' ordinarily implies no more than expediency and is directory only 121

Specific vs. general. When faced with choice between specific and general statute, former is controlling 112

When one statute speaks to subject generally and another deals with element of that subject specifically, statutes will be harmonized, if possible, and if they conflict, more specific statute prevails 112

When statutes provide different procedures on same subject matter, general gives way to specific 112

Specific language. When General Assembly includes specific language in one section of act, but omits language from another section, presumption that exclusion of language was intentional 84

When statute contains given provision with reference to one subject, omission of such provision from similar statute dealing with related subject is significant to show existence of different legislative intent 84

Where statute speaks in specific terms, implication arises that omitted terms were not intended to be included within scope of statute 23

Strict construction. Commonwealth follows rule of strict construction of statutory provisions 50, 54

Rule of strict construction applies prospectively to exemptions established or authorized by 1971 Constitution 159

Tax exemptions are strictly construed; where there is any doubt, doubt is resolved against exception 159

Where power is conferred and mode of execution is specified, no other method may be selected; any other means would be contrary to legislative intent and, therefore, unreasonable 50

Unambiguous meaning. Plain and unambiguous language of statute must be given effect; to do otherwise would be to say that General Assembly did not mean what it actually has stated 79

When language of statute is unambiguous, one is bound by plain meaning of language and may not assign construction that General Assembly did not mean what it said 17

When statute is expressed in plain and unambiguous terns, whether general or limited, legislature is assumed to mean what it plainly has expressed, and not room is left for construction 62

STATUTORY CONSTRUCTION **PAGE**

Unambiguous meaning (contd.)

Where statute is unambiguous, plain meaning is to be accepted without resort to rules of statutory interpretation 50, 62

Unreasonableness. Corollary to Dillon Rule is that where grant of power is silent upon its mode of execution, method of exercise clearly contrary to legislative intent, or inappropriate to ends sought to be accomplishment by grant, would be unreasonable 62

In determining legislative intent, rule is clear that where power is conferred and mode of its execution is specified, no other method may be selected; any other means would be contrary to legislative intent, and, therefore, unreasonable 62

Where grant of power is silent upon mode of execution, method of exercise clearly contrary to legislative intent, or inappropriate to ends sought to be accomplished by grant, would be unreasonable 50

Where power is conferred and mode of execution is specified, no other method may be selected; any other means would be contrary to legislative intent and, therefore, unreasonable 50

Usual meaning. Generally, words and phrases used in statute should be given their ordinary and usually accepted meaning unless different intention is fairly manifest 18

SUPREME COURT OF VIRGINIA, RULES OF
(*See* Rules of Supreme Court of Virginia)

TAXATION

Department of Taxation. Department's interpretation of tax statute is entitled to great weight 152

Guidelines must amplify and clarify statutory provisions 152

General Provisions. Design, establishment, and maintenance of secure data processing system containing confidential taxpayer information primarily is question of fact for local commissioner of revenue; commissioner should balance administrative discretion with statute governing secrecy of certain information obtained in performance of his duties and Government Data Collection and Dissemination Practices Act. Information contained on and access to such system is subject to secrecy. Design and construction of system without access to confidential data is not necessarily subject to secrecy provisions that prohibit commissioner from divulging certain information 147

TAXATION **PAGE**

Disclosure requirements of Virginia Freedom of Information Act generally are superceded by secrecy provisions of § 58.1-3 147

Exceptions regarding disclosure are narrowly construed, and most information concerning individual taxpayers may not be disclosed to other officials of locality for purposes unrelated to collection of taxes 147

General principle is that constitutional officers and other local tax and revenue official must refrain from disclosing information about transactions, property, income, or business of any taxpayer 147

Information disclosed should not exceed that which is necessary; determination of extent or format of disclosure depends on particular facts and circumstances..... 147

'Line of duty' exception permits local tax or revenue officers to divulge taxpayer information to other local tax or revenue officers or employees necessary for performance of the officers' or employees' duties 147

Locality may design, build, and maintain data system; locality personnel that are not employed by commissioner of revenue may not enter or access such information unless there is specific statutory exemption 147

No objection to storage of confidential information on data system that has been entered by, and access limited to, local revenue officer's personnel only 147

No uncontrolled access to data base which includes confidential taxpayer information, nor unrestricted access to locality's system by locality's non-revenue personnel 147

To extent that unrestricted access to commissioner of revenue's confidential date is problem, commissioner should examine what arrangements can be made to provide appropriate security for computer data files maintained by his office 147

Virginia Freedom of Information Act does not require tax officials to reveal information whose disclosure is prohibited by § 58.1-3 147

Where permitted by applicable law, commissioner of revenue may share certain information with other departments of locality's government and with members of general public and others 147

License Taxes. Authority for locality to impose greater threshold amount of gross receipts for purposes of BPOL tax than statutory minimum; locality may create subclassification of BPOL business classification and apply different threshold of gross receipts, provided threshold is greater than applicable statutory threshold and reasonable municipal policy exists to justify classifications 152

BPOL guidelines interpret relevant license tax laws for purposes of implementing those provisions at local level 152

TAXATION **PAGE**

License Taxes (contd.)

'Distinct' business within classification may be taxed on different basis than other types of businesses within that classification 152

Governing body must consider facts and determine whether municipal policy justifies action favoring one subclassification of business over another 152

Imposition of license tax is permissive; no statute requires that particular business activity be taxed 152

Legislature may, constitutionally, treat different subjects differently for taxation purposes if difference is real, if distinction has some relevance to legislative purpose, and treatment is not so disparate to be arbitrary 152

Locality could completely exempt business from BPOL tax or even exclude certain categories of revenue from taxation 152

Locality may set threshold limit which is higher than statutory minimum, but may not impose BPOL tax where gross receipts are less than threshold amount applicable to that locality 152

Multiple businesses conducted by person at single location generally are required to obtain separate license for each business, unless locality's ordinance permits taxpayer to elect otherwise 152

Research and development business was 'distinct' business from other businesses within its classification 152

Local Officers – Commissioners of the Revenue. Commissioner of revenue may not enter into agreement with commissioner of revenue in adjacent locality to change taxing jurisdiction of landowner's property from one locality to other locality; any such agreement is void 157

Payments in Lieu of Real Property Taxation. No authority for county to receive payment of service fee in lieu of property and other taxes unless entity is tax-exempt. County may only negotiate arrangement pursuant to Electric Authorities Act for defined 'authority.' No authority for county to arrange continuous stream of payments in lieu of local taxes from commercial entity; no arrangement for General Assembly to modify or abrogate 159

Real Property Tax. Local tax is result of applying locality's tax rate to property's assessment or valuation; valuation is based on appraisal of property's fair market value multiplied by percentage of fair market value that locality subjects to tax rate; percentage is known as assessment ratio 35

Locality must impose single uniform rate of taxation on residential property within its borders 32, 35

TAXATION **PAGE**

No general rule for valuation of property; factors to consider include size and cost, design, style, location, appearance, availability of use, economics of area 35

Real Property Tax – Boards of Equalization. Fact that lands of one or few taxpayers are assessed at differing percentages of fair market value is not, per se, violation of legal requirements; redress may be had at locality's board of equalization, from commissioner of revenue, or by judicial appeal. Material, systematic, and intentional discrimination against individual taxpayers or group of taxpayers may violate Virginia and federal constitutional requirements 35

Primary remedy for taxpayers claiming that inconsistent percentages of real property assessments have been applied may rest with board of equalization 35

Real Property Tax – Special Assessment for Land Preservation Taxable Real Estate. Board of supervisors may not adopt ordinance classifying all private residences in designated area as real estate devoted to agricultural use in order to make property eligible for use valuation 35

Real Property Tax – Taxable Real Estate. Fact that lands of one or few taxpayers are assessed at differing percentages of fair market value is not, *per se*, violation of legal requirements; redress may be had at locality's board of equalization, from commissioner of revenue, or by judicial appeal. Material, systematic, and intentional discrimination against individual taxpayers or group of taxpayers may violate Virginia and federal constitutional requirements 35

Review of Local Taxes – Correction of Assessments, Remedies and Refunds. Fact that lands of one or few taxpayers are assessed at differing percentages of fair market value is not, *per se*, violation of legal requirements; redress may be had at locality's board of equalization, from commissioner of revenue, or by judicial appeal. Material, systematic, and intentional discrimination against individual taxpayers or group of taxpayers may violate Virginia and federal constitutional requirements 35

Taxpayers claiming inconsistent assessments may seek administrative correction from local commissioner 35

Taxpayers may file application for correction of erroneous assessment with circuit court; may allege that assessment is not uniform in its application 35

Tax exemptions are strictly construed; where there is any doubt, doubt is resolved against exception 159

Taxation of Public Service Corporations. No authority for county to receive payment of service fee in lieu of property and other taxes unless entity is tax-exempt. County may only negotiate arrangement pursuant to Electric Authorities Act for defined 'authority.' No authority for county to arrange continuous stream of payments in lieu of local taxes from commercial entity; no arrangement for General Assembly to modify or abrogate 159

TRADE AND COMMERCE **PAGE**

Virginia Consumer Protection Act. Car rental companies may not assess and collect nongovernmentally mandated 'vehicle licensing fee' as separate charge on consumer car rental transactions. Disclosure of unadvertised, nonmandatory charges for car rental transactions at point of sale does not constitute adequate disclosure pursuant to Act 164

Disclosure of nonmandatory fees at point of sale in written contract is deceptive media advertising 164

Tax recoupment surcharge is not tax; state has not imposed this charge on car rental transaction; surcharge is overhead and no different from other overhead expenses 164

Use of term 'vehicle licensing fees' by car rental company, even with disclosure in written contract, suggests fees are governmentally mandated; such usage would have tendency to mislead consumers and constitutes violation of Act 164

When company intends to charge nonmandatory fees, but advertises car rental terms without reflecting or including nonmandatory fees, such company violates Act 164

TREASURER

Locality eliminating physical decal by entering into agreement with Commissioner of Department of Motor Vehicles where Commissioner refuses to issue or renew vehicle registration of any applicant owing local license fees may carry forward unpaid decal fee and collect it in subsequent years; such collection is subject to limitation of five years from December 31st of tax year for which assessment is made 137

Treasurer, as constitutional officer, is independent of control of local governing body and, except as abrogated by statute, retains complete discretion in day-to-day operations of office, personnel matters, and manner in which duties of officer are performed 147

UNIFORM STATEWIDE BUILDING CODE
(*See* Housing)

VIRGINIA CONSUMER PROTECTION ACT OF 1977
(*See* Trade and Commerce — Virginia Consumer Protection Act)

VIRGINIA EMERGENCY SERVICES AND DISASTER LAW OF 2000, COMMONWEALTH OF
(*See* Military and Emergency Laws – Emergency Services and Disaster Law)

VIRGINIA FREEDOM OF INFORMATION ACT
(*See* Administration of Government)

VIRGINIA PUBLIC PROCUREMENT ACT
(*See* Administration of Government)

VIRGINIA TORT CLAIMS ACT
(*See* Civil Remedies and Procedure: Actions – Tort Claims Against the Commonwealth of Virginia)

VOLUNTEER PROTECTION ACT OF 1997 [FEDERAL] PAGE

Act contains preemptive clause applying federal provisions over less protective state laws 129

Formal declaration of emergency under Disaster Law affords Medical Reserve Corps volunteers immunity for acts of negligence; no immunity for acts of willful misconduct. Common law Good Samaritan doctrine may provide limited immunity to Corps volunteers acting within confines of law. Federal Volunteer Protection Act of 1997 provides broad immunity, both before and during declared emergency, for volunteers' negligent acts provided they act within scope of their responsibilities; no immunity for claims of noneconomic damages, acts involving gross negligence or reckless misconduct, or awards of punitive damage. Whether Corps volunteers are agents of Commonwealth for purposes of sovereign immunity and workers' compensation protection is factual determination 129

If training exercises, mock disasters, transportation to and from exercises and actual disaster situations are within scope of volunteer's duties, then liability protection afforded by Act would apply..... 129

If volunteer Medical Reserve Corps is nonprofit organization organized and conducted for public benefit and primarily operated for health purposes, it will fall under Act ... 129

When volunteer complies with requirements of Good Samaritan law and Act, liability protection associated with those laws would apply prior to gubernatorial declaration of emergency..... 129

WELFARE (SOCIAL SERVICES)

General Provisions. Children in Kidsave International Summer Miracles program do not appear to be entering foster care placement when in Virginia as they already have legal guardians 166

For purposes of social services, 'foster care placement' does not apply to Kidsave International Summer Miracles program 166

Licensure and Registration Procedures. For purposes of social services, 'foster care placement' does not apply to Kidsave International Summer Miracles program. No opinion whether Kidsave may need to be licensed on other basis..... 166