

OPINIONS
OF THE
ATTORNEY GENERAL
AND
REPORT
TO THE
GOVERNOR OF VIRGINIA
2007



COMMONWEALTH OF VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
AT RICHMOND



THE 2007
REPORT OF THE ATTORNEY GENERAL

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LETTER OF TRANSMITTAL

May 1, 2008

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 2007. During the period covered by this report, the Office of the Attorney General issued 42 official opinions. This Office has 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.

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 these public servants. I have the honor to present just a few of the accomplishments from the past year.

2007 LEGISLATIVE ACCOMPLISHMENTS

During the 2007 Session of the General Assembly, the Office of the Attorney General worked to implement the legislative components of my “Protecting Virginia’s Future” agenda. These efforts included securing the individual rights of property owners, providing for the prompt removal of outdated and unnecessary regulations, protecting our most vulnerable citizens, and ensuring that the Commonwealth is prepared during emergencies.

This Office worked closely with legislators and key interest groups to ensure that the erosion of private property rights would not happen in the Commonwealth. A recent case decided by the Supreme Court of the United States held that state laws related to the power to take private property for the public good could be interpreted to permit states to take such property merely for financial gain. Through the hard work of many, laws were passed in 2007 so that property taken in Virginia through eminent domain cannot be for the primary purpose of financial gain, but truly for the greater public good. Further, the laws that were enacted provided for fair and just compensation to the property owners.

Protecting Virginia’s most vulnerable residents, including children, seniors, and victims of crime, was another significant goal. The Office sought legislation requiring sex offenders to register their e-mail addresses with authorities to discourage

sex offender participation on social networking websites. In addition, penalties for the production and distribution of child pornography, as well as on-line solicitation of children, were enhanced.

Legislation was enacted to establish a Senior Alert Program for coordination of local and state efforts to locate missing senior citizens with cognitive impairments. It is essential that such individuals quickly be identified and located to keep them out of harm's way. Additionally, penalties related to the abuse and neglect of seniors were enhanced.

Victims of crime now have the right to testify at sentencing. Further, penalties for subsequent violations of protective orders, which are intended to protect domestic violence victims, were enhanced. As a result of legislation proposed by this Office, officials may receive notification regarding troubled juveniles prior to any violations of Virginia laws. Thus, officials may intervene to help such juveniles become productive citizens.

Legislation was enacted to protect lawful businesses from being unduly or unnecessarily regulated. Outdated regulations now can be repealed on a "fast track" basis. This was proposed by my Government and Regulatory Reform Task Force. This new law already is facilitating the work of the Task Force to examine and reduce Virginia's lengthy and complex Administrative Code.

Virginia's ability to respond effectively in the event of a natural or man-made disaster was improved. The authority of state and local governments to enter into agreements to assist a neighboring state's or locality's request for aid was clarified. Such reciprocity is essential when a disaster occurs in a neighboring jurisdiction. Additionally, such cooperation will ensure that Virginia receives the assistance of other jurisdictions in emergency situations. The new laws enhanced the ability of the Commonwealth's law-enforcement and medical personnel to carry out their duties safely and effectively during an emergency through necessary orders of isolation and quarantine.

Finally, as a result of legislation championed by this Office, the families of fallen Virginia military members are ensured financial resources to obtain an education and become self sufficient. We should honor the service of these fallen heroes by enabling their families to achieve financial security.

STATE SOLICITOR GENERAL

The State Solicitor General Section represents the Commonwealth in litigation in the U.S. Supreme Court (except capital cases) as well as in lower court appeals involving constitutional challenges to statutes or politically sensitive issues. The Section assists all Divisions of this Office with constitutional issues.

During 2007 the Section persuaded the U.S. Supreme Court to review *Virginia v. Moore*, which was fully briefed. The question presented in *Moore* was

whether the federal constitution requires suppression of evidence when the arrest violated state law. The case was scheduled for argument in 2008. Additionally, we persuaded the Court to grant certiorari, vacate judgment, and remand *Herring v. Richmond Medical Center for Women*, which involved a constitutional challenge to the Partial Birth Infanticide Act. The Section filed two amicus briefs on the merits. One of the briefs resulted in a victory, and the other was pending at the end of 2007. A significant part of the Section's U.S. Supreme Court practice is to persuade the Court not to review the Commonwealth's lower appellate court victories. In 2007, the Section successfully opposed every petition for certiorari presented to the Court, including constitutional challenges to the Alcoholic Beverage Control statutes and regulation of viatical settlements.

While U.S. Supreme Court litigation is a significant part of the Solicitor General Section's work, the Section also was involved in numerous lower court appeals. These significant appeals included: (1) a brief and argument on the constitutional challenge to the Anti-Spam Act in the Supreme Court of Virginia; (2) successful defense of the constitutionality of the Sodomy Statute as applied to conduct with a minor; (3) presentation of a case that persuaded the Virginia Supreme Court that sovereign immunity bars a declaratory judgment against the Commonwealth; (4) a brief and argument before the United States Court of Appeals for the Fourth Circuit on the constitutionality of the Partial Birth Infanticide Act on remand from the U.S. Supreme Court; (5) successful defense in the Virginia Supreme Court against a constitutional challenge to Virginia's practice of post-release supervision; and (6) presentation of a case that persuaded the Virginia Supreme Court to uphold the Sex Offender Registration statute.

CIVIL LITIGATION DIVISION

The Civil Litigation Division defends the interests of the Commonwealth, its agencies, institutions, and officials in civil law suits. Such civil actions include tort, construction, employment, workers' compensation, and civil rights claims, as well as constitutional challenges to statutes. 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 matters involving regulated utilities, including cases pending before the State Corporation Commission. Finally, the Division provides legal advice to the agencies and institutions of state government on risk management, employment, insurance, utilities, and construction issues and serves as counsel to Virginia's judiciary and the Virginia State Bar.

Trial Section

During 2007, the Trial Section handled 523 new matters in addition to cases continued from the previous year. The Section provided legal advice to state courts

and judges, the Virginia State Bar, Board of Bar Examiners, Department of Human Resource Management, Human Rights Counsel, Department of Labor and Industry, Virginia Indigent Defense Commission, Advisory Council for the Commonwealth of Virginia Campaign, and the Office of Commonwealth Preparedness. The Section prosecuted unauthorized practice of law matters referred by the Virginia State Bar and represented the State Bar in attorney disciplinary appeals before the Supreme Court of Virginia.

Attorneys in the Trial Section provided training on the Family and Medical Leave Act to human resource personnel from more than 50 state agencies and provided training on employment law and Fair Labor Standards Act issues to the Virginia State Police and the Human Resource Leadership Conference. In addition, Section attorneys presented a seminar on alternative dispute resolution to the Government and Regulatory Reform Task Force. Trial Section attorneys also assisted in presenting several tort liability seminars to Department of Transportation employees.

In *Life Partners, Inc. v. Christie*, the Trial Section successfully defended the constitutionality of Virginia's Viatical Settlement Act in the United States District Court for the Eastern District of Virginia against a dormant Commerce Clause challenge. The challenged statute regulates the purchase of life insurance benefits from Virginia's terminally ill citizens. The District Court's decision was affirmed by the Fourth Circuit Court of Appeals on April 30, 2007. On December 3, 2007, the U.S. Supreme Court denied Life Partners' petition for writ of certiorari.

In *Miller v. Brown*, the Section 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, irrespective of political affiliation. Attorneys for the Section succeeded in limiting the relief granted to a single and specific application of the statute. Beyond the specific facts presented by that case, the Commonwealth's authority to require state-run primaries to be open to all voters was preserved.

Construction Litigation Section

The Construction Litigation Section is responsible for all construction litigation involving the Commonwealth. This includes all horizontal and vertical construction, *i.e.*, all roads, bridges, and buildings. The Section provides ongoing advice to the Department of Transportation, during the administration of hundreds of millions of dollars of road and bridge contracts each year, by engaging in a process of complex problem solving as issues arise to avoid claims and litigation. These efforts facilitate timely and efficient completion of road and bridge projects.

In 2007, the Section resolved 38 claim and litigation matters. The total amount demanded from the Commonwealth in these matters exceeded \$39,000,000, and they were resolved for a collective total of approximately \$8,550,000. In addition, the Section opened 31 new claim and litigation files. Together, the claimants in these

matters requested damages from the Commonwealth in excess of \$130,000,000. Under appropriate circumstances, the Section makes claims or files lawsuits against construction and design professionals or surety companies as requested by state agencies. In 2007, the Commonwealth received payments exceeding \$2,600,000 as a result of the Section's affirmative efforts. At year's end, the Section was handling 32 matters seeking payment from the Commonwealth for a total of \$126,500,000.

The Section provided advice to various colleges and universities during the year regarding construction projects, including the Virginia Military Institute, the College of William and Mary, Norfolk State University, Virginia State University, the Virginia Community College System, Virginia Tech, Christopher Newport University, Longwood University, and others. The Section provided advice to the Departments of Conservation and Recreation, Military Affairs, Game and Inland Fisheries, and General Services. This advice facilitated the effective construction of dormitories, dining areas, classrooms, campgrounds, office buildings, fish hatcheries, and other buildings essential to the effective mission of those agencies.

Antitrust and Consumer Litigation Section

The Antitrust and Consumer Litigation Section enforces state and federal statutes that protect consumers from deception and misrepresentation, and usury and antitrust laws that protect businesses and consumers from behavior that defeats healthy competition. The Section enforces the Virginia Antitrust Act, Virginia Consumer Protection Act, Consumer Finance Act, the solicitation of contributions statute, and federal statutes such as the Telemarketing and Consumer Fraud and Abuse Prevention Act and its accompanying regulations, the Telemarketing Sales Rule. The Section provides advice to the Office of Consumer Affairs within the Virginia Department of Agriculture and Consumer Services and provides antitrust advice to other state agencies.

In the antitrust area, Virginia and 34 other states settled claims against Warner Chilcott (WC), the manufacturer of Ovcon, an oral contraceptive pill. The claims arose from allegations that WC and Barr Pharmaceuticals, Inc., entered into a written market allocation agreement that resulted in WC paying Barr to keep generic forms of the drug off the market. The settlement provided for injunctive relief and a payment of \$5.5 million to the settling states. In addition, Virginia consumers received restitution for purchases of Remeron totaling \$230,000. The payments resulted from a multi-state settlement of claims that Organon USA Inc., the manufacturer of Remeron, unlawfully attempted to extend its monopoly by listing a new "combination therapy" patent with the FDA and to delay the availability of lower-cost generic substitutes for Remeron.

The Section assisted the FTC in its review of local markets to determine if Rite Aid's proposed acquisition of the Eckerd and Brooks drug store chains would

impose threats to competition in the provision of pharmaceutical services in Virginia. The final approved transaction resulted in two Virginia divestitures. In addition, the Section filed comments calling for the United States District Court for the District of Columbia to reject a proposed consent decree that would approve Monsanto's acquisition of Delta & Pine Land Company. Our comments were joined by 12 other states.

The Section resolved pending litigation related to a Virginia Beach-based charitable organization that transferred its primary asset to its former executive director. The resolution took the form of a consent decree that provided for two-thirds of the proceeds from sale of the property (approximately \$212,000) to be distributed for the special benefit of needy or impoverished persons in the Virginia Beach community. The Section issued refunds totaling \$6,627 to 133 former customers of Products at Work, LLC, a for-profit telemarketing company operating out of Norfolk. The refunds resulted from the successful enforcement of the Virginia's solicitation of contributions law and the Virginia Consumer Protection and Telephone Privacy Protection Acts.

On the consumer protection front, the Section brought claims against and entered into settlements with five automobile title lenders operating throughout Virginia that related to alleged violations of the Consumer Finance Act. In addition to injunctive relief, the settlements required the companies to make aggregate refunds exceeding \$420,000 to 2,522 consumers and to forebear collection of nearly \$6,480,000 in interest owed by 12,216 borrowers who took out title loans and then defaulted.

Finally, the Section entered into four significant multi-state settlements of alleged violations of Virginia's Consumer Protection laws that resulted in payments exceeding \$1.5 million to support the consumer education and protection work of the office.

Insurance and Utilities Regulatory Section

The Insurance and Utilities Regulatory Section serves as the Division of Consumer Counsel representing the interests of Virginia's citizens as consumers of the services and products of insurance, electric, natural gas, and telecommunications companies. Doing so includes active participation in proceedings before the State Corporation Commission (SCC) and federal regulatory agencies, such as the Federal Energy Regulatory Commission (FERC) and the Federal Communications Commission (FCC), as well as involvement in the legislative process on behalf of consumer interests in the regulation of public utilities and insurance companies.

In 2007, the General Assembly adopted comprehensive legislation amending the Virginia Electric Utility Restructuring Act and related provisions of the *Code of Virginia* to reregulate the rates of the Commonwealth's electric utilities. The Section played a key role in this Office's participation in the legislative process, ensuring inclusion of sufficient safeguards to protect the interests of utilities' customers.

The Section enjoyed success in a number of important SCC electric utility rate proceedings in 2007. Chief among these was Appalachian Power Company's request for a \$199 million rate increase. The positions taken by the Section contributed to a \$175 million reduction to the Company's request, which resulted in a typical residential customer savings of approximately \$12/month. In a second Appalachian Power case, the SCC agreed with the Section's recommendation to exclude approximately \$10 million of a proposed \$59 million rate increase to recover environmental compliance and transmission and distribution system reliability expenditures.

Relying in part on the positions set forth by the Section, the SCC denied a \$99 million rate request by Allegheny Power based on the legal interpretation of an agreement entered into by the utility in 2000. In a subsequent filing, the SCC awarded Allegheny an increase of only \$9.5 million of a \$42.3 million request, which was consistent with the position advocated by the Section. The SCC adopted this Section's legal arguments in a similar case involving Delmarva Power and Light, which saved customers \$5.4 million, approximately \$11/month for the typical residential customer. The first Allegheny case and the Delmarva case were pending appeal at the end of the year. The Section will continue to represent consumers' interests in these matters on appeal.

The Section represented the Commonwealth's interests before the United States Department of Energy (DOE) challenging a DOE designation of a National Interest Electric Transmission Corridor through parts of the Shenandoah Valley and Piedmont region of Virginia. Such designation could lead to preemption by the federal government of Virginia's authority to approve the siting of electric transmission lines. Reconsideration of DOE's designation and related legal proceedings were pending at the end of 2007. At the federal level, the Section continued to be active in matters involving PJM Interconnection, a regional transmission organization, both within the PJM stakeholder process and in proceedings at FERC.

Before the FCC, the Section successfully intervened with other attorneys general and consumer advocates on a Verizon Petition for Forbearance affecting six East Coast Metropolitan Statistical Areas (MSAs), including the Virginia Beach MSA. If granted, Verizon would have been relieved of certain obligations under the Telecommunications Act of 1996 and would have been able to charge its wholesale customers higher prices for network access. As the Section requested, the FCC denied Verizon's petition.

Finally, the Section participated in the Washington Gas Light Company (WGL) general rate case in which WGL sought a \$17.2 million rate increase and approval of a performance-based ratemaking (PBR) methodology. WGL also sought approval of several other complex rate design changes. The SCC ultimately adopted a stipulation among the parties that provided for only a \$3.9 million base rate increase and, among other things, a 4-year PBR with an earnings sharing mechanism that is fair to both the company and its customers.

HEALTH, EDUCATION AND SOCIAL SERVICES DIVISION

The attorneys in the Division of Health, Education and Social Services provide advice to the public colleges and universities of Virginia and to agencies that provide 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 helps ensure quality education for students from kindergarten through college. For K-12, this guidance relates to implementation of the Standards of Learning and Standards of Quality, providing access to technology for disadvantaged students, maintaining discipline and safety on school grounds, complying with federal education programs, and improving school facilities. The 14 colleges and 23 community colleges in Virginia are self-contained communities with the full range of legal needs: campus safety and security; admission and educational quality issues; personnel issues; the proper relationship between colleges and the Commonwealth; contracts; procurement; and financing.

On April 16th, the deadliest school shooting in the history of the United States occurred on the campus of Virginia Tech. This unprecedented crisis presented the attorneys in the Education section with a host of complex issues. Section attorneys at Virginia Tech and in the Richmond office provided guidance and advice on privacy issues and family notification, repatriation of the remains of foreign citizen victims, and the securing of data, documents, and other physical evidence for use by police investigators. Attorneys also responded to civil complaints and novel legal issues raised by media requests for information under the Freedom of Information Act. The Section also negotiated a hazardous waste decontamination contract for the crime scenes.

Following the immediate crisis, this Section provided counsel on a daily basis to the Virginia Tech administration and to other institutions of higher education on issues arising from the tragedy. Attorneys supplied critical legal analysis on privacy issues, the Family Education Rights Privacy Act, mental health issues, and administration of the “Hokie Spirit Memorial Fund.”

Health Services Section

Attorneys in the Health Services Section devoted significant time and counsel to the Virginia Mental Health Law Reform Commission. This challenging work was

magnified by the tragedy at Virginia Tech, which presented a host of complicated issues in the mental health area, including issues related to community outpatient treatment, issuance of temporary detention orders, involuntary inpatient admission hearings, the role of the Office of Chief Medical Examiner, and interpretation of federal and state health records privacy laws. These activities were in addition to the regular, ongoing services and advice provided by this Section to state agencies.

Section attorneys worked closely with the Office of Comprehensive Services and State Executive Council providing advice related to the drafting of guidelines to ensure that parents need not relinquish custody of their children in order to obtain residential mental health services.

In conjunction with the Virginia Department of Health, the Centers for Disease Control, and the Association of State and Territorial Health Officials, this Section conducted a Social Distancing Law Project, reviewed Virginia laws on isolation and quarantine, closure of public places, curfew, mutual aid agreements, and other tools to curtail a pandemic health event. Further, the Section sponsored two tabletop exercises addressing legal issues arising in the event of a biological or terrorism situation.

Section attorneys successfully defended decisions by the Board of Medicine in complex licensure suspension cases involving an illegal abortion, inadequate prenatal care and diagnostic testing, the deaths of two patients, significant injury to one patient, and Fourth Amendment concerns. The Section continued to represent the State Health Commissioner in high profile certificate of public need cases, as well as in constitutional challenges to the relocation of nursing home beds without compliance with the certificate of public need process. The Section handled a number of issues related to the Office of Emergency Medical Services, including an Administrative Process Act appeal involving suspension of the Culpeper County Rescue Squad.

Social Services Section

Attorneys in the Social Services Section provide guidance regarding myriad complex issues involving Medicaid reimbursement and protection of the children of Virginia through social services departments.

The Section participated in a significant policy change for the Commonwealth, which culminated in the issuance of an official opinion that advised parents that they do not have to relinquish custody of their children to access mental health services. This Section provided advice regarding Medicaid reimbursement to the Commission on Mental Health Law Reform and continued efforts on behalf of the Attorney General's Regulatory Reform Task Force to review complex DMAS regulations.

Attorneys in this Section successfully defended a number of founded dispositions of child abuse throughout the Commonwealth, defended several licensure revocations by DSS of substandard child care facilities, and provided

support to DMAS to ensure that nursing homes were complying with federal and state long term care standards. Attorneys provided advice and guidance on a number of Medicaid provider reimbursement issues, which saved millions of public dollars, and closely worked with the Medicaid Fraud Control Unit to protect the integrity and the fiscal well-being of the Commonwealth's Medicaid program.

Child Support Enforcement Section

The Child Support Enforcement Section continues to lead the nation in its efficient and vigorous prosecution of child support cases. Section attorneys handled 130,572 cases, collected \$11,275,133 in delinquent child support, established \$1,204,243/month in new child support orders, and secured 629,860 days in jail on contempt cases. The Section successfully obtained dismissals of claims made or appeals taken against the Commonwealth in 14 cases, including a case in the Supreme Court of Virginia, ten cases in the Court of Appeals of Virginia, and two in federal bankruptcy courts.

The Child Support Enforcement Section's "Cell Phone Records Initiative" won one of only two 2007 Council of State Governments' Innovations Awards announced at the Council's annual meeting. Virginia was the first state to obtain addresses and phone numbers of noncustodial parents owing child support arrears from cellular phone companies by issuing administrative subpoenas. The Section reviewed the federal 1996 Telecommunications Act and part IV-D of the Social Security Act and determined Virginia had legal justification to subpoena such information from cell phone companies. Virginia led the federal and state efforts to automate the matching of names with those companies. Virginia co-chairs the federal Office of Child Support Enforcement's National Cell Phone Work Group. The Work Group addressed how all states can work together to devise a uniform file layout and achieve centralized automated responses.

Finally, the Section provided guidance to Virginia's child support pilot project under which eight juvenile and domestic relations district courts tested innovative ways to efficiently handle large numbers of child support cases, increase the number of "meaningful hearings," and help parents better understand the court process.

SEXUALLY VIOLENT PREDATORS, TOBACCO, ALCOHOL, GAMING AND DEBT COLLECTION DIVISION

The Sexually Violent Predator, Tobacco, Alcohol, Gaming and Debt Collection Division is responsible for providing comprehensive legal services in a number of diverse areas. In 2007, the Division of Debt Collection (DDC) was added to this Division's Sections. 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, 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; (6) the Virginia Birth-Related Neurological Injury Program; and (7) DDC provides aggressive, appropriate, cost effective, and professional debt collection services on behalf of state agencies.. The Division also represents the Commonwealth in the civil commitment of sexually violent predators.

Civil Commitment of Sexually Violent Predators Section

The Civil Commitment of Sexually Violent Predators Act was funded in 2003, and the Section has reviewed 281 cases since that date. During 2007, the Section filed 77 petitions for civil commitment. At the end of 2007, 26 petitions were at the probable cause stage, 48 were at trial stage, and 11 were at the disposition stage. In addition, Section attorneys drove in excess of 50,000 miles covering these cases in court. Cases concluded in 2007 resulted in 30 persons being declared "sexually violent predators" and civilly committed.

Sexually violent predators who are civilly committed are entitled to an annual review hearing for the first five years and biannually thereafter. In 2007, Section attorneys represented the Commonwealth at 24 annual hearings. At each hearing, the court concluded that the person remained a sexually violent predator.

In the civil commitment cases, 18 petitions for appeal were filed with the Virginia Supreme Court and 1 petition for appeal was filed with and declined by the U.S. Supreme Court. This Office filed 4 of the appeals, and sexually violent predators who were civilly committed filed the remaining 15 appeals.

Virginia Birth-Related Neurological Injury Compensation Representation

The Division handled 15 new eligibility petitions and concluded 5 eligibility cases previously filed under the Virginia Birth-Related Neurological Injury Compensation Act. The Birth Injury Program recommended acceptance of 13 petitions for benefits without a hearing. One petition was dismissed by the Virginia Court of Appeals as lacking in merit, one was dismissed by the Virginia Workers' Compensation Commission, and two petitions were withdrawn by the claimant. Five eligibility petitions and one benefit appeal were still pending at the end of 2007.

With one exception, all fee petitions were resolved by agreement; including two that were resolved after the Program filed a response in opposition. The pending benefits appeal involves a claim for housing benefits and nursing care provided by family members for many years preceding claimant's entry into the Program. One case was concluded before the Virginia Court of Appeals.

Tobacco

The Tobacco Section 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 November 1998. In April, the Commonwealth received \$123,151,935 in payments from the participating manufacturers. In addition, the Section diligently enforced the sections that apply to nonparticipating manufacturers and filed 31 lawsuits alleging violations of the Virginia Tobacco Escrow Statute. The Section reached settlements with numerous other companies and obtained judgments in 16 cases totaling \$14,747,035 in penalties and escrow obligations. Three cases were resolved without further litigation, and four are pending. The Section maintained the Virginia Tobacco Directory that lists tobacco product manufacturers, certified as compliant with Virginia law, together with their brand families. During 2007, the Section certified 54 tobacco product manufacturers as compliant with Virginia law. The certifications represented 33 participating manufacturers and 21 nonparticipating manufacturers. Four of the participating manufacturers listed had brand families refused for listing. The Tobacco Section investigated and approved six supplemental certifications and delisted, either voluntarily at the manufacturer's request or involuntarily for non-compliance by the manufacturer, five participating manufacturers and seven nonparticipating manufacturers. Finally, the Section monitored administration of the National Tobacco Growers Settlement Trust (Phase II Agreement) and provided legal advice and representation to the Virginia Tobacco Indemnification and Community Revitalization Commission.

Alcohol Beverage Control

The Section represented the ABC Board in 21 cases, and argued 5 appeals. Further, Section attorneys provided agency advice on a variety of topics, and responded to citizen inquiries. This Section assisted the Trial Section in the Civil Litigation Division with two constitutional challenges to ABC Board Regulations.

Gaming

The Section handled several significant matters for its gaming agencies clients. Section attorneys assisted in procuring a comprehensive on-line game system for the Virginia Lottery and represented the Lottery in major litigation involving accessibility of lottery retailers to persons with disabilities. Division attorneys also worked with the Racing Commission to craft legislation that addressed deficiencies in the regulatory scheme for entities offering advance deposit wagering services.

Division of Debt Collection

The mission of the Division of Debt Collection (DDC) is to provide aggressive, appropriate, cost effective, and professional debt collection services on behalf of all state agencies. Section attorneys and staff protect taxpayers by ensuring

fiscal accountability for the Commonwealth's receivables. DDC attorneys provided advice on collection and bankruptcy issues to state agencies and other Divisions within this Office. One attorney serves as general counsel to the Unclaimed Property Division of the Department of Treasury.

In 2007, at the direction of the General Assembly, the Section produced a special report on "The Most Cost-Effective Strategies for Improving Virginia's Collections of Receivables, Including Both General and Nongeneral Fund Receivables." Since members travel through out the Commonwealth to represent agency interests, the Section increased its technology purchases to expand operational efficiencies and connectivity with the main Office.

Operationally, DDC is self-funded by contingency fees earned from its recoveries for the "Debt Collection Recovery Fund." During the 12 month period from July 1, 2006 to June 30, 2007, gross recoveries covering 35 state agencies totaled \$11,523,176. During fiscal year 2007, the Section recognized fees of \$2,152,384, which represents \$535,874 in excess of Section expenditures.

PUBLIC SAFETY AND ENFORCEMENT DIVISION

The Public Safety and Enforcement Division is composed of the Correctional Litigation, Criminal Litigation, Health Professions and Professional Integrity, and Special Prosecutions and Organized Crime Sections. The attorneys and staff working in this Division handle criminal appeals, prisoner cases, health professions hearings, as well as prosecutions relating to gangs, money laundering, fraud, and public corruption. The Division represents the Attorney General and the Commonwealth in state and federal courts and in administrative proceedings. Additionally, the Division provides counsel for all of the state agencies within the Public Safety Secretariat and for the Office of Commonwealth Preparedness.

Correctional Litigation Section

The Correctional Litigation Section's client agencies include the Departments of Corrections, Juvenile Justice, and Correctional Education, as well as the Parole Board. Further, the Section represents the Secretary of Public Safety and the Governor on extradition matters, Commonwealth's Attorneys on detainee matters, and Correctional Enterprises. During 2007, the Section was responsible for handling 123 "§ 1983" cases, 198 habeas corpus cases, 660 mandamus petitions, 35 inmate tort claims, 6 employee grievances, 2 warrants in debts, 342 advice matters, 5 trials, 6 employee grievances, and 24 hearings.

In 2007, the Section handled several significant matters in the federal district courts and the Virginia Supreme Court, including a successful defense of another challenge to Virginia's lethal injection process - *Emmett v. Johnson*. The U.S. District

Court for the Eastern District of Virginia found that Virginia has taken considerable precautions to ensure that neither human error nor defective equipment increase the risk that inmates will feel any pain. The Court found Virginia's method of conducting lethal injections constitutional.

In *Scott v. Braxton*, an inmate claimed excessive force was used against him during a cell extraction. The case was tried by a magistrate judge who found that, while the inmate suffered injury, only necessary force was used to subdue the out of control inmate. The district court adopted the magistrate's findings and entered judgment in favor of the defendants. The case was appealed to the Fourth Circuit, but it was dismissed before trial. Another excessive force case claim, *Talbert v. Smith*, included claims of racial discrimination, assault and battery, conspiracy, and negligence. The inmate further claimed his religious materials were confiscated in violation of the First Amendment and Religious Land Use of Institutionalized Persons Act. The U.S. District Court found for the defendants on all counts.

In *Harvin v. Commonwealth*, the U.S. District Court granted summary judgment to defendants finding they were not persons for purposes of § 1983 or were immune from suit that alleged deliberate indifference, negligence, and wrongful death of inmate who collapsed on a basketball court and who allegedly received inadequate medical attention. In *DeLonta v. Johnson*, an inmate with gender identity disorder (transsexualism) alleged that correctional center staff failed to protect him from sexual assault by fellow inmates. The defendants were members of DeLonta's treatment team, which was assembled to deal with the aspects of this difficult incarceration. The case involved significant discovery during 2007, and trial is set for 2008.

Finally, the Correctional Litigation Section successfully advocated for an amendment to the *Code of Virginia* to codify confidentiality protection of the personal identities of execution team members.

Criminal Litigation Section

The Criminal Litigation Section handles an array of post-conviction litigation filed by state prisoners challenging their convictions. This litigation includes criminal appeals, state and federal habeas corpus proceedings, petitions for writs of innocence, and other extraordinary writs. The Section's Capital Unit defends against appellate and collateral challenges to all cases in which a capital sentence was imposed. In addition, Section attorneys review wiretap applications and provide informal advice and assistance to prosecutors statewide. Finally, the Section represents the Capitol Police, state magistrates, and the Commonwealth's Attorneys' Service Council.

In 2007, this Section defended against 1,025 petitions for writs of habeas corpus and represented the Commonwealth in 510 appeals in state and federal courts. In addition, the Section received 38 petitions for writs of actual innocence.

Among the Section's many significant cases were appeals decided by the Virginia Supreme Court, including: (1) *Robinson v. Commonwealth*, holding that police did not violate the defendants' rights by making a warrantless entry onto their property to investigate reports of underage drinking; (2) *Fitzgerald v. Commonwealth* and *Conley v. Commonwealth*, holding that licensed clinical social workers and licensed professional counselors were qualified to testify that child victims of sexual assault suffered from Post-Traumatic Stress Disorder. In addition, the Virginia Supreme Court affirmed the judgment of the Court of Appeals in the actual innocence matter of *Carpitcher v. Commonwealth*. In the 1999 conviction of Carpitcher for sexual offenses against the daughter of his girlfriend, the Commonwealth presented only the testimony of the 11-year-old victim. After trial and sentencing, the victim recanted some of her trial testimony. In subsequent proceedings, the evidence demonstrated that the victim was pressured into recanting. The Court found that Carpitcher failed to present credible evidence of innocence and held that, in the context of witness recantation, an actual innocence petitioner must prove that the recantation was true and that no rational trier of fact could have found him guilty of the crime. Finally, in *Ward v. Commonwealth*, the Court applied the good faith exception to the exclusionary rule in the context of an anticipatory search warrant.

The Criminal Litigation Section received numerous important decisions from the Virginia Court of Appeals. In *Waddler v. Commonwealth*, the Court affirmed convictions for murder and illegal use of a firearm and approved the procedural method to replace a jury member excused before the panel was sworn. In *Depsky v. Commonwealth*, the Court held that the 60-day administrative suspension of the defendant's driver's license, after a second DUI charge, did not violate the double jeopardy provisions of the United States and Virginia Constitutions. The Court in *Johnson v. Commonwealth* upheld the trial court ruling that disqualified an attorney seeking to represent both the criminal defendant and the witness who would testify against the defendant. In *Hairston v. Commonwealth*, the Court of Appeals held that a defendant seeking to subpoena medical or psychological records of a child victim of sexual assault must comply with the Health Records Privacy Act. In *Glenn v. Commonwealth*, a divided *en banc* Court of Appeals affirmed the trial court ruling that police reasonably believed a homeowner's consent to search his home extended to an unmarked, unlocked backpack in open view in a room occupied by the homeowner's grandson. In *Pharr v. Commonwealth*, the Court held that upon arrest for a sexual offense and consent to DNA testing of his saliva, the arrestee did not have a continued and reasonable expectation of privacy under the Fourth Amendment that the sample would not be tested for unrelated offenses to which he did not expressly consent. Finally, in *Doss v. Commonwealth*, the petitioner challenged convictions of first-degree murder, statutory burglary, conspiracy, and two counts of using a firearm

in the commission of a felony based upon a witness who recanted his testimony. The Court of Appeals upheld the trial court's finding that the witness was not credible.

The Capital Unit Section defended, on appeal and collateral attack, the convictions of persons sentenced to death under Virginia law. Two new appeals were received from convictions in 2007, and 18 other death row inmates continued existing litigation. Three cases were of particular significance. In *Emmett v. Warden*, the Fourth Circuit Court of Appeals held that the failure of Emmett's trial counsel to present certain mitigating evidence did not prejudice his case, and the U.S. Supreme Court denied his petition for certiorari. In *Walker v. Warden*, the magistrate judge recommended denial of Walker's *Brady* claim and found no proof of prosecutorial misconduct. Finally, in *Green v. Director*, the Commonwealth prevailed on Green's claim that he is mentally retarded and cannot be executed. The Section recently argued in the Fourth Circuit that the district court's judgment in *Green* should be affirmed.

Health Care Fraud and Professional Integrity Section

The Health Care Fraud & Professional Integrity Section is comprised of two units: Medicaid Fraud Control and Health Professions & Fair Housing. These Units handle criminal investigations and prosecutions of fraud against the Commonwealth by Medicaid providers, and litigation under the Virginia Fraud Against Taxpayers Act. The Units also prosecute violations of Virginia's fair housing laws and administrative prosecution of licensees of the Department of Health Professions.

Medicaid Fraud Control Unit

The Medicaid Fraud Control Unit (MFCU) had a record-breaking year investigating and prosecuting many fraud cases throughout Virginia. MFCU's criminal and civil investigations resulted in 14 convictions of health care providers and a criminal and civil recovery exceeding \$117 million for Virginia's Medicaid and Medicare programs. MFCU's Civil Investigation Squad handles Virginia Fraud Against Taxpayers Act cases, federal *qui tam* cases involving allegations of fraud in the Virginia Medicaid program, and Affirmative Civil Enforcement (ACE) program activities. In 2007, the Squad recovered more than \$18 million from health care providers who fraudulently billed the state Medicaid and the federal Medicare programs.

In July 2007, a joint investigation into allegations of fraud committed by the Purdue Pharma Company resulted in a plea agreement and conviction of three corporate officers. This agreement was the culmination of a four-year investigation. The Unit led the joint investigative team, including agents from the Food and Drug Administration, the IRS, the Department of Defense, the Department of Labor, HHS, and West Virginia and Virginia State Police. The U.S. Attorney's Office for Virginia's Western District prosecuted the case. The agreed restitution, fines, disgorgement, and

costs paid by the defendants totaled \$634,500,000 with \$105 million being paid to various Commonwealth agencies.

In October 2007, Bristol-Meyers Squibb Pharmaceuticals, Inc. (BMS), entered into a settlement agreement with the federal government and various states resolving claims of fraudulent marketing and billing practices. The agreement resolved several federal and state court *qui tam* complaints. The resolved claims against BMS and a subsidiary included: (1) average wholesale price fraud from 1993 through 2002; (2) violations of the federal Anti-Kickback Statute; (3) off-label marketing and promotion of Abilify; and (4) violations of the Medicaid Drug Rebate Statute based on failure to report accurate best price data for Serzone. The total value of the settlement to state Medicaid programs is \$403 million, including Virginia's share of \$7,091,209.

In December 2007, Merck & Company, Inc., the Department of Justice, and the National Association of Medicaid Fraud Control Units reached a settlement resolving two federal *qui tam* cases, which alleged that Merck failed to report accurate best price data to the Center for Medicare and Medicaid Services for the drugs Vioxx and Zocor. Merck's failure to report accurate best price data resulted in a loss of money that the Virginia Medicaid program was entitled to receive. Virginia's share of the settlement, including federal and state funds, was \$8,304,590.

Health Professions Unit/Fair Housing Unit

The Health Professions Unit primarily prosecutes cases before health regulatory boards under the Department of Health Professions, including the Boards of Medicine, Nursing, Pharmacy, and Dentistry. The Unit also represents the Virginia Fair Housing Office before the Virginia Real Estate and Fair Housing Boards. In this capacity, the Unit reviews investigative files and prepares consultation opinions to the boards. Where a board determines that housing discrimination has occurred, the Unit litigates the civil lawsuits and appeals.

This Unit successfully prosecuted numerous formal administrative hearings, including one against an Annandale chiropractor who engaged in offensive sexual contact with a patient. Further, the chiropractor billed another patient for unprovided services that were not set out in treatment contracts. He failed to maintain and properly manage patient records and willfully misled the Department of Health Professions investigator. The Board of Medicine indefinitely suspended his license.

The Unit prosecuted a physician engaging in a sexual relationship with a patient to whom he prescribed controlled substances without a proper evaluation or medical diagnosis. Further, the physician failed to monitor and appropriately manage the use of the narcotic medications. The Board of Medicine ordered an indefinite suspension of the physician's license. Additionally, the Unit administratively prosecuted a psychologist for unprofessional conduct and conflict of interest issues.

The psychologist diagnosed a non-patient in a contested custody case where he called the mother of his patient a “malignant psychopath.” The doctor was placed on indefinite probation.

A dentist was administratively prosecuted for permitting an unlicensed staff member to administer anesthesia on a three-year-old child and for failure to conduct a proper preoperative assessment of the child. The child suffered laryngospasms after administration of an excessive amount of sedatives. The dentist was placed on probation for a two-year period.

In the fair housing area, the Unit provided consultations and several informal opinions while working with the Virginia Fair Housing Office, including 21 official consultation opinions to the Fair Housing and Real Estate Boards. The Unit recovered \$119,400 for fair housing complainants and \$4,000 in board costs, and filed six circuit court complaints that resulted in four settlements.

The Unit obtained a \$75,000 settlement from a homeowners’ association that discriminated against a group home and interfered with its operations. The Unit successfully recovered \$25,000 for a disabled person with mobility impairment because his request to transfer to a handicap-accessible apartment was denied. In another notable case, an auction attendee sued a real estate licensee/auctioneer for retaliation. The defendant/auctioneer barred the complainant from attending future auctions after the attendee filed a fair housing complaint against the auctioneer. The Unit negotiated a settlement with the defendant, which also provided for a six-month suspension of the defendant’s real estate license.

Special Prosecutions & Organized Crime Section

The Special Prosecutions & Organized Crime Section (SPOCS) is the primary prosecutorial division of the Public Safety and Enforcement Division. The Section is tasked with prosecuting crimes that are within the jurisdiction of the Attorney General, representing criminal justice and public safety agencies, and implementing public safety initiatives of the Attorney General. The Section is also charged with the seizure of assets from organized criminal activity.

The Section serves as legal counsel to the Departments of State Police, Criminal Justice Services, Forensic Science, Military Affairs, Emergency Management, Fire Programs, and Alcoholic Beverage Control-Enforcement Division as well as to the Virginia National Industrial Authority and the Office of Commonwealth Preparedness. On behalf of the agencies it represents, the Section filed and argued approximately 70 motions in state and federal courts.

SPOCS provided representation to the Department of State Police in numerous civil actions brought by sex offenders who contested inclusion in the sex offender registry. The Section successfully defended all the litigated cases. In 2007, SPOCS represented the Department of State Police on a wide range of issues, including review of real estate contracts related to the Department’s communication

system, statutory interpretation, FOIA, firearms issues, and proposed regulatory amendments.

The Section represented the Enforcement Division of the Department of Alcoholic Beverage Control in approximately 20 administrative proceedings where the Department sought to sanction or revoke a licensee. This representation included four revocations of a license, a civil penalty of \$4,500 and a three-year probation, and a \$10,000 fine and 60-day license suspension.

Attorneys in the Section represented the Private Security Services Section of the Department of Criminal Justice Services (“DCJS”) in cases involving bail enforcement and private security licensees. SPOCS represented DCJS in the first full-length formal hearing on a bail enforcement license since its regulation of bail bondsmen in 2005.

Gang Prevention

The Section continued its involvement in gang prevention, intervention, and suppression. Attorneys and staff spoke at conferences and community awareness meetings about gangs and ways that communities may combat the spread of gangs. The Section provided numerous DCJS-certified training courses for law-enforcement and prosecutors on gangs and Virginia’s gang statutes and lectured at each training event conducted by the Commonwealth’s Attorneys Services Council.

A federal grant provided funding to implement a state-wide pilot database for tracking gang members and associates through 2007. A committee comprised of law-enforcement agencies from several jurisdictions across the Commonwealth reviewed and made recommendations for the database. Two national databases are now available to Virginia law-enforcement, RISSGang and HIDTA Gangnet. The Section ensured proper distribution of funds from the federal grant to provide access to 29 Virginia law-enforcement agencies.

In 2007, the General Assembly passed legislation authorizing the Office of the Attorney General to prosecute gang crimes occurring in Department of Corrections (DOC) facilities. Section attorneys conducted gang statute training at an annual DOC meeting and met with Department of State Police, DOC investigators, and relevant Commonwealth’s Attorneys to establish a prosecutorial plan.

Funds from a federal grant were allocated to establish a witness protection program in prosecutions of violent gang-related crimes. Law-enforcement agencies may apply to the State Police for temporary assistance to alleviate potential intimidation of witnesses and their families who may be in danger due to cooperation with investigations and prosecutions of gang-related crimes. In 2007, \$20,566 was disbursed to serve 11 witnesses.

Virginia Tech

In the immediate aftermath of the tragedy at Virginia Tech, SPOCS attorneys joined with other Divisions of this Office and with the Governor’s Office to resolve

the immediate problem of preventing individuals ordered to undergo outpatient mental health treatment from buying and possessing firearms. As part of a long-term solution, legislation was proposed to provide law-enforcement with the proper tools and notification systems to prevent future incidents.

Public Outreach

The Section worked with Wal-Mart to create an anti-identity theft campaign to assist senior citizens, college students, and disadvantaged persons throughout the region. Wal-Mart purchased and distributed promotional items reminding customers to protect their identity and produced posters and brochures in Spanish and English with tips to avoid identity theft. The posters and brochures will be distributed at Sam's Club and Wal-Mart shopping centers, community events, area service-providing agencies, and on the websites for Wal-Mart and this Office.

Elected Official Investigations

Pursuant to § 52-8.3, the Department of State Police may conduct criminal investigations of elected officials only upon the request of the Attorney General, the Governor, or a grand jury. Of the 25 elected official investigations authorized by this Office, 12 were prosecuted in 2007.

Identity Theft

Six prosecutors in the Section were assigned to federal regional identity theft task forces. These prosecutors obtained indictments against 25 defendants for identity theft crimes. One notable conviction was that of Letrista L. West, who assumed the identity of her victims to obtain bank loans, bank accounts, credit accounts, utilities, and housing. Ms. West was found guilty of bank fraud and aggravated identity theft in the Eastern District of Virginia and received a 38-month sentence.

Violent Crimes

The SPOCS attorney assigned to the Richmond Office of the United States Attorney worked as a Special Assistant United States Attorney on cases involving guns and drugs, gangs, and other violent crimes. One notable case handled by this prosecutor involved a Portsmouth police lieutenant and his nephew, a known drug dealer. The police lieutenant, the commander of his department's drug unit and SWAT team, disseminated sensitive law-enforcement information to his nephew that aided his distribution of narcotics. Through careful coordination between this Office, the Portsmouth Commonwealth's Attorney and Police Department, and the Virginia State Police, both suspects were arrested. The nephew was indicted in U.S. District Court and received a four-year sentence. The lieutenant pled guilty in state court and is awaiting sentencing.

Gang Prosecutions

The Office, through a federal grant, assigned a prosecutor to the Shenandoah Valley to serve as special counsel to a multi-jurisdictional grand jury. This prosecutor

and the SPOCS crime analyst assisted gang cases in that region. Testimony elicited from numerous witnesses before the multi-jurisdictional grand jury led to the successful prosecution of 101 state and federal indictments, which resulted in sentences totaling 132 years for gang members and associates. Every individual indicted by this grand jury was convicted. The most notable 2007 investigation was “Operation Vampire,” a coordinated operation designed to eliminate the 9-3 Bloods in the Shenandoah Valley. This successful investigation resulted in convictions of 22 adult gang members and associates.

Petersburg

More than 40 individuals were arrested in or near Petersburg in the first wave of a new federal and state enforcement action known as “Operation Impact.” Federal, state, and local law-enforcement agencies pooled their resources to identify, arrest, and prosecute persons buying or selling illegal narcotics. The cases will be prosecuted in the Petersburg courts with 16 defendants being prosecuted in the federal system, of which 12 will be handled by attorneys from this Section.

Commonwealth Preparedness

A Section attorney is assigned to handle Commonwealth Preparedness and emergency management issues and participated in numerous seminars designed to enhance the Commonwealth’s overall preparedness and facilitate coordination with regional partners. This Office, in conjunction with the Department of Emergency Management (“DEM”) and Office of Commonwealth Preparedness (“OCP”), conducted the Second Annual Table Top Legal Exercise in September 2007. The Exercise was designed according to the Department of Homeland Security’s guidelines and allowed the Commonwealth to test its emergency response capabilities. Further, the Exercise was designed to examine and identify solutions to legal issues faced by Commonwealth agencies as they conduct operations resulting from public health and other emergencies. Approximately 100 people participated in the Exercise, including representatives from the Governor’s Office, 35 state agencies, personnel of this Office, and private sector representatives.

Financial Crime Intelligence Center

The Financial Crime Intelligence Center (FCIC) assists local law-enforcement and prosecutors to investigate money laundering and other financial crimes. FCIC opened 26 new cases in 2007. FCIC developed strong working relationships with interstate agencies, including the New York City Police Department, the Miami Dade Police Department, the Massachusetts State Police, the Office of the Attorney General of Pennsylvania, and the Philadelphia Police Department. This Section worked with federal law-enforcement agencies including the FBI, ICE, IRS, and ATF.

A notable FCIC accomplishment, stemming from an intensive six-month investigation, was the conviction of a person responsible for illegal drug operations along the East Coast from New York to Florida. The convicted criminal employed at

least 10 people for more than a year, distributed more than a ton of marijuana, and laundered millions of dollars in cash. In October 2007, the defendant pled guilty to a state racketeering charge and three charges of possession with the intent to distribute more than five pounds of marijuana. The defendant forfeited \$1,000,000, submitted to a complete debriefing, and must cooperate with any subsequent prosecutions. Pursuant to the conviction, he faces a 90-year term of incarceration.

Special Projects

The Special Projects Coordinator manages grants administered by the Division. The Coordinator also manages special projects and new initiatives and represents this Office at a variety of Commission and Task Force meetings. The Coordinator serves on the Grants Management Review Team and writes applications for future grants.

For several months, the Special Projects Coordinator worked with Shakespeare Festival/Los Angeles to bring its successful “Will Power to Youth” program to Richmond. Utilizing the community resources of the Gang Reduction and Intervention Program, with the support of the local arts community, the Special Projects Coordinator implemented a unique youth development program designed to curb youth violence by offering an alternative to Richmond’s underprivileged youth.

The Coordinator administered the first statewide pilot program for “Badges for Baseball.” This program, developed and funded by the Cal Ripken, Sr. Foundation, partners law-enforcement volunteers with at-risk youth. Finally, the Special Projects Coordinator assisted with the organization of this Office’s October 2007 Summit on Domestic Violence.

Richmond Gang Reduction and Intervention and Prevention Program

This Office worked with local, state, and federal partners to reduce gang activity and provide youth and the community with a better environment through the Richmond Gang Reduction and Intervention Program (GRIP). GRIP sponsored more than 50 programs in primary and secondary prevention areas, intervention, suppression, and reentry back into the community after incarceration. As a result of the broad-based partnership within GRIP and the significant efforts of the City of Richmond Police Department and Commonwealth’s Attorney, the GRIP area experienced a significant decrease in crime, including a 47.06% reduction in robbery and a 71.43% reduction in aggravated assault. GRIP components included after school programs, summer camps, mentoring programs, intervention teams, suppression efforts, reentry programs, health care, and a host of other programs to provide the community with tools to prevent children from joining gangs. GRIP partners included federal, state, and local partners as well as faith-based and not-for-profit groups.

**TECHNOLOGY, REAL ESTATE, ENVIRONMENTAL AND
TRANSPORTATION DIVISION**

The Technology, Real Estate, Environmental and Transportation Division is comprised of five sections. The Technology and Procurement Section represents the Virginia Information Technologies Agency (VITA) and other communications agencies that provide information technology resources, oversight, and guidance necessary for government operations and programs. The Computer Crime Section is a specially trained and equipped group of prosecutors and investigators skilled in computer, communications, and Internet technologies. The Section vigorously investigates and prosecutes illegal activities, such as spam and identity theft, with an emphasis on the protection of children susceptible to targeting by Internet predators. In addition to the Virginia Port Authority and the Motor Vehicle Dealer Board, the Transportation Section represents the Departments of Transportation, Rail and Public Transportation, Aviation, and Motor Vehicles. The Environmental Section represents the agencies under the Secretary of Natural Resources in addition to certain agencies outside that Secretariat. The Real Estate and Land Use Section is responsible for the vast majority of the Commonwealth's transactional real estate, including sales of surplus property, purchases, easements (including conservation easements), leases, and licenses other than those for the Department of Transportation. This Section provides construction procurement and contract administration advice for non-higher education vertical construction projects and for projects pursuant to the Public-Private Education Facilities and Infrastructure Act of 2002.

Technology and Procurement Section

The Technology and Procurement Section provided legal support and representation needed by numerous agencies and institutions to implement their technology agendas, fill their procurement needs, and address legal claims and compliance issues. This included extensive advice to assist: (1) VITA with implementation of the Infrastructure Agreement with Northrop Grumman; (2) the Enterprise Applications Project Office in pursuit of its initiative with CGI; (3) the Departments of General Services and Minority Business Enterprise and other agencies with implementation of Executive Order No. 33 relating to SWAM; and (4) various agencies with compliance regarding new federal rule requirement changes related to electronic discovery. This Section assisted agencies with contract performance problems, technology acquisitions, licensing of Commonwealth data and software to other parties, intellectual property claims and agreements, Internet issues, electronic contracting, settlement of claims, structuring of procurements, response to protests, and representation in procurement appeals. Additionally, the Section provided training sessions for government procurement and contracting officials at the Department of General Services' 2007 Public Procurement Forum and at other events.

Computer Crime Section

The Office of the Attorney General has concurrent and original jurisdiction to prosecute crimes committed by means of computer as well as other such crimes dealing with the identity theft and the exploitation of children. During 2007, the Computer Crime Section prosecuted such cases in the counties of Chesterfield, Halifax, James City, Lee, Louisa, Lunenburg, Mecklenburg, and Patrick and in the cities of Colonial Heights, Newport News, Richmond, and Virginia Beach. Section attorneys are cross-designated as Special Assistant United States Attorneys and prosecute federal and state court cases.

The Section continued as an active member of the Virginia Cyber Crime Strike Force, dedicating one full- and two part-time investigators and providing three prosecutors to pursue the resulting federal and state court cases. This partnership between federal, state, and local law-enforcement coordinates the prosecution of Internet crime and provides a centralized location to report Internet-related crimes. The Strike Force handled 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, the Section serves as a clearinghouse for information concerning criminal and civil misuses of computers and the Internet. Section members give presentations and make appearances on television and radio to inform the public about identity theft, the use of computers and the Internet by sexual predators, and related issues.

The Section hosted regular meetings of the Youth Internet Safety Advisory Committee. The Committee met to implement the educational recommendations of the Youth Internet Safety Task Force. The Section and the Committee worked to launch two significant educational initiatives. First, the Section and the Committee distributed an Internet safety book for elementary school students—*Faux Paw's Adventures in the Internet*. This Office, using private donations, purchased thousands of copies of the book to distribute to every public elementary school and public library in Virginia. The Virginia Association of Independent Schools also assisted in distribution of the book to numerous private schools.

The second initiative is the Virginia Youth Internet Safety Contest, which will culminate in 2008. The contest is statewide for students in grades 6-12. The students must create and film a 30-second public service announcement on an aspect of Internet safety. The winning entry will be aired on television throughout Virginia, and the top three entries will receive prizes from Microsoft and the FOX network.

During September, designated as Internet Safety month, this Office mounted an aggressive public campaign to present and promote the “*Faux Paw's*” book, the PSA contest, and the Section’s “Safety Net” presentation. “Safety Net” is an interactive program that utilizes a real-life story to demonstrate the ease with which

Internet predators, using very little personal information, can identify and locate child victims. During 2007, Section members presented the program to schools in the Counties of Chesterfield, Fairfax, Henrico, Pittsylvania, and Suffolk and in the cities of Alexandria, Arlington, Chesapeake, Danville, Newport News, Richmond, Roanoke, and Virginia Beach.

The 2007 Session of the General Assembly acted on many of the legislative recommendations from the Youth Internet Safety Task Force. Some of the adopted changes included mandatory minimum sentences for certain child pornography crimes and for crimes involving online sexual solicitation of minors. Other changes mandated that convicted sex offenders must register their email addresses and online user names with the Virginia State Police. The General Assembly granted administrative subpoena power to Commonwealth's Attorneys, who may issue subpoenas to Internet service providers to obtain subscriber information for online accounts used in child exploitation crimes. Finally, the bail and forfeiture statutes were strengthened to include several additional child exploitation crimes.

Transportation Section

The Transportation Section represents state agencies and boards that report to the Secretary of Transportation, including the Commonwealth Transportation and Virginia Aviation Boards, the Departments of Transportation, Motor Vehicles, Aviation, and Rail and Public Transportation. The Section also represents the Rail Advisory, Motor Vehicle Dealer, Towing and Recovery Operators, and Transportation Safety Boards as well as the Virginia Port Authority and the Department of Motor Vehicles Medical Advisory Board.

The Department of Transportation (DOT) presented a host of legal issues ranging from complex highway construction programs and agreements to those arising from its day-to-day operations. Section attorneys addressed legal issues regarding construction of the Woodrow Wilson Bridge, complex negotiations for improvements to the I-81 Corridor, construction of high occupancy toll lanes in Northern Virginia, the Coalfield Expressway, new Route 460, and Midtown Tunnel improvements.

At the end of 2007, the initial work of the Section related to document development and advice regarding a permit granted by DOT to the Metropolitan Washington Airports Authority was concluded when DOT and the Authority executed a transfer agreement and permit. Under these documents, the Authority will begin a 50-year operation of the Dulles Toll Road in the Northern Virginia area. With toll revenues and other funding sources, the Authority plans to construct an extension of Metrorail. Contemporaneously, the Section participated in document development and advised the Rail and Public Transportation Department regarding assignment of its comprehensive agreement with Dulles Transit Partners, LLC, to the Authority. The

assigned agreement requires the Authority to provide oversight of the construction of the Metrorail to Dulles Airport and beyond. Litigation challenging transfer of the Dulles Toll Road to MWAA was filed and was appealed to the Virginia Supreme Court. During the last quarter, an additional lawsuit, challenging the construction of the Metrorail in the area of Tyson's Corner area was filed in federal court against the federal entities involved in the project.

The Section worked closely with DOT staff in drafting and negotiating a Memorandum of Agreement between DOT, the U.S. Army, and the Federal Highway Administration for completion of the Fairfax County Parkway. The negotiations presented various complex issues, including environmental concerns associated with the location of the roadway on federal property.

The Section participated in issuance of revenue bonds for regional projects in Northern Virginia. Pending court cases may impact issuance of the bonds. A bond validation case was appealed to the Virginia Supreme Court. The second case, filed in the Circuit Court for the City of Richmond, posed a constitutional challenge to the authorizing legislation, House Bill 3202. The case primarily focused on allegations that the legislation violated the single-object rule, failed to specify projects to be funded by the bonds, and the bonds should have been the subject of a ballot.

Section attorneys have handled matters or issues involving: (a) Department of Motor Vehicles driver licensing, motor vehicle registration and titling, driving schools, automobile manufacturer and dealer disputes, motor fuel and vehicle sales taxes, procurement, and hearings administration; (b) DOT design-build contracts for major projects, homeland security issues, bid protests, disadvantaged business enterprise hearings, inverse condemnation matters, agreements and negotiations under PPTA, outdoor advertising and logos, right of way, and eminent domain matters; (c) Rail and Public Transportation Department procurement and intellectual property, improved passenger and freight rail performance and reliability, rail enhancement and rail access funding, and major rail and transit initiatives such as the Heartland Corridor, Dulles Rail, Norfolk Light Rail, and the East Coast High Speed Rail Initiative; (d) Aviation Department grants and distribution of funding; (e) Motor Vehicle Dealer Board licensing and disciplining of automobile dealers and salespersons; and (f) Towing and Recovery Operators Board promulgation of first-time regulations governing licensure and operation of tow companies and their drivers and the provision of public safety towing services. Additionally, the Section advised client agencies in general matters relating to FOIA, procurement, conflicts of interest, personnel and employment, and the promulgation and amendment of regulations.

Environmental Section

The Environmental Section primarily represents the agencies under the Secretary of Natural Resources and provides legal advice, including litigation,

regulation and legislative review, transactional work, personnel issues, and related matters. The Public Safety and Enforcement Division's environmental prosecutor assists local Commonwealth's Attorneys with criminal cases under the environmental statutes.

The Section concluded its work in leading a ten-state coalition as intervenors in support of an EPA regulation that exempted certain equipment replacement activities from air pollution preconstruction permit requirements. The Court of Appeals for the District of Columbia vacated the EPA regulation, and EPA filed a petition for certiorari with the U.S. Supreme Court.

Extensive litigation over the State Air Pollution Control Board's permitting of the Mirant power plant in Alexandria consumed considerable Section time in 2007. The Section intervened in an EPA action in federal court in Ohio and joined a multi-state enforcement settlement involving E.I. duPont de Nemours & Co. The Section handled a considerable docket of litigation for the Department of Environmental Quality (DEQ) and the Virginia Marine Resources Commission. A major DEQ enforcement action against a Rockingham County waste treatment facility continued during 2007. The company filed for bankruptcy, but the facility was sold to the town of Broadway and a consent decree was entered.

The Section defended the State Water Control Board in challenges to a number of high profile cases, including extension of the King William Reservoir permit. Section attorneys represented the Department of Game and Inland Fisheries and intervened in a permitting proceeding before the State Corporation Commission regarding a proposed Highland County wind turbine generation project.

The Department of Mines, Minerals and Energy (DMME) workload increased during 2007. The Section saw a 10-15% increase in the number of Virginia Gas and Oil Board cases, which included the creation and pooling of gas units, approval of exceptions, establishment of field rules, and requests for disbursement. The Gas and Oil Board maintained escrow deposits in excess of \$18 million. Over 30 judicial appeals from Board decisions were filed with 6 decisions still pending.

The Section handled a highly complex administrative appeal of a permit issued to Consolidation Coal for DMME. Litigation over preliminary matters delayed the administrative hearing until 2008.

Real Estate and Land Use Section

The Real Estate and Land Use Section (RELUS) provided construction procurement and contract administration advice for vertical construction projects of the Commonwealth and for projects undertaken pursuant to PPEA. The Section handled a high volume of transactional matters during 2007 and opened 244 new matters with an estimated value exceeding \$371,728,456. A total of 272 matters were active at the beginning of 2007, while 194 matters valued at \$173,218,366 were

closed. The active case load at the end of 2007 was 322 cases with a value exceeding \$1,000,000,000. During 2007, the Section experienced significant increase in cases from the Department of Conservation and Recreation and state universities. The Section worked with the Virginia Outdoors Foundation to meet the Governor's goal of increasing Virginia land protected by open space and other conservation easements.

Significant Cases

Fort Monroe Base Closure – RELUS worked directly with the Governor's Office, Cabinet Secretaries, agency heads, and local government officials to craft legislation that created the Fort Monroe Federal Area Development Authority to deal with the closure of Fort Monroe by 2011. The property value of the Fort and the impact of the closure in the Tidewater area are estimated to be in the hundreds of millions of dollars.

New Forensic Sciences Building in Northern Virginia – RELUS assisted the Departments of General Services and Forensic Science with negotiation of interim and comprehensive agreements under PPEA. The negotiations resulted in a \$60,000,000 contract for the construction and installation of major laboratory equipment at the new facility, which will also house offices for the Department of the Medical Examiner.

Capitol Square Office Space Renovation Project – RELUS provided advice to the Department of General Services regarding administration of the contract for several construction/renovation/demolition projects and assisted with attempts to resolve disputes between the Commonwealth and the developer. RELUS assisted the Construction Litigation Section with defense of the lawsuit and the Commonwealth's counter-claim.

Delisting Request for Waterford Historic District – A resident in Waterford, Virginia, filed a request with the Department of Historic Resources to "delist" property from the state registry of historic landmarks, which is also protected as a National Historic Landmark. A lawsuit was threatened.

Springfield Interchange Improvement Project – The Springfield Interchange Improvement Project involved extensive improvements to Interstates 95 and 395 and the Capital Beltway. Assistance was provided to project staff to evaluate and respond to Proposed Change Orders, Notices of Intent to file claims, Time Impact Analyses, continuing DRB issues, and the final phase contractor's \$16,821,760 acceleration claim.

Conveyance of George Washington's Grist Mill State Park – RELUS worked to complete the gift transfer of George Washington's Grist Mill State Park to The Mount Vernon Ladies' Association of the Union. After many meetings and conference calls, the parties reached tentative agreement on the configuration of the right of way and the plat to define the property rights.

FINANCIAL LAW AND GOVERNMENT SERVICES DIVISION

The Financial Law and Government Services Division was created during a 2007 reorganization and is comprised of the Financial Law, Commerce, and Opinions Sections. The Division also assists local government officers and agencies with questions related to local government.

Commerce Section

Attorneys in the Commerce Section provide advice to agencies and boards reporting to the Secretaries of Commerce and Agriculture and Forestry. These agencies include the Virginia Economic Development Partnership, Virginia Employment Commission, Virginia Port Authority, State Board of Elections, and the Departments of Veterans Services, Agriculture and Consumer Services, and Professional and Occupational Regulation. The Section represents numerous other state agencies and boards charged with administrative and regulatory responsibility for the Commonwealth's economic policies. This Section works closely with constitutional officers and local government attorneys to help resolve issues as they arise.

In 2007, Section attorneys represented the Commonwealth throughout the state court system in numerous matters. For example, the Section represented the Virginia Employment Commission in its appeal to the Virginia Court of Appeals. The Court agreed with the argument on brief that the exclusion of certain types of seasonal employees, such as professional athletes, from eligibility for benefits under the Virginia Unemployment Compensation Act signaled the General Assembly's intent that seasonal employees not specifically excluded from coverage do have access to benefits.

Finance Section

The Financial Law Section provides advice to agencies and boards reporting to the Secretaries of Finance and Public Safety, including the Departments of Taxation, Treasury, Accounts, Planning and Budget, and Veterans Services and the Virginia Retirement System. The Section worked with the Taxation Department on complex litigation regarding conservation easement tax credits. The IRS initiated a similar investigation into the same easement transaction and has shared information with the Tax Department. This Section served as "issuer's counsel" when the Commonwealth or its bond issuing agencies entered into land transactions. During 2007, the Section served as counsel for \$2,077,000,000 of refunding and new debt for the Commonwealth. In the past year, Section attorneys provided extensive assistance and counsel to the Regulatory Reform Taskforce, including the recommendation of numerous regulatory changes.

Opinions Section

The Opinions Section oversees the official opinions issued by the Attorney General as well as conflict of interest opinions for state and local government officers and employees and members of the General Assembly. The Section also manages the informal opinions issued by Deputy Attorneys General. Attorneys throughout all Divisions in this Office are responsible for the research and drafting of opinions. In 2007, the Section processed 185 requests for opinions and this Office issued 117 official, informal, and conflict opinions.

This Section publishes the Annual Report of the Attorney General, which is presented annually to the Governor of Virginia on May 1st as mandated by § 2.2-516. The Annual Report includes the official opinions issued by the Attorney General as well as a summary of the important matters handled by this Office during the preceding year.

Official opinions also are published on the website of the Attorney General (www.vaag.com) and are available to the public within 24-48 hours of issuance. The Section also developed and manages the Conflict of Interest and Ethics in Public Contracting orientation course for certain state officers and employees as required by § 2.2-3128.

CONCLUSION

It is a continuing honor and pleasure to serve the citizens of this Commonwealth as Attorney General. The accomplishments of the attorneys and staff of this Office are many, and they provide a valuable service to the Commonwealth. While it is impossible to detail all of the accomplishments in this report, the names of the dedicated professionals who served this Office are listed on the following pages. The citizens of this Commonwealth are well served by the efforts of these individuals.

With kindest regards, I am

Very truly yours,



Robert F. McDonnell
Attorney General

PERSONNEL OF THE OFFICE¹

| NAME | TITLE |
|--------------------------------|---------------------------------------|
| Robert F. McDonnell | Attorney General |
| William C. Mims..... | Chief Deputy Attorney General |
| Martin L. Kent | Chief Counsel to the Attorney General |
| J. Jasen Eige | Chief of Staff and Counsel |
| Richard B. Campbell..... | Deputy Attorney General |
| Marla G. Decker..... | Deputy Attorney General |
| Francis S. Ferguson..... | Deputy Attorney General |
| Stephanie L. Hamlett | Deputy Attorney General |
| Lisa M. Hicks-Thomas..... | Deputy Attorney General |
| David E. Johnson | Deputy Attorney General |
| Maureen R. Matsen..... | Deputy Attorney General |
| William E. Thro | State Solicitor General |
| John J. Beall Jr. | Sr. Assistant Attorney General/Chief |
| C. Meade Browder Jr. | Sr. Assistant Attorney General/Chief |
| Steven T. Buck | Sr. Assistant Attorney General/Chief |
| Craig M. Burshem..... | Sr. Assistant Attorney General/Chief |
| Roger L. Chaffe | Sr. Assistant Attorney General/Chief |
| Gary L. Conover | Sr. Assistant Attorney General/Chief |
| G. Michael Favale..... | Sr. Assistant Attorney General/Chief |
| Samuel E. Fishel IV | Sr. Assistant Attorney General/Chief |
| Ronald C. Forehand | Sr. Assistant Attorney General/Chief |
| Christy E. Harris-Lipford..... | Sr. Assistant Attorney General/Chief |
| Jane D. Hickey | Sr. Assistant Attorney General/Chief |
| James W. Hopper | Sr. Assistant Attorney General/Chief |
| David B. Irvin | Sr. Assistant Attorney General/Chief |
| Alan Katz | Sr. Assistant Attorney General/Chief |
| JoAnne P. Maxell | Sr. Assistant Attorney General/Chief |
| Richard T. McGrath | Sr. Assistant Attorney General/Chief |
| Peter R. Messitt..... | Sr. Assistant Attorney General/Chief |
| Steven O. Owens..... | Sr. Assistant Attorney General/Chief |
| Kim F. Piner | Sr. Assistant Attorney General/Chief |
| Pamela A. Sargent..... | Sr. Assistant Attorney General/Chief |
| Jerry P. Slonaker..... | Sr. Assistant Attorney General/Chief |

¹This list includes all persons employed and compensated by the Office of the Attorney General during calendar year 2007, as provided by the Office’s Division of Administration. The most recent title is used for each employee whose position changed during the year.

| NAME | TITLE |
|------------------------------|--------------------------------------|
| James O. Towey | Sr. Assistant Attorney General/Chief |
| John S. Westrick..... | Sr. Assistant Attorney General/Chief |
| Robert H. Anderson III | Senior Assistant Attorney General |
| Nancy C. Auth..... | Senior Assistant Attorney General |
| Howard M. Casway | Senior Assistant Attorney General |
| Ellen E. Coates..... | Senior Assistant Attorney General |
| Leah A. Darron..... | Senior Assistant Attorney General |
| Mark R. Davis..... | Senior Assistant Attorney General |
| Matthew P. Dullaghan..... | Senior Assistant Attorney General |
| Christopher D. Eib | Senior Assistant Attorney General |
| Suzanne T. Ellison..... | Senior Assistant Attorney General |
| Donald R. Ferguson | Senior Assistant Attorney General |
| Eric K.G. Fiske | Senior Assistant Attorney General |
| Scott J. Fitzgerald..... | Senior Assistant Attorney General |
| Gregory C. Fleming | Senior Assistant Attorney General |
| Charles R. Gray..... | Senior Assistant Attorney General |
| Kenneth C. Grigg..... | Senior Assistant Attorney General |
| James V. Ingold..... | Senior Assistant Attorney General |
| Carl Josephson | Senior Assistant Attorney General |
| Frederick R. Kozak..... | Senior Assistant Attorney General |
| Donald A. Lahy..... | Senior Assistant Attorney General |
| Alison P. Landry..... | Senior Assistant Attorney General |
| Todd E. LePage..... | Senior Assistant Attorney General |
| Deborah A. Love..... | Senior Assistant Attorney General |
| Amy L. Marschean..... | Senior Assistant Attorney General |
| Kathleen B. Martin..... | Senior Assistant Attorney General |
| John H. McLees Jr..... | Senior Assistant Attorney General |
| Teri C. Miles | Senior Assistant Attorney General |
| Eugene P. Murphy..... | Senior Assistant Attorney General |
| William W. Muse | Senior Assistant Attorney General |
| Richard E. Nance | Senior Assistant Attorney General |
| Francis W. Pedrotty..... | Senior Assistant Attorney General |
| Sharon M.B. Pigeon..... | Senior Assistant Attorney General |
| Donald G. Powers | Senior Assistant Attorney General |
| Ann R. Purdue..... | Senior Assistant Attorney General |
| Sydney E. Rab..... | Senior Assistant Attorney General |
| Ronald N. Regnery..... | Senior Assistant Attorney General |
| Richard S. Schweiker Jr..... | Senior Assistant Attorney General |

| NAME | TITLE |
|------------------------------|----------------------------------------------------|
| Deanis L. Simmons..... | Senior Assistant Attorney General |
| Jeffrey A. Spencer..... | Senior Assistant Attorney General |
| Virginia B. Theisen..... | Senior Assistant Attorney General |
| Richard C. Vorhis..... | Senior Assistant Attorney General |
| Cheryl A. Wilkerson..... | Senior Assistant Attorney General |
| Katherine P. Baldwin..... | Sr. Asst. Att’y Gen./Dir., Capital Litigation Unit |
| Stephen R. McCullough..... | Deputy State Solicitor General |
| Matthew C. Ackley..... | Assistant Attorney General |
| Alfred B. Albiston..... | Assistant Attorney General |
| Sarah O. Allen..... | Assistant Attorney General |
| Denise C. Anderson..... | Assistant Attorney General |
| Elizabeth A. Andrews..... | Assistant Attorney General |
| Alice T. Armstrong..... | Assistant Attorney General |
| Karri B. Atwood..... | Assistant Attorney General |
| Angela B. Axselle..... | Assistant Attorney General |
| Lelia P. Beck..... | Assistant Attorney General |
| Angela Benjamin-Daniels..... | Assistant Attorney General |
| Rosemary V. Bourne..... | Assistant Attorney General |
| Vivian F. Brown..... | Assistant Attorney General |
| J. Robert Bryden II..... | Assistant Attorney General |
| Evelyn Bufton..... | Assistant Attorney General |
| Matthew M. Cobb..... | Assistant Attorney General |
| Carla R. Collins..... | Assistant Attorney General |
| Matthew A. Conrad..... | Assistant Attorney General |
| Kara K. Crane..... | Assistant Attorney General |
| Susan B. Curwood..... | Assistant Attorney General |
| D. Nelson Daniel..... | Assistant Attorney General |
| Joshua M. Didlake..... | Assistant Attorney General |
| Amy K. Dilworth..... | Assistant Attorney General |
| Shannon Y. Dion..... | Assistant Attorney General |
| Patrick W. Dorgan..... | Assistant Attorney General |
| Brett C. Ellsworth..... | Assistant Attorney General |
| James A. Fiorelli..... | Assistant Attorney General |
| Gregory W. Franklin..... | Assistant Attorney General |
| Joanne V. Frye..... | Assistant Attorney General |
| C. Nicole Gilliam..... | Assistant Attorney General |
| Jennifer L. Gobble..... | Assistant Attorney General |
| David C. Grandis..... | Assistant Attorney General |

| NAME | TITLE |
|-----------------------------|----------------------------|
| Eric A. Gregory..... | Assistant Attorney General |
| Wayne T. Halbleib..... | Assistant Attorney General |
| Stephen M. Hall..... | Assistant Attorney General |
| Susan M. Harris..... | Assistant Attorney General |
| Mary Hendricks Hawkins..... | Assistant Attorney General |
| Flora T. Hezel..... | Assistant Attorney General |
| Catherine Crooks Hill..... | Assistant Attorney General |
| Catherina F. Hutchins..... | Assistant Attorney General |
| D. Monique Hutton..... | Assistant Attorney General |
| Steven P. Jack..... | Assistant Attorney General |
| Donald E. Jeffrey III..... | Assistant Attorney General |
| Marie E.H. Johnson..... | Assistant Attorney General |
| Benjamin H. Katz..... | Assistant Attorney General |
| Thomas E. Kegley..... | Assistant Attorney General |
| Susan L. Kimble..... | Assistant Attorney General |
| John F. Knight..... | Assistant Attorney General |
| Usha Koduru..... | Assistant Attorney General |
| John F. Kotvas Jr..... | Assistant Attorney General |
| Mark S. Kubiak..... | Assistant Attorney General |
| Paul Kugelman Jr..... | Assistant Attorney General |
| Jonathan M. Larcomb..... | Assistant Attorney General |
| Ashley B. Macko..... | Assistant Attorney General |
| Richard A. Mahevich II..... | Assistant Attorney General |
| Christopher T. McGee..... | Assistant Attorney General |
| Mikie F. Melis..... | Assistant Attorney General |
| Anthony P. Meredith..... | Assistant Attorney General |
| Christy W. Monolo..... | Assistant Attorney General |
| Ishneila G. Moore..... | Assistant Attorney General |
| Valerie L. Myers..... | Assistant Attorney General |
| Carrie S. Nee..... | Assistant Attorney General |
| Thomas W. Nesbitt..... | Assistant Attorney General |
| Kerri L. Nicholas..... | Assistant Attorney General |
| Amanda B. Nichols..... | Assistant Attorney General |
| Cynthia H. Norwood..... | Assistant Attorney General |
| Patrick O. O’Leary..... | Assistant Attorney General |
| J. Michael Parsons..... | Assistant Attorney General |
| R. Thomas Payne II..... | Assistant Attorney General |
| Elizabeth B. Peay..... | Assistant Attorney General |

| NAME | TITLE |
|------------------------------|--------------------------------------------|
| Kiva Bland Pierce | Assistant Attorney General |
| Lori L. Pound | Assistant Attorney General |
| Charles A. Quagliato | Assistant Attorney General |
| Barbara M. Rose | Assistant Attorney General |
| D. Mathias Roussy Jr. | Assistant Attorney General |
| Jill M. Ryan | Assistant Attorney General |
| Nikki R. Salunga | Assistant Attorney General |
| Greer D. Saunders | Assistant Attorney General |
| James E. Schliessmann | Assistant Attorney General |
| Noelle L. Shaw-Bell | Assistant Attorney General |
| Craig W. Stallard | Assistant Attorney General |
| Tracey D. Stith | Assistant Attorney General |
| J. David Taranto | Assistant Attorney General |
| Banci E. Tewolde | Assistant Attorney General |
| Richard H. Traylor | Assistant Attorney General |
| Crystal Y. Twitty | Assistant Attorney General |
| Allyson K. Tysinger | Assistant Attorney General |
| Samantha D. Vanterpool | Assistant Attorney General |
| K. Michelle Welch | Assistant Attorney General |
| Josephine F. Whalen | Assistant Attorney General |
| Julie M. Whitlock | Assistant Attorney General |
| Jennifer C. Williamson | Assistant Attorney General |
| Randall H. Wintory | Assistant Attorney General |
| Steven A. Witmer | Assistant Attorney General |
| Daniel S. Wolf | Assistant Attorney General |
| Dale G. Mullen | Chief Prosecutor |
| David W. Tooker | Chief Prosecutor |
| Michael T. Judge | Deputy Director, Prosecutions & Litigation |
| Erica J. Bailey | Chief of Civil Investigations |
| Courtney M. Malveaux | Special Counsel Manager/Asst. Att’y Gen. |
| Phillip O. Figura | Assistant Attorney General/Gang Prosecutor |
| Joseph E. H. Atkinson | Assistant Attorney General/Prosecutor |
| Michele B. Brooks | Assistant Attorney General/Prosecutor |
| Thomas A. Garrett Jr. | Assistant Attorney General/Prosecutor |
| W. Clay Garrett | Assistant Attorney General/Prosecutor |
| Steven W. Grist | Assistant Attorney General/Prosecutor |
| Russell E. McGuire | Assistant Attorney General/Prosecutor |
| Karen G. Misbach | Assistant Attorney General/Prosecutor |
| Matthew D. Nelson | Assistant Attorney General/Prosecutor |

| NAME | TITLE |
|-----------------------|-----------------------------------------------|
| Charlene R. Day | Prosecutor |
| Thomas D. Bagwell | Special Assistant Attorney General |
| John R. Butcher | Special Assistant Attorney General |
| Frederick S. Fisher | Special Assistant Attorney General |
| Guy W. Horsley Jr. | Special Assistant Attorney General |
| Richard B. Smith | Senior Assistant Attorney General |
| Jessica Wszalek | Special Assistant Attorney General |
| Cornell T. Adams | Senior Criminal Investigator |
| Crystal V. Adams | Legal Secretary Senior |
| Matthew B. Addison | Claims Representative |
| Jasma B. Adkins | Paralegal |
| J. Hunter Allen Jr | Procurement Officer |
| Jennifer C. Allen | Claims Representative |
| S. Elizabeth Allen | Legal Secretary Senior Expert |
| Esther Welch Anderson | Director, Gang Reduction Program |
| Paul N. Anderson | Deputy Director, Investigations & Audits |
| Bonita R. Archer | Project Assistant/GRIP & Class Action Program |
| Kristine E. Asgian | Chief Auditor |
| Jennifer B. Aulgur | Director, TRIAD & Citizen Outreach |
| Robert S. Bailey | Regional Coordinator/Class Action Program |
| Juanita Balenger | Community Outreach Coordinator |
| Delilah Beaner | Administrative Legal Secretary Senior |
| Mary H. Blackburn | Auditor |
| Heather K. Blanchard | Paralegal Senior |
| John W. Blanton | Legal Assistant |
| Carolyn R. Blaylock | Legal Secretary Senior |
| Charles D. Branson | Criminal Investigator |
| Heather K. Brunner | Legal Secretary |
| Michele J. Bruno | Senior Criminal Investigator |
| Linda B. Buell | Employee Relations Manager |
| Betsy R. Busch | Travel Coordinator |
| Charles R. Calton | Claims Representative |
| Daniel W. Carlson | Criminal Investigator |
| Mary Rae Carter | Regional Coordinator/Class Action Program |
| Addison L. Cheeseman | MFCU Computer Forensic-IT Supervisor |
| Gloria A. Clark | Legal Secretary |
| David E. Clementson | Deputy Director of Communications |
| Heather A. Clouse | Office Services Floater |
| Randall L. Clouse | Director, Medicaid Fraud Control Unit |

| NAME | TITLE |
|------------------------|---------------------------------------------------|
| Betty S. Coble | Legal Secretary Senior Expert |
| Christina I. Coen | Legal Secretary Senior |
| Jeanne E. Cole-Amos | Director of Human Resources |
| Olivia Coleman | Legal Secretary |
| Teresa T. Conrad | Senior Auditor Analyst |
| Deborah P. Cook | Claims Specialist Senior |
| Jill S. Costen | MFCU Analyst |
| Donna D. Creekmore | Legal Secretary Senior |
| Marilyn A. Crigler | Program Assistant Senior |
| Horace T. Croxton | Senior Criminal Investigator |
| Charles E. Crute, Jr. | Investigator |
| Holly T. Cuellar | Deputy Scheduler |
| Brandon T. de Graaf | Deputy Scheduler |
| Beverly B. Darby | Criminal Analyst |
| Jennifer S. Dautier | Criminal Analyst Senior |
| Diane W. Davis | Legal Secretary |
| J. Randall Davis | Director, Programs & Consumer Affairs |
| Robert A. DeGroot | Criminal Investigator |
| Linda A. Dickerson | Consumer Specialist Senior |
| Trevor C. Dickerson | Office Services Specialist |
| Polly B. Dowdy | Paralegal Senior Expert |
| Edward J. Doyle | Director, FCIC |
| Marlene I. Ebert | Administrative Office Manager |
| Kelly Ford Ecimovic | Claims Manager |
| Harrell E. Erwin | Senior Criminal Investigator |
| Mark S. Fero | Grants Manager |
| Vivian B. Ferry | Legal Secretary Senior Expert |
| Erika C. Fischer | Community Outreach Coordinator |
| Cheryl D. Fleming | Legal Secretary |
| Beverly A. Ford | Administrative Legal Secretary Senior |
| Judith B. Frazier | Legal Secretary Senior |
| Julia L. Fuller-Wilson | Program Assist. Sr., Victim Notification Program |
| Ellen Gardner | Special Counsel Administrator/Consumer Specialist |
| Todd L. Gathje | Legal Assistant |
| Thomas A. Gelozin | Director of Finance |
| Vickie B. George | Administrative Legal Secretary Senior |
| Montruae H. Goldfarb | Paralegal Senior |
| Mary P. Goodman | Legal Secretary Senior |
| David C. Graham | Crime Analyst |

| NAME | TITLE |
|------------------------------|------------------------------------------------|
| Karl E. Grotos | Financial Specialist |
| Lyn J. Hammack | Administrative Legal Secretary Senior |
| Mary Anne Harper | Claims Representative |
| Eugene B. Harris | GRIP Project Assistant |
| Robert A. Hosick | Criminal Investigator |
| Sandra W. Hott | Legal Secretary Senior |
| Jewel J. Jefferson | Human Resources Assistant |
| Laura T. Jennings | Legal Secretary Senior |
| Judith G. Jesse | Paralegal Senior Expert |
| Douglas A. Johnson | MFCU Investigative Supervisor |
| Genea C.P. Johnson | Paralegal |
| Jeri M. Johnson | Paralegal Senior |
| Kevin M. Johnson | Criminal Investigator |
| Tierra G. Johnson | Legal Secretary Senior |
| Tyrone Johnson Jr. | Office Technician |
| Tammy P. Kagey | Paralegal Senior Expert |
| Hyo J. Kang | Database Administrator/Programmer |
| Debra M. Kilpatrick | Claims Representative |
| William W. Kincaid | Director, Class Action Program |
| Robert J. Kipper | Director, Class Action Program |
| Frederick A. Knapp III | Project Coordinator, Gang Reduction |
| Jacqueline A. Kotvas | Special Assistant, Community Relations |
| Pamela H. Landrum | Procurement Officer |
| Mary Anne Lange | Paralegal |
| Leslie E. Lauziere | Criminal Investigator |
| Laureen S. Lester | Supervising Investigator |
| Patricia M. Lewis | Unit Program Coordinator |
| Robert T. Lewis | Deputy Director of Finance |
| Lesley C. Lovett | Paralegal |
| Tara L. Maddox | Legal Secretary |
| Deborah W. Mahone | Paralegal Senior Expert/Legislative Specialist |
| J. Tucker Martin | Director of Communications |
| Jason A. Martin | IT Support Specialist I |
| Sara I. Martin | Human Resources Analyst |
| Tomisha R. Martin | Claims Specialist |
| Aaron M. Mathes | Chief Information Officer |
| Melinda R. Matzell | Forensic Auditor |
| Racquel D. McRae | Legal Secretary |

| NAME | TITLE |
|------------------------|------------------------------------------------|
| George T. McLaughlin | Investigator/Forensic Examiner |
| Cheryl F. Miller | Nurse Investigator |
| Lynice D. Mitchell | Office Services Specialist Senior |
| Eda M. Montgomery | Forensic Accountant |
| Sharon Y. Moore | Legal Secretary Senior |
| Howard M. Mulholland | FCIC Financial Investigator |
| Rebecca L. Muncy | Legal Secretary Senior Expert |
| Janice M. Myer | Administrative Legal Secretary Senior |
| Kevin J. Nash | Senior Criminal Investigator |
| Connie J. Newcomb | Director of Office Operations |
| Carol G. Nixon | Unit Administrative Coordinator |
| Morgan L. O’Quinn | Community Outreach Coordinator |
| Ellett A. Ohree | Office Technician |
| Trudy A. Oliver-Cuoghi | Paralegal |
| Jennifer L. Onusconich | Paralegal |
| Sheila B. Overton | Internet Services Administrator |
| Wayne J. Ozmore Jr. | Senior Criminal Investigator |
| Janice R. Pace | Payroll Manager |
| Sharon P. Pannell | Legal Secretary Senior |
| Vickie J. Pauley | Payroll Manager |
| John W. Peirce | Senior Criminal Investigator |
| Jane A. Perkins | Paralegal Senior Expert |
| Barbara B. Peschke | Criminal Investigator |
| Tichi L. Pinkney Eppes | Criminal Investigator |
| Janet V. Polarek | Director of Administration |
| Bruce W. Popp | Computer Systems Engineer |
| Bobby N. Powell | Civil Investigator |
| Jacquelin T. Powell | Legal Secretary Senior Expert |
| Jennifer L. Powell | Administrative Legal Secretary Senior |
| Sandra L. Powell | Legal Secretary Senior |
| William S. Purcell | Senior Criminal Investigator |
| N. Jean Redford | Legal Secretary Senior Expert |
| Nicole A. Riley | Special Assistant, Legislative Affairs |
| Melissa A. Roberson | Program Coordinator/Domestic Violence |
| Jocelyn G. Roberts | Senior Claims Representative |
| Linda M. Roberts | Senior Receptionist |
| Bernadine H. Rowlett | Executive Assistant to State Solicitor General |
| Hamilton J. Roye | Facilities and Operations Manager |

| NAME | TITLE |
|-----------------------------|-----------------------------------------------------|
| Joseph M. Rusek | Criminal Investigator |
| Frances M. Sadler | Director of Library Services |
| Patrice J. Sandridge..... | Criminal Investigator |
| Lisa W. Seaborn | Publications Coordinator |
| Pamela A. Sekulich | Financial Services Specialist II |
| Bernard J. Shamblin..... | Criminal Investigator |
| Chadd C. Smith..... | Office Services Specialist |
| Debra L. Smith..... | Administrative Legal Secretary Senior |
| Faye H. Smith | Human Resources Manager I |
| Jameen C. Smith | Claims Specialist Senior |
| Tricia M. Smyth..... | Legal Secretary |
| Cheryl L. Snyder..... | Legal Secretary |
| Cristie L. Steele..... | Claims Representative |
| Kimberly F. Steinhoff | Executive Assistant to the Chief Deputy |
| Victoria G. Stewart..... | Legal Secretary |
| Mary Sullivan..... | Criminal Investigator |
| Katherine E. Terry..... | Community Outreach Coordinator |
| Meredith W. Tribble..... | Scheduler |
| James M. Trussell | Regional Support Systems Engineer |
| Lynda Turrieta-McLeod | Legal Secretary Senior |
| Latarsha Y. Tyler | Legal Secretary |
| Patricia L. Tyler..... | Paralegal Senior Expert/Manager |
| Corrine Vaughan | Program Director Victim Notification |
| Cassidy F. Vestal | Administrative Secretary Senior |
| Kathleen B. Walker | Program Assistant, Victim Witness Program |
| Pamelia D. Watts..... | Executive Assistant to the Attorney General |
| Nanora W. Westbrook | Receptionist |
| Amy R. Wight | Special Projects Coordinator |
| Kimberly Wilborn | Paralegal |
| M. Donette Williams..... | Paralegal |
| Tameka S. Winston | Legal Secretary |
| Brenda K. Wright..... | Legal Secretary Senior Expert |
| Michael J. Wyatt | Investigator |
| Abigail T. Yawn | Legal Secretary Senior |
| Reade H. Young | Special Assistant to DAG/Assistant to Counsel to AG |

A TTORNEYS GENERAL OF VIRGINIA FROM 1776 TO 2007

| | |
|----------------------------------------------|-----------|
| 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. Bocoock..... | 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 |

¹The Honorable J.D. Hank Jr. was appointed Attorney General on January 5, 1918, to fill the unexpired term of the Honorable John Garland Pollard, and served until February 1, 1918.

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

³The 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.

⁴The 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.

⁵The 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 | 2005–2006 |
| Robert F. McDonnell | 2006- |

⁶The 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.

⁷The 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.

⁸The 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.

⁹The 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.

¹⁰The 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.

¹¹The 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.

¹²The 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

Afzall v. Commonwealth. Holding that sovereign immunity bars declaratory judgment action against Commonwealth.

Alston v. Commonwealth. Affirming Court of Appeals ruling that imposition of postrelease supervision term under § 19.2-295.2 did not violate defendant's Sixth Amendment rights.

Baldwin v. Commonwealth. Reversing Court of Appeals and holding that evidence was insufficient to prove specific intent to kill.

Barnes v. Commonwealth. Affirming Court of Appeals decision and holding that evidence was sufficient to prove defendant acted with malice and with intent to inflict permanent injury upon victim.

Bazemore v. Director. Affirming trial court judgment dismissing habeas corpus proceeding alleging ineffective assistance of counsel.

Brown v. Va. State Bar. Affirming public reprimand of attorney.

Carpitcher v. Commonwealth. Affirming Court of Appeals dismissal of petition for writ of actual innocence following evidentiary circuit court hearing addressing questions of whether victim recanted her testimony in material way and whether recantation was result of duress or undue pressure.

Commonwealth v. Burns. Affirming public duty rule does not bar claims against Department of Transportation road crew supervisor for decision to leave milled area of pavement open with nearby warning devices.

Commonwealth v. Juarez. Reversing Court of Appeals decision and holding that bailiff's statement to jury regarding availability of translator did not pertain to matter pending before jury and was not prejudicial to defendant's right to fair trial and reinstating conviction.

Commonwealth Transp. Comm'r v. Target Corp. Affirming circuit court judgment for defendant on procedural grounds without addressing Commonwealth's substantive argument regarding availability of damages for loss of real property visibility resulting from government taking.

Conley v. Commonwealth. Affirming Court of Appeals decision and holding that licensed clinical social worker was qualified to testify regarding victim's post-traumatic stress disorder.

Dabney v. Commonwealth. Affirming Court of Appeals holding that victim's recantation was not sufficient to grant writ of actual innocence.

Fitzgerald v. Commonwealth. Affirming Court of Appeals decision and holding that licensed professional counselor was qualified to testify regarding victim's post-traumatic stress disorder.

Gray v. Commonwealth. Affirming conviction for capital murder and sentence of death.

Green v. Va. State Bar. Affirming two separate appeals of suspension of attorney's license for violating Rules of Professional Conduct.

Howell v. Commonwealth. Reversing Court of Appeals decision and holding that trial court abused its discretion by requiring payment of cost of security system as restitution.

In re Burns. Denying petition for writ of mandamus directed to Shenandoah County Circuit Court.

Jackson v. Commonwealth. Reversing and dismissing conviction for driving under influence of narcotics and holding that § 18.2-266(iii) requires evidence to prove narcotic was “self-administered.”

Lee v. Va. State Bar. Affirming revocation of attorney’s license subsequent to felony embezzlement conviction.

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

Markland Techs., Inc. v. Williams. Dismissing petition for writ of mandamus or prohibition seeking to vacate discovery order.

Martin v. Commonwealth. Affirming Court of Appeals decision and holding that trial court did not err in directing defendant to provide child support for his children as condition of suspended sentence for driving as habitual offender.

McCabe v. Commonwealth. Affirming conviction of taking indecent liberties with child by person in custodial or supervisory relationship and concluding that compliance with Sex Offender Registration statute does not violate substantive due process or procedural due process rights.

McDonald v. Commonwealth. Affirming convictions under sodomy statute and refusing as-applied and facial challenges to sodomy statute.

McGowan v. Commonwealth. Reversing Court of Appeals decision and holding that Commonwealth was not permitted to impeach defendant on “collateral” matter on which she perjured herself during cross-examination.

Meeks v. Commonwealth. Reversing Court of Appeals judgment and holding defendant’s theft of credit card was complete in location where card was taken and prosecution was improper in location where defendant attempted to use stolen card.

Morency v. Commonwealth. Affirming denial of petition to bar posting of Sex Offender registration.

Muhammad v. Warden. Denying habeas corpus petition challenging convictions for capital murder and sentences of death.

Nusbaum v. Berlin. Affirming trial court judgment of criminal contempt because defendant defaulted his claims that his procedural rights were violated.

Patterson v. Commonwealth. Affirming Court of Appeals decision and holding that defendant had failed to assign error to court’s application of Rule 5A:18.

Perez v. Commonwealth. Affirming Court of Appeals holding that juvenile court predicate order was sufficient to conclude defendant was convicted of felony as juvenile.

Powell v. Commonwealth. Affirming Court of Appeals decision and holding that evidence was sufficient to sustain conviction for grand larceny.

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

Robinson v. Commonwealth. Affirming Court of Appeals decision and convictions for multiple counts of contributing to delinquency of minors arising from underage drinking party and rejecting argument that police officer making warrantless entry onto property to investigate suspicions of illegal activity violated Fourth Amendment rights.

Robinson v. Commonwealth. Affirming Court of Appeals judgment that defendant was not entitled to “no-fault” self-defense jury instruction where he had been part of feud between rival campus groups and, after arming himself, injected himself back into fray outside his dorm.

Robinson v. Commonwealth. Reversing Court of Appeals decision affirming conviction for leaving scene of accident where automobile did not actually collide with other car and driving was not cause of accident.

Rodriguez v. Va. State Bar. Affirming revocation of attorney’s license for violating Rules of Professional Conduct.

Switzer v. Switzer. Reversing Court of Appeals dismissal of indigent pro se litigant’s appeals for failure to pay prior judgment, holding that sanction was too severe and not tailored to correct frivolous filings, and remanding cases.

Teleguz v. Commonwealth. Affirming conviction for capital murder for hire and sentence of death.

Toothman v. Va. State Bar. Reversing and remanding public reprimand of attorney.

Torloni v. Commonwealth. Reversing and remanding dismissal of tort action where plaintiff recovered \$100,000 from joint tortfeasor and sued Commonwealth under Virginia Tort Claims Act.

Ward v. Commonwealth. Affirming Court of Appeals judgment regarding anticipatory search warrant, but applying “good faith exception,” which was subject of assignment of cross-error.

Young v. Commonwealth. Reversing Court of Appeals decision and holding that trial court error admitting certain evidence of other crimes committed by defendant was not harmless regarding guilt or sentencing and remanding case for retrial.

CASES PENDING IN THE SUPREME COURT OF VIRGINIA

Adams v. Commonwealth. Appealing Court of Appeals decision that trial court did not err in holding that police acted with good faith in executing search warrant at defendant’s residence.

Ahari v. Commonwealth. Appealing circuit court order dismissing plaintiff’s amended complaint as barred by statute of limitations.

Allegheny Power Co. v. State Corp. Comm’n. Appealing Commission decision enforcing rate agreement entered into by electric utility.

Briscoe v. Commonwealth. Appealing Court of Appeals ruling that admission of certificate of analysis did not violate Confrontation Clause.

Burhman v. Commonwealth. Appealing Court of Appeals dismissal of Fourth Amendment challenge that officer did not have sufficient probable cause to justify arrest.

Commonwealth v. Cross. Appealing Court of Appeals decision reversing conviction for possession of cocaine on grounds that officers executed improper custodial misdemeanor arrest.

Commonwealth v. Dutton. Appealing circuit court decision voiding individual income tax assessment as violative of the Due Process Clause and the Commerce Clause of the United States Constitution.

Comptroller v. Barker. Appealing circuit court award of benefits under Line of Duty Act.

Cost v. Commonwealth. Appealing Court of Appeals ruling that drugs were found upon proper pat down based on totality of circumstances, which consisted of furtive movements and suspicious conduct.

Cypress v. Commonwealth. Appealing Court of Appeals dismissal of Confrontation Clause challenge to admissibility of certificate of drug analysis to sustain conviction for possession of cocaine. Court held claim was waived because defendant did not notify Commonwealth or trial court that he wished to cross-examine chemist.

Delmarva Power & Light Co. v. State Corp. Comm'n. Appealing Commission decision enforcing rate agreement entered into by electric utility.

Dep't of Taxation v. Bloomingdale's, Inc. Appealing circuit court decision holding Department's gift sale regulation inconsistent with interstate commerce exemption.

DiBelardino v. Commonwealth. Appealing circuit court decision upholding individual income tax assessments.

Dodge v. Trustees. Filing amicus brief regarding ability of private parties to enforce charitable trusts.

Elliott v. Warden. Habeas corpus case challenging conviction for capital murder and sentence of death.

Garnett v. Commonwealth. Appealing Court of Appeals holding that Garnett had not established that *Brady v. Maryland* requirements were violated when Commonwealth did not provide "best evidence" for impeachment of complaining witness.

Gilman v. Commonwealth. Appealing Court of Appeals ruling that admission of judge's certificate in contempt proceeding did not violate Confrontation Clause.

Glenn v. Commonwealth. Appealing Court of Appeals en banc holding that police search of unmarked, unlocked backpack, located in room used by plaintiff in his grandfather's house did not violate Fourth Amendment rights when police relied on grandfather's consent to search home and police reasonably concluded that consent extended to backpack.

Gray v. Secretary. Appealing holding regarding sovereign immunity arising from constitutional challenge to transfer of Dulles Airport Toll Road to Metropolitan Washington Airports Authority.

In re Haley. Petitioning for writ of prohibition to prohibit two judges from hearing criminal matters pending in their court.

In re Morris. Petitioning for writ of prohibition against circuit court judge regarding denial of motion for nonsuit in guardianship matters in which estate was left to university foundation instead of children.

Int'l Paper Co. v. Dep't of Taxation. Appealing circuit court dismissal of case based on sovereign immunity.

Jaynes v. Commonwealth. Appealing constitutional challenge to the Anti-Spam Act.

Juniper v. Warden. Habeas corpus case challenging conviction for capital murder and sentence of death.

Magruder v. Commonwealth. Appealing Court of Appeals ruling that trial court did not err in admitting certificate of analysis in violation of Confrontation Clause.

Marshall v. N. Va. Transp. Auth. Appealing constitutionality of Transportation Act of 2007.

Miller-Jenkins v. Miller-Jenkins. Filing amicus brief in support of public policy exception to Parental Kidnapping Prevention Act.

Morgan v. Commonwealth. Appealing Court of Appeals decision that Confrontation Clause was not violated when Commonwealth was permitted to read into evidence preliminary and suppression hearings testimony of witness who had been deported at time of trial.

Phelps v. Commonwealth. Appealing interpretation of felony eluding statute that conduct which endangers “a person” also includes defendant.

Porter v. Commonwealth. Appealing conviction of capital murder and sentence of death.

Robinson v. Commonwealth. Appealing Court of Appeals decision that warrantless entry by police into defendant’s house was unreasonable under exigent circumstances exception.

Tice v. Johnson. Appealing writ of habeas corpus based on ineffective assistance of counsel claim for murder conviction.

Va. Cellular, LLC v. Dep’t of Taxation. Appealing circuit court decision upholding Department’s assessment of alternative minimum tax on telecommunications company that is pass-through entity.

Williams v. Commonwealth. Appealing Court of Appeals decision affirming drug transportation convictions (heroin and cocaine) on ground that defendant lacked standing to challenge stop.

CASES REFUSED BY THE SUPREME COURT OF VIRGINIA

Borschel v. Va. Polytechnic Inst. & St. Univ. Refusing to hear appeal regarding five wrestlers who alleged fraud, breach of contract, and denial of administrative due process in failing to allow them to transfer and retain all eligibility to compete at their new school.

Commonwealth v. Fairbanks. Refusing to hear appeal regarding judgment extending reach of defamation actions permitted against public administrators making employment decisions by overcoming qualified immunity even absent of history of ill-will between parties.

DiNapoli v. Va. Div. of Child Support Enforcement. Refusing to hear appeal regarding taking of personal property under Article I, § 11 of Constitution of Virginia after tax return was seized to pay child support.

Elbow Farm v. Paylor. Refusing to hear appeal of Court of Appeals decision upholding challenges to Department of Environmental Quality permitting decisions respecting landfill operation in Chesapeake.

Gould & Holywell Corp. v. Dep’t of Taxation. Refusing to hear appeal regarding tax assessments upheld by circuit court.

In re Atkins. Refusing to hear petition for writ of mandamus directed to York County Circuit Court.

In re Belton. Refusing to hear petition for writ of prohibition alleging denial of due process by judge.

In re Donahue. Refusing to hear writ of actual innocence based on biological evidence where DNA tests were inconclusive and evidence adduced at trial was sufficient to sustain convictions.

In re Jones. Refusing to hear petitions for writs of mandamus, quo warranto, and prohibition seeking reversal of circuit court order imposing judgment and dismissing with prejudice underlying civil action.

In re Norford. Refusing to hear petition for writ of prohibition to prevent judge from allowing declaratory action to proceed.

In re Powell. Refusing to hear appeal regarding State Bar's Disciplinary Board suspension of attorney's license following one-year suspension of license in District of Columbia.

In re Sloan. Refusing to hear petition for writ of mandamus against judge.

In re Spragans. Refusing to hear petition for writ of mandamus alleging judge erred in treatment of circuit court habeas corpus case.

In re Straub. Refusing to hear appeal regarding denial of petition for emergency writ of mandamus.

In re Wilder. Refusing to hear petition for writ of prohibition or mandamus to direct judge to dismiss for lack of jurisdiction underlying case seeking declaratory relief regarding powers and duties of Richmond City Council.

CASES IN THE SUPREME COURT OF THE UNITED STATES

Arrington v. Wheeler. Petition for certiorari, seeking review of habeas claims found to be time-barred, pending.

Brooks v. Vassar. Petition for certiorari, seeking review of Fourth Circuit decision affirming constitutionality of ABC statutes, denied.

Crawford v. Pham. Petition for certiorari, seeking review of denial of challenge to criminal conviction by inmate's mother in action against public defender, denied.

Easter v. Cir. Ct. of Va. Beach. Petition for certiorari, seeking review of dismissal of suit against state agencies, circuit courts, and federal agencies and courts for violation of rights under Americans with Disabilities Act, pending.

Emmett v. Warden. Petition for certiorari and application, seeking to stay affirming denial of habeas corpus relief from conviction of capital murder and sentence of death, denied.

Env'tl. Prot. Agency v. New York. Petition for certiorari, seeking review of challenge to EPA's New Source Review regulations, denied.

Gray v. Virginia. Petition for certiorari, seeking review of decision affirming conviction for capital murder and sentence of death, pending.

Herring v. Richmond Med. Ctr. Petition for certiorari, seeking review of challenge to Partial Birth Infanticide Act, granted, vacated, and remanded.

In re Farshidi. Petition for certiorari, seeking review of refusal to enter order compelling Governor of Virginia and Norfolk State University to pay Title VII case claims, denied.

Jackson v. Warden. Petition for certiorari, seeking review of decision denying habeas corpus petition challenging conviction for capital murder and sentence of death, denied.

Jenkins v. Director. Petition for certiorari, seeking constitutional review of habeas corpus claims found to be procedurally defaulted because petitioner failed to comply with state procedural rule in appeal of state habeas petition, pending.

Konan v. Sengal. Petition for certiorari, seeking review of dismissal of § 1983 action alleging violations of Due Process and Equal Protection clauses arising out of alleged improprieties and misstatements in Virginia State Bar disciplinary proceedings, pending.

Life Partners, Inc. v. Miller. Petition for certiorari, seeking review of constitutional challenge to Virginia's Viatical Settlements Act, denied.

Life Partners, Inc. v. Morrison. Petition for certiorari, seeking review of challenge to Virginia's Viatical Settlements Act, denied.

Medellin v. Texas. Filing amicus curiae brief on merits in support of Texas, addressing whether U.S. President has authority to order state to reopen concluded criminal proceedings, pending.

Miller-Jenkins v. Miller-Jenkins. Filing amicus curiae brief in support of Virginia resident seeking review of decision holding that same-sex partner was parent of Virginia resident's biological child, denied.

Motley v. Va. State Bar. Petition for certiorari, seeking declaratory judgment that Virginia State Bar wrongly revoked license to practice law, denied.

Pacific Bell v. Linkline. Filing amicus curiae brief in support of petitioner seeking review of anti-trust laws, pending.

Pleasant Grove City v. Summum. Filing amicus curiae brief in support of petitioner seeking review of Tenth Circuit decision restricting government's ability to use donated property for government expression, pending.

Powell v. Warden. Petition for certiorari, seeking review of decision denying habeas corpus petition challenging conviction for capital murder and sentence of death, denied.

Rodriguez v. Va. State Bar. Petition for certiorari, seeking review of revocation of attorney's license, denied.

Schneider v. Virginia. Petition for certiorari, seeking review of admissibility of preliminary hearing testimony under Crawford v. Washington, denied.

Sole v. Wyner. Filing amicus curiae brief on merits in support of Florida officials regarding ability of litigants to recover attorneys' fees when litigant obtains preliminary injunction, but ultimately loses case, reversed-judgment for Florida officials.

Souser v. Robinson. Petition for certiorari, seeking review of § 1983 claims under Prison Litigation Reform Act, denied.

Teleguz v. Virginia. Petition for certiorari, seeking review of decision affirming conviction for capital murder and sentence of death, pending.

Texas v. Meyers. Filing amicus curiae brief in support of Texas, seeking review of decision that state waived sovereign immunity by removing to federal court, pending.

Univ. of Puerto Rico v. Toledo. Filing amicus curiae brief in support of University of Puerto Rico seeking review of whether sovereign immunity bars statutory claim that does not involve constitutional violation, denied.

Virginia v. Moore. Petition for certiorari, seeking review of whether U.S. Constitution requires suppression of evidence for violation of state law, pending on merits.

Willis v. Director. Petition for certiorari, seeking constitutional review of Virginia's judicially created ruling barring review in habeas corpus of claims that could have been, but were not, raised on appeal, pending.

Winston v. Warden. Petition for certiorari, seeking review of decision dismissing habeas corpus petition challenging conviction for capital murder and sentence of death, pending.

OFFICIAL OPINIONS
OF
ATTORNEY GENERAL
ROBERT F. McDONNELL



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: 2007 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; on WESTLAW, beginning with opinions issued in 1976, and on CaseFinder, beginning with opinions from July 1967 (also available as a CD-ROM product). The following CD-ROM products contain opinions of the Attorney General: Michie’s Law on Disc for Virginia, including opinions from July 1980; and Virginia Reporter & West’s® Virginia Code, including opinions from July 1976.

OP. NO. 07-027

ADMINISTRATION OF GOVERNMENT: VIRGINIA FREEDOM OF INFORMATION ACT.

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

Discretionary authority for Department of State Police to release names of concealed carry handgun permittees, including other associated personal information, pursuant to Virginia Freedom of Information Act request. Identities and locations of crime victim and witness permittees should be protected in interest of public safety. Department has responsibility to refrain from releasing sensitive personal information when interests of public safety demand discretion. Use of concealed carry permit information is limited to law-enforcement personnel for investigative purposes.

THE HONORABLE DAVE NUTTER
MEMBER, HOUSE OF DELEGATES
APRIL 6, 2007

ISSUE PRESENTED

You ask whether the Department of State Police, in response to a request under The Freedom of Information Act, may release the names and addresses of all persons who have received concealed carry handgun permits pursuant to § 18.2-308.

RESPONSE

It is my opinion that the Department of State Police possesses the discretionary authority to release the names of concealed carry handgun permittees, including other associated personal information, pursuant to a request under The Virginia Freedom of Information Act. However, since such list of permittees will include names and other personal information of crime victims and witnesses, it is my opinion that the identities and locations of these persons should be protected in the interest of public safety. The Department has the responsibility to refrain from releasing sensitive personal information when the interests of public safety demand discretion. Further, it is my opinion that the express language of § 18.2-308(K) limits the use of concealed carry permit information to law-enforcement personnel for investigative purposes.

BACKGROUND

You relate that the Department of State Police has received certain requests under The Virginia Freedom of Information Act¹ (“FOIA”) from media outlets and other organizations seeking records containing the names and addresses of persons possessing concealed carry handgun permits. You state that the release of such information may violate other state laws. Therefore, you seek clarification regarding the legality of the release of such information.

APPLICABLE LAW AND DISCUSSION

Section 18.2-308 is the statute under which private citizens meeting certain qualifications may obtain permits to carry concealed handguns. Section 18.2-308(K) provides that, once a permit has been issued, the Department of State Police “shall enter the permittee’s name and description in the Virginia Criminal Information Network so that the permit’s existence and current status will be made known to law-enforcement personnel accessing the Network for investigative purposes.” Thus, § 18.2-308(K) requires that

the Department maintain a list of concealed carry permittees in the Virginia Criminal Information Network² (“VCIN”), specifically for purposes of investigation by law-enforcement personnel.

Section 2.2-3700(B) of FOIA mandates that “[a]ll public records and meetings shall be presumed open, unless an exemption is properly invoked.” However, FOIA grants the Department of State Police the discretion to disclose or withhold certain information in appropriate situations. For example, FOIA does not mandate that the Department release the “identity of any victim, witness or undercover officer, or investigative techniques or procedures,”³ “[r]eports submitted in confidence to ... state and local law-enforcement agencies,”⁴ or “[p]ersonal information, as defined in § 2.2-3801.”⁵

Although FOIA does not contain a specific exemption for information related to concealed carry permittees, it is clear that the Department of State Police accumulates and uses the concealed carry permittee information expressly for investigative purposes.⁶ Further, there is clear statutory guidance that provides the Department with discretion regarding release of “personal information” and information sensitive to public safety.⁷ The record of registration under § 18.2-308, including the permittee’s address, is among the data included by the General Assembly as personal information. A plain reading of the definition of “personal information” indicates that the address of a concealed carry permittee would fall within such definition because it “describes” and “locates” him with particularity.⁸

The Department of State Police is not required to release information related to the identities of crime victims, witnesses, undercover officers, or the personal information of any person.⁹ In some circumstances, such information is contained among the Department’s comprehensive list of concealed carry permittees. A list of permittees (“permit list”) generated by the Department and released pursuant to FOIA likely will include identifiers of crime victims or witnesses.¹⁰ The release of such personal information of a crime victim or witness potentially jeopardizes his safety and privacy, as well as the safety of the community in which he lives.¹¹

In determining whether FOIA requires permit list disclosure, notwithstanding the express limits placed on permit lists by other *Code* sections, general rules of statutory interpretation should be applied. “[W]hen one statute speaks to a subject in a general way and another deals with a part of the same subject in a more specific manner, the two should be harmonized if possible, and where they conflict, the latter prevails.”¹² Section 18.2-308 governs the specific subject of concealed carry permits and information required for the VCIN database and its authorized use. Section 18.2-308(K) specifically provides that the information related to concealed carry permittees required to be entered in VCIN is for law-enforcement personnel to access for “investigative purposes.” Reconciling the specific provisions of § 18.2-308(K) with the apparent conflict with FOIA’s disclosure requirement,¹³ it is my opinion that the § 18.2-308(K) provides a specific exception to FOIA for information related to concealed carry permittees.

CONCLUSION

Accordingly, it is my opinion that the Department of State Police possesses the discretionary authority to release the names of concealed carry handgun permittees, including other associated personal information, pursuant to a request under The Virginia Freedom of Information Act. However, since such list of permittees will include names and other personal information of crime victims and witnesses, it is my opinion that the identities and locations of these persons should be protected in the interest of public safety. The Department has the responsibility to refrain from releasing sensitive personal information when the interests of public safety demand discretion. Further, it is my opinion that the express language of § 18.2-308(K) limits the use of concealed carry permit information to law-enforcement personnel for investigative purposes.

¹Va. CODE ANN. tit. 2.2, ch. 27, §§ 2.2-3700 to 2.2-3714 (2005 & Supp. 2006).

²The Network currently is recognized as the communication system required by § 52-12. See 2006 Op. Va. Att’y Gen. 157, 158; Virginia Criminal Information Network website at http://www.vsp.state.va.us/CJIS_VCIN.shtm (last visited April 4, 2007).

³Section 2.2-3706(D) (Supp. 2006).

⁴Section 2.2-3706(F)(3).

⁵Section 2.2-3705.1(10) (2005). FOIA adopts by reference the definition of “personal information” from § 2.2-3801. *Id.* Section 2.2-3801(2) defines “personal information” as “all information that *describes, locates or indexes anything about an individual* including his real or personal property holdings derived from tax returns, and his education, financial transactions, medical history, ancestry, religion, political ideology, criminal or employment record, or that affords a basis for inferring personal characteristics, such as finger and voice prints, photographs, or things done by or to such individual; and *the record of his presence, registration, or membership in an organization or activity*, or admission to an institution.” (Emphasis added.)

⁶See Va. CODE ANN. § 18.2-308(K) (Supp. 2006).

⁷See *supra* notes 3-5.

⁸Section 2.2-3801(2) (defining “personal information”); see also § 2.2-3705.1(10) (adopting definition of personal information in § 2.2-3801).

⁹See *supra* notes 3-5.

¹⁰Section 2.2-3706(D) of FOIA contemplates issues related to identification of victims and witnesses and defers to the judgment of the Department regarding disclosure.

¹¹In FOIA, the General Assembly specifically has provided local law enforcement with an exemption from releasing certain information “where the release of such information would jeopardize the safety or privacy of any person.” Section 2.2-3706(G)(1).

¹²Thomas v. Commonwealth, 244 Va. 1, 22-23, 419 S.E.2d 606, 618 (1992) (quoting Va. Nat’l Bank v. Harris, 220 Va. 336, 340, 257 S.E.2d 867, 870 (1979)).

¹³Section 2.2-3700(B) (2005).

OP. NO. 07-068

**ADMINISTRATION OF GOVERNMENT: VIRGINIA FREEDOM OF INFORMATION ACT.
PENSIONS, BENEFITS, AND RETIREMENT: VIRGINIA RETIREMENT SYSTEM.
TRADE AND COMMERCE: UNIFORM TRADE SECRETS ACT.**

Certain information provided to Virginia Retirement System by private entity “relates to” trade secrets of entity and is exempt from disclosure under The Virginia Freedom of Information Act provided private entity meets requirements of § 2.2-3705.7(25).

MR. ROBERT P. SCHULTZE
DIRECTOR, VIRGINIA RETIREMENT SYSTEM
SEPTEMBER 4, 2007

ISSUE PRESENTED

You ask whether certain information provided to the Virginia Retirement System or a local retirement system¹ by a private entity² “relates to” the trade secrets of the private entity rendering such information exempt from disclosure under The Virginia Freedom of Information Act.³

RESPONSE

It is my opinion that the information described herein that is provided to the Virginia Retirement System by a private entity “relates to” the trade secrets of the entity. It further is my opinion that such information is exempt from disclosure under The Virginia Freedom of Information Act provided the private entity meets the requirements of § 2.2-3705.7(25).

BACKGROUND

You relate that the Virginia Retirement System maintains a diversified investment portfolio⁴ and considers a vast amount of information in determining the allocation of assets and investments within asset groups. You relate that private entities possibly could provide investment opportunities across all asset groups, but the majority of these investments are in the real estate and private equity markets. You note that each of these markets is a growing asset class that is crucial to the overall return on the Retirement System’s diversified investment portfolio.

You note that a prior opinion of the Attorney General (the “2003 Opinion”) has described the method by which the Retirement System typically invests in a private equity.⁵ This method generally is applicable across asset classes. Participation in any limited partnership investment is at the discretion of the general partner. You also indicate that these limited partnerships rely on the Retirement System to keep confidential the information regarding the underlying investments and other basic core information regarding their business purposes. You note that disclosure of such information would have an adverse impact on investments acquired, held, or disposed of by a limited partnership. Consequently, there would be an adverse impact on the financial interest of the Retirement System and its beneficiaries. Additionally, you indicate that the threat of disclosure has limited, and may continue to limit, access of the Retirement System to private equity, real estate, and other markets because general partners do not want to risk public disclosure of partnership information.⁶ You advise that such partnership information may include a partnership’s (i) structure and duration of existence, (ii) stable of portfolio companies or other properties, including financial performance; and (iii) strategy or approach in developing companies or other properties for introduction to the market to maximize profit for the entity’s investors. Thus,

if such information is made public, it could adversely affect the entity's ability to maximize its return to investors and ultimately adversely impact the financial interest of the Retirement System.

You advise that a private entity, particularly a general partner of a private equity or other limited partnership, typically desires assurance that information relating to its structure, portfolio, or strategy will be protected from public disclosure. Such assurance often is required as a condition for the Retirement System to participate in the partnership investment. The protected information may include: (1) limited partnership agreements and any amendments thereto; (2) subscription agreements; (3) private placement memoranda; (4) audited financial statements and related quarterly or annual financial reports; (5) investment memoranda; (6) manager portfolio updates; (7) capital call information; (8) distribution information; and (9) Internal Revenue Service Forms K1 or similar forms provided to the Retirement System by the private entity.⁷

You advise that it is your view that the exemption from The Freedom of Information Act discussed in the 2003 Opinion regarding private equity investments⁸ does not encompass all of the documents that private investment entities require to be kept confidential as a condition for the Retirement System to gain access to desirable investment opportunities.

APPLICABLE LAW AND DISCUSSION

Section 2.2-3704(A) of The Virginia Freedom of Information Act provides that “[e]xcept as otherwise specifically provided by law, all public records shall be open to inspection and copying by any citizens of the Commonwealth during the regular office hours of the custodian of such records.” Section 2.2-3705.7 of the Act establishes exceptions from the mandatory disclosure in § 2.2-3704(A) relating to specific public bodies, including the Virginia Retirement System. Section 2.2-3705.7(25), as amended by the General Assembly and effective March 21, 2007,⁹ provides that:

Records of the Virginia Retirement System acting pursuant to § 51.1-124.30 or of a local retirement system acting pursuant to § 51.1-803 (hereinafter collectively referred to as “the retirement system”), relating to:

a. Internal deliberations of or decisions by the retirement system on the pursuit of particular investment strategies, or the selection or termination of investment managers, prior to the execution of such investment strategies or the selection or termination of such managers, to the extent that disclosure of such records would have an adverse impact on the financial interest of the retirement system; and

b. *Trade secrets, as defined in the Uniform Trade Secrets Act (§ 59.1-336 et seq.), provided by a private entity to the retirement system, to the extent disclosure of such records would have an adverse impact on the financial interest of the retirement system.*

For the records specified in subdivision b to be excluded from the provisions of this chapter, the entity shall make a written request to the retirement system:

(1) Invoking such exclusion prior to or upon submission of the data or other materials for which protection from disclosure is sought;

(2) Identifying with specificity the data or other materials for which protection is sought; and

(3) Stating the reasons why protection is necessary.

The retirement system shall determine whether the requested exclusion from disclosure meets the requirements set forth in subdivision b.

Nothing in this subdivision shall be construed to authorize the withholding of the identity or amount of any investment held or the present value and performance of all asset classes and subclasses. [Emphasis added.]

Essentially, § 2.2-3705.7(25)(b) mandates that three conditions¹⁰ be met before the exception from disclosure is applicable. First, the records must “relate to” a trade secret of the private entity. The “relate to” condition typically is met since the described information has a connection or reference to the structure, portfolio, or strategy information comprising the business purpose of the private entity. Therefore, according to the plain and ordinary meaning of “relates to,”¹¹ the information would “relate to” the structure, portfolio, or strategy information of a private entity. Next, such information must be “trade secrets”¹² as defined in the Uniform Trade Secrets Act. Under the third condition, the Retirement System must determine that disclosure of the described information would have an adverse impact on the financial interest of the Retirement System. To the extent the information you describe meets such criteria, § 2.2-3705.7(25) authorizes the Retirement System to exclude such information from the mandatory disclosure requirements of The Freedom of Information Act. Therefore, the focus of the inquiry is whether the structure, portfolio, or strategy information of a private entity is considered a trade secret. According to § 59.1-336 of the Uniform Trade Secrets Act,

“Trade secret” means information, including but not limited to, a formula, pattern, compilation, program, device, method, technique, or process, that:

1. Derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

2. *Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.* [Emphasis added.]

There is certain basic information that goes to the core of a private entity's existence, which includes an entity's stable of portfolio companies or properties, its approach in developing those companies or properties, and the duration of the entity's existence. Public disclosure of such information could defeat the business purpose of the private entity and adversely affect an entity's ability to maximize its return to investors. Consequently, such disclosure would have an adverse impact on the financial interest of the Retirement System. Additionally, public disclosure would permit other persons to obtain economic value from the disclosure or use of the entity's structure, portfolio or strategy information. For example, other parties could sell the information as part of a database or timing information to gain a negotiating advantage in connection with the sale of one or more portfolio companies. Thus, the first prong of the definition of "trade secret" is satisfied.

Most private entities with which the Retirement System invests or desires to make investments take reasonable steps to ensure that their investors are the sole recipients of their structure, portfolio or strategy information. The entities that take steps to protect this information do not make it available to the general public, or even to the investment community generally. Consequently, such entities meet the second prong of the "trade secret" definition.

Finally, in the 2003 Opinion, the Attorney General previously has observed that the trade secret exclusion is consistent with the constitutional and statutory provisions relative to the Retirement System's investment responsibilities.¹³ Article X, § 11 of the Constitution of Virginia provides that Retirement System funds "shall be deemed separate and independent trust funds, ... and shall be *invested and administered solely in the interests of the members and beneficiaries thereof.*" (Emphasis added.)

Section 51.1-124.30(C) emphasizes the importance of investing Retirement System funds in a manner that is in the best interests of its beneficiaries:

The Board [of Trustees of the Virginia Retirement System] shall discharge its duties with respect to the Retirement System *solely in the interest of the beneficiaries thereof* and shall invest the assets of the Retirement System with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims. *The Board shall also diversify such investments so as to minimize the risk of large losses unless under the circumstances it is clearly prudent not to do so.* [Emphasis added.]

Section 51.1-124.30(C) clearly provides that the Retirement System should diversify its assets as part of its responsibility. The exception from disclosure in § 2.2-3705.7(25)

further recognizes the need for the Retirement System to invest in an array of assets that benefit its beneficiaries. In the context of the Retirement System investing in certain private entities, disclosure may have an adverse effect on the investment acquired, held, and disposed of as well as the Retirement System's overall financial interests. Should the Retirement System be required to disclose information related to the trade secrets of a private entity offering a particular type of investment, the Retirement System may not be invited to participate, which would be detrimental to its financial interests.

CONCLUSION

Accordingly, it is my opinion that the information described herein that is provided to the Virginia Retirement System by a private entity "relates to" the trade secrets of the entity. It further is my opinion that such information is exempt from disclosure under The Virginia Freedom of Information Act provided the private entity meets the requirements of § 2.2-3705.7(25).

¹ Although this opinion refers to the Virginia Retirement System or the Retirement System, the analysis is intended to apply to any local retirement system governed by §§ 51.1-800 to 51.1-823.

² For example, a limited partnership vehicle that is used for investment purposes would be a private entity.

³ VA. CODE ANN. §§ 2.2-3700 to 2.2-3714 (2005 & Supp. 2007).

⁴ The portfolio includes fixed income investments; domestic, international and private equity investments; real estate; and other investments.

⁵ See 2003 Op. Va. Att'y Gen. 140. The 2003 Opinion notes that the Retirement System usually invests in a private entity as a limited partner in a limited partnership. *Id.* at 140. "In many instances, the general partner is a management firm that manages a specific fund or funds in which the limited partners invest. While the limited partnership may own interests in several investments, the Retirement System holds only an investment position in the limited partnership and not in the underlying investments of the partnership. The general partner, whether a management fund or otherwise, provides detailed information to the Retirement System regarding the partnership's underlying investments. This information is provided on a confidential basis so that the Retirement System may monitor current investments and make informed investment decisions. You also relate that the confidentiality of both the initial and the ongoing analyses regarding these underlying investments is critical, because disclosure of such confidential investment information would affect adversely the value of the investment being acquired, held or disposed of by the Retirement System." *Id.* at 140-41.

⁶ You also advise that private equity market limited partnerships require execution of a confidentiality agreement to participate in certain investments. You note that the same requirement applies to limited partnerships in other asset classes.

⁷ See VC expERTs, Glossary (follow alphabetical links to terms) (defining partnership agreement, limited partnerships, subscription agreement, private placement memorandum, capital call/draw down, and distribution), available at <http://vcexperts.com/vce/library/encyclopedia/glossary.asp> (last visited July 23, 2007); *id.*, Encyclopedia (follow link to "Definitions: Financial Statements") (defining financial statements), available at http://vcexperts.com/vce/library/encyclopedia/book_contents.asp?book_number=1 (last visited July 23, 2007); investorwords.com (follow link to search for term) (defining investment memorandum and portfolio manager), available at http://www.investorwords.com/2620/investment_memorandum.html (last visited July 23, 2007); Internal Revenue Service, United States Department of the Treasury, General Instructions [for Schedule K-1], available at <http://www.irs.gov/instructions/i1065sk1/ch01.html>; see also JAMES M. SCHELL, PRIVATE EQUITY FUNDS BUSINESS STRUCTURE & OPERATIONS (2007) (defining various terms in context of limited partnership agreement).

⁸2003 Op. Va. Att’y Gen., *supra* note 5, at 140 (interpreting exemption under § 2.2-3705(47), predecessor to § 2.2-3705.7(12)).

⁹See 2007 Va. Acts. ch. 739, cl. 2, at 1119, 1125 (noting that emergency exists and enacting provisions upon passage).

¹⁰Section 2.2-3705.7(25)(b) also requires an entity to make a written request to invoke the exemption from disclosure. For purposes of this opinion, I will assume that such written request has been filed with the Virginia Retirement System. I note that the form and sufficiency of any such request is outside the scope of this opinion.

¹¹Absent a statutory definition, the plain and ordinary meaning of the term is controlling. See *Sansom v. Bd. of Supvrs.*, 257 Va. 589, 594-95, 514 S.E.2d 345 349 (1999); *Commonwealth v. Orange-Madison Coop. Farm Serv.*, 220 Va. 655, 658, 261 S.E.2d 532, 533-34 (1980); 1999 Op. Va. Att’y Gen. 31, 31.

¹²See VA. CODE ANN. § 59.1-336 (2006).

¹³2003 Op. Va. Att’y Gen., *supra* note 5, at 142.

OP. NO. 07-055

ADMINISTRATION OF GOVERNMENT: VIRGINIA PUBLIC PROCUREMENT ACT – CONTRACT FORMATION AND ADMINISTRATION.

COUNTIES, CITIES AND TOWNS: GENERAL POWERS OF LOCAL GOVERNMENTS – ADDITIONAL POWERS.

‘Service disabled veteran business’ status may only be granted to business that also qualifies as small business; citizenship requirements similar to those imposed by § 2.2-4310 on minority-owned and women-owned businesses apply to service disabled veteran business owners.

MR. VINCENT M. BURGESS
COMMISSIONER, DEPARTMENT OF VETERAN SERVICES
SEPTEMBER 6, 2007

ISSUES PRESENTED

You inquire regarding businesses affected by the passage of Senate Bill 1145¹ (“SB 1145” or “2007 Amendments”), including the requirements for programs established under the 2007 Amendments. Specifically, you ask whether the new category for “service disabled veteran business” in § 2.2-4310 applies only to small businesses² or to any service disabled veteran business, regardless of size³ and whether citizenship requirements apply to owners of service disabled veteran businesses.

RESPONSE

It is my opinion that “service disabled veteran business” status may only be granted to a business that also qualifies as a small business. It further is my opinion that citizenship requirements similar to those imposed by § 2.2-4310 on minority-owned and women-owned businesses apply to service disabled veteran business owners.

BACKGROUND

You inquire concerning several matters related to the 2007 Amendments.⁴ You advise that the intent of the 2007 Amendments is to facilitate participation of businesses owned by service disabled veterans in state procurement transactions. Further, you note that the Department of Minority Business Enterprise (DMBE) and the Department

of Veterans Services (DVS) are charged with developing or promoting programs to implement the 2007 Amendments.⁵ The 2007 Amendments to §§ 2.2-2001 and 2.2-4310 added the status of “service disabled veteran business.”⁶ You advise that DVS and DMBE assert that to qualify as a “service disabled veteran business,” an applicant for certification must also be a “small business” and that the 2007 Amendments apply only to small businesses. Finally, you note that the 2007 Amendments to § 2.2-4310 impose citizenship requirements on “minority individuals” and owners of “women-owned businesses,” but do not appear to mandate similar requirements for service disabled veteran business owners.

APPLICABLE LAW AND DISCUSSION

It is a fundamental rule of statutory construction that each part or section of a statute must be construed in conjunction with every other part.⁷ Moreover, the Supreme Court of Virginia has held that “[a] statute should be construed so as to give effect to its component parts. Its meaning should not be derived from single words isolated from the true purpose of the Act.”⁸ “[T]he practical construction given to a statute by public officials charged with its enforcement is entitled to great weight by the courts and in doubtful cases will be regarded as decisive.”⁹

The status of “service disabled veteran business” is limited to small business owners under the 2007 Amendments. The addition of the words “small business owner” to § 2.2-2001(B) reveals the General Assembly’s intent to limit “service disabled veteran business” status to small businesses. As introduced, SB 1145 provided that:

The Department shall adopt reasonable regulations in accordance with the Administrative Process Act (§ 2.2-4000 et seq.) to implement a certification program for businesses owned or operated by individuals holding special disabled veteran status.^[10]

Significantly, the General Assembly revised SB 1145 to include the phrase “small business owner” and § 2.2-2001(B) currently provides that:

The Department shall adopt reasonable regulations to implement a program to certify, upon request of the *small business owner*, that he holds a “service disabled veteran” status. [Emphasis added.]

“When the wording of a statute is clear and unambiguous, its plain meaning is to be accepted without resort to rules of interpretation.”¹¹ Additionally, “[i]t is [the court’s] duty to take the words which the legislature has seen fit to employ and give to them their usual and ordinary signification, and having thus ascertained the legislative intent, to give effect to it.”¹² Consequently, the intent manifested by the General Assembly’s revision of the original language of SB 1145¹³ to add the phrase “small business owner” to § 2.2-2001(B) confirms that “service disabled veteran” status is limited to businesses that otherwise qualify as a “small business.”

Furthermore, § 2.2-4310(B) provides, in part, that:

All public bodies shall establish programs consistent with [the Virginia Public Procurement Act] to facilitate the participation of small businesses and businesses owned by women, minorities, and service disabled veterans in procurement transactions. The programs established shall be in writing and shall comply with the provisions of any enhancement or remedial measures authorized by the Governor pursuant to subsection C or, where applicable, by the chief executive of a local governing body pursuant to § 15.2-965.1, and shall include specific plans to achieve any goals established therein. [Emphasis added.]

Therefore, pursuant to § 2.2-4310(B), any program established must comply with § 2.2-4310(C) or § 15.2-965.1, depending on which public body establishes the program. Section 2.2-4310(C) creates two categories under which a program is authorized to provide “enhancement or remedial measures”:

Whenever there exists (i) a rational basis for *small business enhancement* or (ii) a persuasive analysis that documents a statistically significant disparity between the availability and utilization of *women- and minority-owned businesses*[.]

Section 15.2-965.1(A) is virtually identical to § 2.2-4310(C).¹⁴ The General Assembly did not include “service disabled veteran business” language in § 2.2-4310(C) as it did in other sections amended by SB 1145.¹⁵ Notably, the General Assembly did not amend § 15.2-965.1, which does not include language relating to a “service disabled veteran business.” Section 15.2-965.1(B) provides that:

A *small, women- or minority-owned business* that is certified by the Department of Minority Business Enterprises pursuant to § 2.2-1403 shall not be required by any locality to obtain any additional certification to participate in any program designed to enhance the participation of such businesses as vendors or to remedy any documented disparity. [Emphasis added.]

Therefore, any program certified by DMBE for the benefit of a “service disabled veteran business” and established by a locality pursuant to § 15.2-965.1 can only apply when such business is also a small businesses because § 15.2-965.1 does not include a “service disabled veteran business” category. Therefore, any program established to benefit a “service disabled veteran business” under the 2007 Amendments must exist to provide “for small business enhancement.”¹⁶

Further, the 2007 Amendments do not permit a “service disabled veteran business” that does not otherwise qualify as a small, minority-owned, or women-owned business to receive any additional advantages or benefits.¹⁷ “[W]hen analyzing a statute, [courts] must assume that ‘the legislature chose, with care, the words it used when it enacted the relevant statute, and we are bound by those words as we interpret the statute.’”¹⁸ “‘Courts are not permitted to rewrite statutes. This is a legislative function. The manifest intention of the legislature, clearly disclosed by its language, must be applied.’”¹⁹ “[Courts] may not add to a statute language which the legislature has chosen not to include.”²⁰ The General Assembly has included language in the 2007 Amendments that limits the scope of “service disabled veteran business” status²¹ while simultaneously declining to add language that would expand the scope of the status beyond that of a small business.²²

Finally, you inquire concerning the citizenship requirements placed upon owners of minority-owned businesses and women-owned businesses and whether similar requirements apply to owners of “service disabled veteran businesses.” Section 2.2-4310 specifically imposes citizenship requirements on minority individuals and minority- and women-owned businesses:

“Minority individual” means an individual who is a citizen of the United States or a *non-citizen who is in full compliance with United States immigration law*

....

“Minority-owned business” means a business concern that is at least 51% owned by one or more *minority individuals*

....

“Women-owned business” means a business concern that is at least 51% owned by one or more women who are citizens of the United States or *non-citizens who are in full compliance with United States immigration law*, or in the case of a corporation, partnership, or limited liability company or other entity, at least 51% of the equity ownership interest is owned by one or more women who are citizens of the United States or *non-citizens who are in full compliance with United States immigration law*, and both the management and daily business operations are controlled by one or more women who are citizens of the United States or *non-citizens who are in full compliance with United States immigration law*. [Emphasis added.]

The 2007 Amendments to § 2.2-4310 do not include citizenship requirements or restrictions in the definitions for “service disabled veteran business” and “service disabled veteran.” However, a person joining any branch of the military “must be a U.S. citizen or resident alien.”²³ Further, federal law limits the ability of those not legally present in the United States to receive state or local public benefits.²⁴

Therefore, anyone who *lawfully* served in active duty in the United States military must have complied with United States immigration law; thus, a person must be a citizen or resident alien to be a service disabled veteran.

CONCLUSION

Accordingly, it is my opinion that “service disabled veteran business” status may only be granted to a business that also qualifies as a small business. It further is my opinion that citizenship requirements similar to those imposed by § 2.2-4310 on minority-owned and women-owned businesses apply to service disabled veteran business owners.

¹ See 2007 Va. Acts ch. 787, at 1205, 1205-07; see also 2007 S.B. 1145, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?071+ful+SB1145ER+pdf>.

² Section 2.2-4310(E) defines “small business” as “an independently owned and operated business which, together with affiliates, has 250 or fewer employees, or average annual gross receipts of \$10 million or less averaged over the previous three years.”

³ You express concern that such treatment would allow special advantages to a “service disabled veteran business” that is not a small business or a minority- or women-owned business.

⁴ See *supra* note 1.

⁵ See VA. CODE ANN. § 2.2-2001(B) (Supp. 2007) (directing DVS to adopt regulations to implement program); § 2.2-4310(B) (Supp. 2007) (directing DMBE to provide information regarding service disabled veteran procurement opportunities).

⁶ See 2007 Va. Acts, *supra* note 1, at 1206-07 (amending §§ 2.2-2001(B), 2.2-4310(E)).

⁷ See *Jones v. Conwell*, 227 Va. 176, 181, 314 S.E.2d 61, 64 (1984); 1986-1987 Op. Va. Att’y Gen. 152, 153.

⁸ *Commonwealth v. Jones*, 194 Va. 727, 731, 74 S.E.2d 817, 820 (1953).

⁹ *S. Spring Bed Co. v. State Corp. Comm’n*, 205 Va. 272, 275, 136 S.E.2d 900, 902 (1964); *Commonwealth v. Appalachian Electric Power Co.*, 193 Va. 37, 45, 68 S.E.2d 122, 127 (1951).

¹⁰ 2007 S.B. 1145 (as introduced Jan. 10, 2007) (emphasis added), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?071+ful+SB1145+pdf> (quoting § 2.2-2001(B)).

¹¹ *Kossman v. Commonwealth*, 24 Va. App. 762, 766, 485 S.E.2d 643, 645 (1997) (quoting *Commonwealth v. May Bros.*, 11 Va. App. 115, 118, 396 S.E.2d 695, 696 (1990)).

¹² *Commonwealth v. Sanderson*, 170 Va. 33, 38-39, 195 S.E. 516, 519 (1938) (quoting *Saville v. Va. Ry. & Power Co.*, 114 Va. 444, 453, 76 S.E. 954, 957 (1913)).

¹³ See *supra* note 10 and accompanying text.

¹⁴ Section 15.2-965.1(A) provides for “enhancement *and* remedial measures” “whenever there exists (i) a rational basis for small business enhancement, or (ii) a persuasive analysis that documents a statistically significant disparity between the availability and utilization of women- and minority-owned businesses.” (Emphasis added.)

¹⁵ See, e.g., § 2.2-4310(B).

¹⁶ Section 2.2-4310(C); VA. CODE ANN. § 15.2-965.1(A) (Supp. 2007).

¹⁷ Section 2.2-4310 confers advantages and benefits to all qualifying businesses.

¹⁸ *City of Va. Beach v. ESG Enters.*, 243 Va. 149, 153, 413 S.E.2d 642, 644 (1992) (quoting *Barr v. Town & Country Props., Inc.*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990)).

¹⁹ *Barr*, 240 Va. at 295, 396 S.E.2d at 674 (quoting *Anderson v. Commonwealth*, 182 Va. 560, 566, 29 S.E.2d 838, 841 (1944)).

²⁰ *County of Amherst v. Brockman*, 224 Va. 391, 397, 297 S.E.2d 805, 808 (1992).

²¹ See 2007 Va. Acts, *supra* note 1, at 1206 (amending § 2.2-2001 to add subsection B directing DVS to adopt regulations to implement program upon request of “small business owner, that he holds a ‘service disabled veteran’ status”).

²² For example, the General Assembly did not amend §§ 2.2-4310(C) and 15.2-965.1 to add “service disabled veteran business” language.

²³ See Military.com, “Eligibility Basics,” at http://www.military.com/Recruiting/Content/0.13898_rec_step02_eligibility_00.html (stating basic requirements for joining military) (last visited Aug. 3, 2007).

²⁴ See 8 U.S.C.S. § 1621(a) (LexisNexis 1997). However, under § 1621, benefits are available for certain emergency medical conditions or disaster relief, immunizations, and certain programs if agreed to by the Attorney General of the United States. See *id.* § 1621(b) (LexisNexis 1997). The benefits provided in § 2.2-4310 would not qualify. Further, an applicant who is not legally present in the United States is not eligible to receive a business license in the Commonwealth. See 2006 Op. Va. Att’y Gen. 32.

OP. NO. 07-020

ADMINISTRATION OF GOVERNMENT: VIRGINIA PUBLIC PROCUREMENT ACT — STATE AND LOCAL GOVERNMENT CONFLICT OF INTERESTS ACT.

Procurement and Conflict Acts do not apply to Breaks Interstate Park Commission or its members. In exercising public mission, Commission should adopt appropriate rules or measures to preserve and promote public confidence in its operations and guard against circumstances that create appearance or actual occurrence of impropriety.

THE HONORABLE CLARENCE E. “BUD” PHILLIPS
MEMBER, HOUSE OF DELEGATES
JUNE 20, 2007

ISSUES PRESENTED

You ask whether the Virginia Public Procurement Act¹ (“Procurement Act”) and the State and Local Government Conflict of Interests Act² (“Conflict Act”) apply to the Breaks Interstate Park Commission and its members. If so, you ask whether the Acts would prohibit a member of the Commission from submitting a bid or being awarded a contract. If such actions are not prohibited, you ask what steps must be taken to comply with the law.

RESPONSE

It is my opinion that the Procurement and Conflict Acts do not apply to the Breaks Interstate Park Commission or its members. However, it is my opinion that the Commission, in the exercise of its public mission, should adopt appropriate rules or other measures to preserve and promote public confidence in its operations and to guard against circumstances that may create an appearance or actual occurrence of impropriety.

BACKGROUND

The Breaks Interstate Park Commission (“Commission”) is a joint corporate instrumentality of the Commonwealths of Virginia and Kentucky that performs governmental functions for the two states. Additionally, you state that the Commission

has, among other things, the power to enter into contracts. You indicate that the Commission receives funding from the Commonwealth of Virginia and may receive funding from the Virginia Coalfield Economic Development Authority to perform construction within the Park. Finally, you relate that a member of the Commission, who is a resident of Kentucky, wishes to place a bid for construction work that may be funded by that Authority.

APPLICABLE LAW AND DISCUSSION

The Commission was created by interstate compact among the governments of Virginia and Kentucky³ and approved by Congress⁴ for the purpose of creating, developing, and operating an interstate park⁵ (“Compact”). As a creation of the Compact, the Commission’s rights and responsibilities are governed by the Compact.⁶ Except as found in the Compact, the Commission is not required to comply with a particular signatory’s laws, and one of the signatories may not unilaterally subject the Commission to an obligation not found in the Compact.⁷

Thus, I must look to the Compact concerning application of laws regulating the Commission and the conduct of the governmental bodies. The Compact provides that:

Pursuant to authority granted by an Act of the 83rd Congress of the United States, being Public Law 275, approved August 14, 1953, the Commonwealth of Kentucky and the Commonwealth of Virginia do hereby covenant and agree as follows:

....

There is hereby created the Breaks Interstate Park Commission....

....

The Commission ... shall be deemed to be performing governmental functions of the two states in the performance of its duties hereunder. The Commission shall have power to sue and be sued, to contract and be contracted with, to use a common seal and to make and adopt suitable by-laws, rules and regulations....

...They [members of the Commission] shall take the oath of office required of officers and their respective states.

...The Commission shall submit annually and at other times as required such reports as may be required by the laws of each Commonwealth....

...The Commission is authorized to issue revenue bonds ... pursuant to procedures which shall be in substantial compliance with the provisions of laws of either or both states[.]^[8]

The Compact provides that the Commission shall be subject to the signatories’ laws regarding the oath of office, submission of reports, and bond issuance procedures,

but nothing subjects the Commission to the signatories' laws regarding public contracting and ethics. In my opinion, neither the signatories nor Congress intended to make the signatories' procurement and ethics laws applicable to the Commission or its members.⁹

While the Compact does not subject the Commission to the procurement and ethics laws of either Commonwealth, you mention that the Commission may accept funds from the Commonwealth of Virginia or from the Virginia Coalfield Economic Development Authority. It is possible that the Commission may expressly or implicitly agree to follow certain state procedures or ethical standards to the extent this is a condition of receiving particular appropriations or grants. Any such undertaking, however, would depend on the particular terms associated with the funding at issue.

The fact that the Compact does not prescribe procedures and ethical standards for the Commission to follow when exercising its contracting power¹⁰ does not suggest that the Commission, which is a governmental entity created to serve the public interest, should allow procedures and ethical conflicts that create an appearance of impropriety or undermine public confidence in its operations. The Compact gives the Commission the power to "adopt suitable by-laws, rules and regulations."¹¹ Therefore, in my opinion, it would be appropriate for the Commission to adopt rules addressing such matters, which are important to the execution of its governmental functions.

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, because it is chiefly through that conduct and character that the government's reputation is derived. Where a governmental entity's legal structure falls outside the protection of generally applicable laws designed to define and prohibit inappropriate actions or conflicts, it becomes all the more important for the entity itself to determine whether its procedures will present an appearance or actual occurrence of impropriety that it finds unacceptable and that will affect the confidence of the public in its ability to perform its duties impartially.

CONCLUSION

Accordingly, it is my opinion that the Procurement and Conflict Acts do not apply to the Breaks Interstate Park Commission or its members. However, it is my opinion that the Commission, in the exercise of its public mission, should adopt appropriate rules or other measures to preserve and promote public confidence in its operations and to guard against circumstances that may create an appearance or actual occurrence of impropriety.

¹Va. CODE ANN. §§ 2.2-4300 to 2.2-4377 (2005 & Supp. 2006).

²Sections 2.2-3100 to 2.2-3131 (2005 & Supp. 2006).

³See 1954 Va. Acts ch. 37, at 36, 36-38 (creating Breaks Interstate Park Commission and authorizing Governor to execute compact); *see also* 1994 Va. Acts ch. 622, at 893, 893-95 (amending and reenacting

compact to revise membership of Commission); 1964 Va. Acts ch. 292, at 506, 506-08 (amending and reenacting compact to authorize Commission to exercise right of eminent domain).

⁴ See Pub. L. No. 543, 68 Stat. 571 (1954) (consenting to Breaks Interstate Park Compact); *see also* Pub. L. No. 88-602, 78 Stat. 957 (1964) (consenting to amendment to The Breaks Interstate Park Compact).

⁵ See 1954 Va. Acts, *supra* note 3, art. I, at 36.

⁶ See *id.*, art. II, at 37.

⁷ See Potomac Elec. Power Co. v. State Corp. Comm'n, 221 Va. 632, 635 n.1, 272 S.E.2d 214, 216 (1980); 1983-1984 Op. Va. Att'y Gen. 409, 410.

⁸ 1994 Va. Acts, *supra* note 3, at 894-95.

⁹ See Smith Mtn. Lake Yacht Club, Inc. v. Ramaker, 261 Va. 240, 246, 542 S.E.2d 392, 395 (2001) (noting maxim of *expressio unius est exclusio alterius*, which provides that mention of specific item in statute implies that other omitted items were not intended to be included within scope of statute); C.T. Hellmuth & Assocs. v. Washington Metro. Area Transit Auth., 414 F. Supp. 408, 410 (D. Md. 1976) (holding that Maryland open records laws do not apply to authority created by compact).

¹⁰ Although this opinion addresses the applicability of certain state laws to the Commission, it is apparent that the compact creating the Commission also reveals no intention to apply federal procurement or ethics rules to the Commission. *Cf.* Seal & Co. v. Washington Metro. Area Transit Auth., 768 F. Supp. 1150, 1156-57 (E.D. Va. 1991) (examining compact in which court found unusual degree of federal involvement and use of terms of art drawn from federal procurement regulations; therefore, court allowed aggrieved bidder to challenge authority's procurement decision under federal procurement law).

¹¹ See 1994 Va. Acts, *supra* note 3, at 894.

OP. NO. 06-103

AGRICULTURE, HORTICULTURE AND FOOD: COMPREHENSIVE ANIMAL LAWS – AUTHORITY OF LOCAL GOVERNING BODIES AND LICENSING OF DOGS – ANIMAL CONTROL OFFICERS AND HUMANE INVESTIGATORS.

No authority for private reporting services to administer records companion animal facilities must maintain. No authority for private organizations to conduct official inspections of companion animal facilities; State Veterinarian generally has discretion to determine time for and frequency of inspections of such facilities. State Veterinarian cannot ignore known operation of noncompliant facilities or use of noncompliant procedures to euthanize companion animals. Board of Agriculture and Consumer Services or its designee may assess civil fines for noncompliant facilities or procedures; Commissioner of Agriculture and Consumer Services may enjoin or shut down operations of such noncompliant facilities.

THE HONORABLE H. RUSSELL POTTS JR.
MEMBER, SENATE OF VIRGINIA
JANUARY 30, 2007

ISSUES PRESENTED

You inquire concerning records and inspection requirements for companion animal facilities. Specifically, you ask whether the Secretary of Agriculture and Forestry may: (1) allow private organizations to keep and maintain companion animal records; (2) allow private organizations to perform inspections of companion animal facilities to ensure that they comply with relevant statutes and regulations; (3) waive mandated inspections of companion animal facilities; or (4) permit the operation of noncompliant gas chambers for euthanization of companion animals in such chambers.

RESPONSE

It is my opinion that private reporting services are not authorized to administer the records required to be maintained by companion animal facilities. It further is my opinion that private organizations are not authorized to conduct official inspections of companion animal facilities. The State Veterinarian generally has the discretion to determine the time for and frequency of inspections of such facilities. It further is my opinion that the State Veterinarian cannot ignore the known operation of noncompliant facilities or the use of noncompliant procedures to euthanize companion animals. Finally, it is my opinion that the Board of Agriculture and Consumer Services or its designee has the discretion, but is not required, to assess civil fines for such noncompliant facilities or procedures; and the Commissioner of Agriculture and Consumer Services may enjoin or shut down the operations of noncompliant facilities.

APPLICABLE LAW AND DISCUSSION

I. PRIVATIZATION OF RECORD REPORTING

Chapter 27.4 of Title 3.1, §§ 3.1-796.66 through 3.1-796.129, contains Virginia's "Comprehensive Animal Laws." Section 3.1-796.96 governs the establishment and operation of particular companion animal¹ facilities, specifically county or city pounds. Recordkeeping and reporting requirements for those pounds are set forth in § 3.1-796.96(A)(4)-(6). These provisions require pounds to "maintain a written record of the information on each companion animal submitted to the pound" by an animal shelter, a releasing agency, or an individual.² The records must be kept "for a period of 30 days from the date the information is received by the pound."³ The records must be made available to any person inquiring about a lost companion animal.⁴

Releasing agencies other than pounds or animal shelters also are required to "keep accurate records of each companion animal received for two years from the date of disposition of the companion animal."⁵ These records must "be made available upon request to the Department [of Agriculture and Consumer Services], animal control officers, and law-enforcement officers at mutually agreeable times."⁶ In addition to being available for request on demand, releasing agencies must make annual reports⁷ summarizing the records to the State Veterinarian.⁸ Releasing agencies subject to this reporting requirement include any "humane society, animal welfare organization, society for the prevention of cruelty to animals, or other similar entity or home-based rescue, that releases companion animals for adoption."⁹

The relevant statutes require that the pounds "*shall* maintain" and the releasing agencies "*shall* keep" record.¹⁰ The use of the word "shall" in a statute indicates that the General Assembly intends its terms to be mandatory, rather than permissive or directive.¹¹ Therefore, pounds and releasing agencies expressly are required to maintain their own animal records pursuant to §§ 3.1-796.96(A)(4)-(A)(6) and 3.1-796.96:5(A)(2).

In addition, § 3.1-796.105(B) requires

[a]n animal control officer, law-enforcement officer, humane investigator or custodian of any pound or animal shelter, upon tak-ing custody of any animal in the course of his official duties, or any representative of a humane society, upon obtaining custody of any animal on behalf of the society, shall immediately make a record of the matter.... Records required by this subsection shall be maintained for at least five years, and shall be available for public inspection upon request. A summary of such records shall be submitted annually to the State Veterinarian in a format prescribed by him.

Thus, § 3.1-796.105(B) requires public officials and custodians of shelters to make and maintain records of the animals of which they gain custody. Again, because § 3.1-796.105(B) uses the phrase “*shall* immediately make a record of the matter” it is mandatory that the named officials make the required records. (Emphasis added.) Furthermore, there is no statutory authority expressly allowing public officials and custodians of shelters to privatize such statutory obligations.

II. PRIVATIZATION OF INSPECTIONS

“*The State Veterinarian and each State Veterinarian’s representative shall have the power to conduct inspections of animal shelters, and inspect any business premises where animals are housed or kept ... at any reasonable time, for the purposes of determining if a violation*” has occurred.¹² Section 3.1-796.107(A) provides that “[u]pon receiving a complaint of a suspected violation ... *any animal control officer, law-enforcement officer, or State Veterinarian’s representative*”¹³ may, for the purpose of investigating the allegations of the complaint, enter upon, during business hours, any business premises, including any place where animals or animal records are housed or kept.” (Emphasis added.) Therefore, only the State Veterinarian, animal control officers, law enforcement officers, and State Veterinarian’s representatives expressly are authorized to conduct inspections.

III. FAILURE TO CONDUCT INSPECTIONS

The General Assembly has granted to the State Veterinarian the discretion to determine the time for and frequency of inspections of established public pounds and private animal shelters.¹⁴ The State Veterinarian or his designee must, however, inspect all private animal shelters before those shelters may begin to confine or dispose of animals.¹⁵

Section 3.1-796.107(A) states that “[u]pon receiving a complaint of a suspected violation ... any animal control officer, law-enforcement officer, or State Veterinarian’s representative *may*,”¹⁶ for the purpose of investigating the allegations of the complaint, enter upon, during business hours, any business premises, including any place where animals or animal records are housed or kept.” (Emphasis added.)

Therefore, §§ 3.1-796.67:2(A) and 3.1-796.107(A) authorize the State Veterinarian or his representative to inspect companion animal facilities at reasonable times, but do not require regular or specific inspections.

Section 3.1-796.96 governs the establishment and operation of particular companion animal facilities, specifically county or city pounds. This section does not require regular or specific inspection of such facilities. However, § 3.1-796.96:2 governs the establishment and operation of certain other companion animal facilities, specifically private animal shelters. Section 3.1-796.96:2(C) provides that “[t]he State Veterinarian or his designee *shall* inspect an animal shelter prior to the animal shelter confining or disposing of animals pursuant to this section.” (Emphasis added.) By including the term “shall” with the phrase “inspect an animal shelter” in § 3.1-796.96:2(C), which governs private animal shelters, the statute requires an initial inspection of any facility operated by a private organization. However, § 3.1-796.96, which governs public animal shelters run by local governments, leaves the determination of when to perform an inspection to the discretion of the State Veterinarian unless he receives a complaint about a particular facility.

IV. COMPLIANCE WITH STATUTES AND REGULATIONS

Finally, the Department of Agriculture and Consumer Services, the Board of Agriculture and Consumer Services, and in particular the State Veterinarian, cannot ignore the known operation of noncompliant facilities or noncompliant procedures used to euthanize companion animals.¹⁷ The Commissioner of Agriculture and Consumer Services¹⁸ has the discretion, but is not required, to enjoin the operation of noncompliant facilities.¹⁹

Section 3.1-796.96(A) requires that the local governing body “*shall* maintain or cause to be maintained a pound.” (Emphasis added.) Section 3.1-796.96(K) then adds that “[t]he governing body *shall require* that the pound be operated in accordance with regulations issued by the Board [of Agriculture and Consumer Services].” (Emphasis added.) The Attorney General previously has concluded that “shall” as used in the preceding statutes created a “mandatory duty” in the “establishment and maintenance of the pound,” as well as making the “manner of euthanasia to be used to destroy animals in the pound” mandatory.²⁰ Additionally, the Board’s regulation concerning euthanasia, 2 VAC 5-110-80, provides that “[e]uthanasia *shall* be performed in compliance with methods approved or prescribed by the State Veterinarian.” (Emphasis added.) Therefore, if the operation of a gas chamber or the procedures used in operating such chamber to euthanize companion animals do not comply with the methods approved by the State Veterinarian, including the requirements in Directive 79-1 of the Division of Animal and Food Industry Services²¹ (“Directive 79-1”), the facility would violate § 3.1-96.796(K) and 2 VAC 5-110-80.²²

Directive 79-1 allows, but with significant warnings, the use of carbon monoxide gas chambers to euthanize companion animals.²³ Although Directive 79-1 provides minimum requirements for the maintenance and operation of such chambers, it does not include mandatory certification or inspection requirements.

If violations are found after an inspection, § 3.1-796.96(K) provides that “the locality *may* be assessed a civil penalty by the Board [of Agriculture and Consumer Services] or its designee in an amount that does not exceed \$1,000 per violation. Each day of the violation shall constitute a separate offense.” (Emphasis added.) Also, § 3.1-796.96(L) provides that “[i]f . . . any laws governing pounds are violated, the Commissioner [of Agriculture and Consumer Services] *may*”¹²⁴¹ bring an action to enjoin the violation or threatened violation.” (Emphasis added.) By allowing for civil penalties in the form of fines, the General Assembly has given the Board or its designee discretion to assess fines for the continued operation of a facility for minor violations. The fines simply accrue for each day that the facility is operated in a noncompliant manner. The Board may also determine the amount of the fines up to \$1,000 per violation.²⁵ In addition to the civil penalties, the General Assembly has given the Commissioner discretion to obtain injunctive restriction of a noncompliant facility.²⁶

CONCLUSION

Accordingly, it is my opinion that private reporting services are not authorized to administer the records required to be maintained by companion animal facilities. It further is my opinion that private organizations are not authorized to conduct official inspections of companion animal facilities. The State Veterinarian generally has the discretion to determine the time for and frequency of inspections of such facilities. It further is my opinion that the State Veterinarian cannot ignore the known operation of noncompliant facilities or the use of noncompliant procedures to euthanize companion animals. Finally, it is my opinion that the Board of Agriculture and Consumer Services or its designee has the discretion, but is not required, to assess civil fines for such noncompliant facilities or procedures; and the Commissioner of Agriculture and Consumer Services may enjoin or shut down the operations of noncompliant facilities.

¹ Section 3.1-796.66 defines a “companion animal” to include “any domestic or feral dog [or] domestic or feral cat.” For purposes of this opinion, it is not necessary to include a list of all the named companion animals.

² VA. CODE ANN. § 3.1-796.96(A)(4)-(A)(6) (Supp. 2006).

³ *Id.*

⁴ *See id.*

⁵ *See* § 3.1-796.96:5(A)(2) (Supp. 2006).

⁶ *See id.*

⁷ *See id.* (“A releasing agency other than a pound or animal shelter shall submit a summary of such records to the State Veterinarian annually in a format prescribed by him[.]”).

⁸ The “State Veterinarian” “means the veterinarian employed by the Commissioner of Agriculture and Consumer Services.” Section 3.1-796.66 (Supp. 2006).

⁹ *See id.*

¹⁰ *See* §§ 3.1-796.96(A)(4)-(A)(6), 3.1-796.96:5(A)(2).

¹¹ 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).

¹² Section 3.1-796.67:2(A) (Supp. 2006) (emphasis added).

¹³ Section 3.1-796.66 defines “State Veterinarian’s representative” to mean “an employee of the Department of Agriculture and Consumer Services who is under the direction of the State Veterinarian.”

¹⁴ See § 3.1-796.67:2(A); see also discussion *supra* Part II.

¹⁵ See § 3.1-796.96:2(C).

¹⁶ See *supra* note 11.

¹⁷ See §§ 3.1-796.96(K)-(L), 3.1-796.96:2(J)-(K).

¹⁸ See § 3.1-8 (1994).

¹⁹ See §§ 3.1-796.96(L), 3.1-796.96:2(K).

²⁰ See 1978-1979 Op. Va. Att’y Gen. 93, 93 (interpreting § 29-213.9, predecessor to § 3.1-796.96).

²¹ The State Veterinarian has developed methods approved for animal euthanasia. See DEP’T OF AGRIC. & CONSUMER SERVS., DIV. OF ANIMAL INDUS. SERVS., DIRECTIVE NO. 79-1, METHODS PRESCRIBED OR APPROVED FOR ANIMAL EUTHANASIA & COMPETENCY CERTIFICATION REQUIREMENTS (NOV. 1, 2004), available at <http://www.vdacs.virginia.gov/animals/pdf/euthansiadirective.pdf> [hereinafter “DIRECTIVE 79-1”].

²² In § 3.1-796.67, the General Assembly has authorized the Board of Agriculture and Consumer Services to promulgate rules and regulations or guidelines governing the care and transport of animals. The Board adopted regulations, including 2 VAC 5-110-80.

²³ See DIRECTIVE 79-1, *supra* note 21, Appdx. C, at *10 (providing that “the potential personnel and safety hazards that accompany the use of carbon monoxide for the euthanasia of animals should be strongly considered before using this method of euthanasia. However, if this method is to be used, the following conditions must, at a minimum, be met”).

²⁴ See *supra* note 11.

²⁵ See § 3.1-796.96(K).

²⁶ See § 3.1-796.96(L).

OP. NO. 07-014

BANKING AND FINANCE: MONEY AND INTEREST – LATE CHARGES; PREPAYMENT AND ACCELERATION LAWS; CERTAIN RIGHTS OF BORROWERS AND CONSUMERS.

Federally regulated financial institution holding note and mortgage purchased for value and state-regulated financial institution that was maker of note may assess and charge two percent prepayment penalty when borrower voluntarily pays down balance of loan, with initial principal amount exceeding \$75,000, that secured property owned in whole or part by borrower.

THE HONORABLE L. SCOTT LINGAMFELTER
MEMBER, HOUSE OF DELEGATES
JUNE 1, 2007

ISSUE PRESENTED

You ask whether state law regarding prepayment penalties is preempted when a federally regulated financial institution purchases a mortgage loan from a state-regulated mortgage lender.

RESPONSE

It is my opinion that when a borrower voluntarily pays down the balance of a loan with an initial principal amount exceeding \$75,000 that is secured by property owned in whole or in part by the borrower, Virginia law permits both a federally regulated financial institution, which holds the note and mortgage that were purchased for value, and a state-regulated financial institution, which was the maker of the note, to assess and charge a two percent prepayment penalty.

BACKGROUND

You inquire regarding a situation where a private individual purchased real estate and obtained purchase-money financing in an amount exceeding \$600,000 from a state-regulated mortgage lender. You relate that the mortgage note contained a two percent prepayment penalty provision should the note be paid down within two years of the date of issuance.¹ You state that after the note was executed, a federally regulated financial institution purchased the note and mortgage.² It is my understanding that the private homeowners sold the property within two years of the execution of the mortgage instruments, paid down the mortgage, and the federally regulated financial institution assessed and collected the two percent prepayment penalty, which exceeded \$10,000.

APPLICABLE LAW AND DISCUSSION

Section 6.1-330.87 provides, in relevant part, that:

No lender shall collect or receive any prepayment penalty on loans secured by real property comprised of one to four family residential dwelling units, *if the prepayment results from the [lender's] enforcement of the right to call the loan upon the sale of the real property which secures the loan.* [Emphasis added.]

Generally, “[w]here the language of a statute is clear and unambiguous[,] rules of construction are not required.”³ It is evident from a plain reading of § 6.1-330.87 that the intent is to prohibit the collection of a prepayment penalty when the lender actually exercises the right to obligate the seller to pay the balance of the loan upon sale of the property. Thus, only such a limited circumstance would bar a lender from collecting a prepayment penalty on a residential mortgage.⁴

Real estate transactions often involve a contractual obligation of the seller to convey clear and marketable title to the buyer to consummate the transaction.⁵ Under such circumstances, the decision to pay down the loan is voluntary pursuant to the seller’s contractual agreement with the buyer. Generally, such decision does not arise from the action of the lender.

When the decision to pay down a mortgage does not arise from an action of the lender, we must examine §§ 6.1-330.81 and 6.1-330.83 to determine whether a prepayment penalty is permissible. Section 6.1-330.81(A) provides that:

Every loan contract ... secured by a first deed of trust or first mortgage on real estate, where the principal amount of the loan is less than \$75,000, shall permit the prepayment of the unpaid principal at any time and no penalty in excess of one percent of the unpaid principal balance shall be allowed.

Moreover, § 6.1-330.83 provides that “[t]he prepayment penalty in the case of a loan secured by a mortgage or deed of trust on a home which is occupied or to be occupied in whole or in part by a borrower⁶ shall not be in excess of two percent of the amount of such prepayment.” When read together, §§ 6.1-330.81 and 6.1-330.83 indicate that a prepayment penalty of two percent on a home mortgage generally is permissible unless the original note was for an amount less than \$75,000.

Since the transaction about which you inquire was for more than \$75,000, a two percent prepayment penalty is permissible under Virginia law. However, I must assume that the borrower voluntarily paid down the note principal pursuant to a real estate sales contract with a third party.⁷ In such a situation, there is no federal preemption issue.⁸ The state-regulated mortgage lender that originated the transaction could charge the prepayment penalty under state law, and the federally regulated institution that purchased the note and mortgage could charge the otherwise valid prepayment penalty as a bona fide purchaser for value.⁹

CONCLUSION

Accordingly, it is my opinion that when a borrower voluntarily pays down the balance of a loan with an initial principal amount exceeding \$75,000 that is secured by property owned in whole or in part by the borrower, Virginia law permits both a federally regulated financial institution, which holds the note and mortgage that were purchased for value, and a state-regulated financial institution, which was the maker of the note, to assess and charge a two percent prepayment penalty.

¹I must assume that the transaction about which you inquire does not constitute an alternative mortgage transaction that would be subject to the Alternative Mortgage Transaction Parity Act of 1982. *See* 12 U.S.C.S. §§ 3801-3806 (LexisNexis 1997). The Parity Act permits a state-regulated financial institution to follow a federally regulated program of mortgage lending, in which case the state laws limiting the imposition of a prepayment penalty would be preempted by federal law. *See generally* Nat’l Home Equity Mortgage Ass’n v. Face, 239 F.3d 633 (4th Cir. 2001).

²Generally speaking, federally regulated financial institutions are given wide latitude by the Office of Thrift Supervision to assess prepayment penalties on mortgages. *See* 12 C.F.R. § 560.34 (2006). Furthermore, the Office “occupies the entire field of lending regulations for federal savings associations.” 12 C.F.R. § 560.2(a) (2006). Where a federally regulated savings institution is the maker of the note, it may “extend credit as authorized under federal law ... without regard to state laws purporting to regulate their credit activities.” *Id.* “[T]he types of state laws preempted by paragraph (a) ... include, without limitation, state laws purporting to impose requirements regarding ... prepayment penalties[.]” 12 C.F.R. § 560.2(b)(5) (2006).

³*See* Ambrogio v. Koontz, 224 Va. 381, 386, 297 S.E.2d 660, 662 (1982); 2003 Op. Va. Att’y Gen. 18, 19.

⁴It is my understanding that the Bureau of Financial Institutions affords a similar interpretation to § 6.1-330.87. This information was provided by the Office of the General Counsel to the State Corporation Commission,

who represents the Bureau of Financial Institutions. Courts give great weight to the construction and interpretation of statutes by the agency charged with such responsibility. *See* County of Henrico v. Mgmt. Recruiters of Richmond, Inc., 221 Va. 1004, 1010, 277 S.E.2d 163, 166-67 (1981); Dep't of Taxation v. Progressive Cmty. Club, 215 Va. 732, 739, 213 S.E.2d 759, 763 (1975); Commonwealth v. Appalachian Elec. Power Co., 193 Va. 37, 45, 68 S.E.2d 122, 127 (1951); 2005 Op. Va. Att'y Gen. 117, 121 n.16 and opinions cited therein.

⁵“Clear title” means “[a] title free from any encumbrances, burdens, or other limitations.” BLACK’S LAW DICTIONARY 1522 (8th ed. 2004). “Marketable title” means “[a] title that a reasonable buyer would accept because it appears to lack any defect and to cover the entire property that the seller has purported to sell.” *Id.* at 1523.

⁶For purposes of this opinion, I will assume that the borrower about whom you inquire occupied at least a portion of the property secured by the mortgage.

⁷Should the lender exercise the right to call the loan upon the sale of the property, § 6.1-330.87 would apply, and a state-regulated lender would be barred from collecting a prepayment penalty. A federal institution, as a bona fide purchaser for value, could enforce a loan provision that was otherwise illegal between the original borrower and lender unless such provision was void by statute. *See* Garrison v. First Fed. Sav. & Loan Ass’n, 241 Va. 335, 340-41, 402 S.E.2d 25, 28 (1991); *see also* Lynchburg Nat’l Bank v. Scott Bros., 91 Va. 652, 22 S.E. 487 (1895) (discussing loan provisions made illegal by statute versus those declared void at outset by statute). In the event the loan provision was void at the outset by statute, the more lenient federal regulations governing federally regulated financial institutions would not save the provision. *See* Garrison, 241 Va. at 344-45, 22 S.E.2d at 30-31. In that case, the federally regulated financial institution would merely be an assignee, not the maker of the note. *See id.*; *see also supra* note 2 (discussing federal regulation of prepayment penalties).

⁸Based on the facts you present, the federally regulated financial institution merely is an assignee and not the maker of the note. *See* Garrison, 241 Va. at 344-45, 22 S.E.2d at 30-31. If the federally regulated institution were the maker of the note, it could assess and charge a prepayment penalty, even in excess of the two percent limit proscribed by state law, whether or not it was enforcing a right to call the loan since state law would be preempted by the more lenient federal regulation. *Compare* 12 C.F.R. § 560.34 with VA. CODE ANN. §§ 6.1-330.83, 6.1-330.87 (1999).

⁹Generally, a bona fide purchaser for value of a note can enforce the terms of the note that it purchased unless those terms expressly are void. *See* Lynchburg Nat’l Bank, 91 Va. at 654-55, 22 S.E. at 488.

OP. NO. 06-073

CIVIL REMEDIES AND PROCEDURE: PROCESS – WHO TO BE SERVED.

No specific obligation for process server to ascertain that residence is actual abode of person to be served prior to posting service; good faith and due diligence require server to make reasonable inquiry when it appears that residence might not be actual abode. Server may not always rely solely on address supplied by party requesting such service.

THE HONORABLE S. LEE MORRIS
PORTSMOUTH GENERAL DISTRICT COURT
JANUARY 5, 2007

ISSUE PRESENTED

You ask whether § 8.01-296 obligates a process server to ascertain independently that a residence is in fact the place of abode of the person to be served before posting service or whether he may rely solely upon the address supplied by the party requesting such service.

RESPONSE

It is my opinion that the language of § 8.01-296 imposes no specific obligation on a process server to ascertain that a residence is the place of abode of the person to be served prior to posting service; however, good faith and due diligence¹ require a process server to make reasonable inquiry when it is apparent that the residence might not be the place of abode of the person to be served. It further is my opinion that based on the good faith and due diligence standard, a process server may not always rely solely on the address supplied by the party requesting such service.

APPLICABLE LAW AND DISCUSSION

The *Code of Virginia* and the Rules of the Supreme Court of Virginia set forth the manner by which process is served upon commencement of an action.² Section 8.01-290 requires that:

Upon the commencement of every action, the plaintiff shall furnish in writing to the clerk or other issuing officer the full name and last known address of each defendant and if unable to furnish such name and address, he shall furnish such salient facts as are calculated to identify with reasonable certainty such defendant. The clerk or other official whose function it is to issue any such process shall note in the record or the papers the address or other identifying facts furnished.

A prior opinion of the Attorney General states that, to the extent possible, a full name and address of the party to be served must accompany service of process issued to the sheriff.³

For example, if only the name of a town is given, the plaintiff could be required to provide additional facts to assist in the identification of the party to be served.... A request for service of process at a post office box or general delivery address need not be considered a full address and additional information to identify the location of the party to be served could be required.⁴

Section 8.01-296 governs the manner of serving process upon natural persons. The preferred method of serving process is to “deliver[] a copy thereof in writing to the party in person.”⁵ Additionally, § 8.01-296 provides two methods of substituted service. First, under § 8.01-296(2)(a),

[i]f the party to be served is not found at his usual place of abode, by delivering a copy of such process and giving information of its purport to any person found there, who is a member of his family, other than a temporary sojourner or guest, and who is of the age of 16 years or older[.]

Second, § 8.01-296(2)(b) provides, in part, that “[i]f such service cannot be effected under subdivision 2 a, then by posting a copy of such process at the front door or at such other door as appears to be the main entrance of such place of abode.”

Rule 3:6 of the Rules of the Supreme Court of Virginia provides that “[i]t shall be the duty of all persons eligible to serve process to make service within five days after receipt.” The person serving process also must return the process to the clerk’s office within seventy-two hours of service, except when such return would be due on a Saturday, Sunday, or legal holiday.⁶ The returned process must state “the date and manner of service and the name of the party served.”⁷ If service was executed by a sheriff, the return is sufficient if it complies with “the Rules of the Supreme Court.”⁸ The Virginia Supreme Court has ruled that a sheriff’s return “may also be of the existence of such a state of facts as, without fault or negligence on his part, prevented a compliance with the mandate of the writ.”⁹ If service was executed by a qualified person other than a sheriff, that person must include an affidavit stating: (1) his qualifications; (2) the date and manner of service; (3) the name of the party served; (4) an annotation that the service was by private server; and (5) the name, address, and telephone number of the server.¹⁰

Statutes that allow substituted service when personal service fails must be strictly construed.¹¹ As such, in order to effect service, a process server must strictly comply with the terms of § 8.01-296, and he must reflect such strict compliance in the return providing proof of service.¹²

Although § 8.01-296 does not specifically impose an obligation on a process server to do so, in order to ensure effective service, it may be necessary for a process server to ascertain that a residence is, in fact, the place of abode of the person to be served before posting. Such a determination by the process server would ensure the accuracy of any subsequent proof of service or affidavit stating that service by posting was effected.

In addition, Virginia law generally requires that a sheriff execute his duty of serving civil process in good faith and with due diligence.¹³ The same standard applicable to a sheriff should apply to a private process server who also serves process pursuant to § 8.01-296. Such a standard would at a minimum require that a process server attempt to determine that a residence is the correct place of abode. For example, when the name displayed on a mailbox is different than the name of the person to be served, or the residence clearly is not inhabited or inhabitable, i.e., when it is apparent that the residence might not be the place of abode of the person to be served, good faith and due diligence would require a process server to make a reasonable inquiry.

CONCLUSION

Accordingly, it is my opinion that the language of § 8.01-296 imposes no specific obligation on a process server to ascertain that a residence is the place of abode of the person to be served prior to posting service; however, good faith and due diligence¹⁴ require a process server to make reasonable inquiry when it is apparent that the residence might not be the place of abode of the person to be served. It further is my opinion that based on the good faith and due diligence standard, a process server may not always rely solely on the address supplied by the party requesting such service.

¹ See *infra* note 13 and accompanying text.

² See VA. CODE ANN. tit. 8.01, ch. 8, §§ 8.01-287 to 8.01-327.2 (2000 & Supp. 2006); VA. SUP. CT. R. 3:6.

³ See 1978-1979 Op. Va. Att’y Gen. 40, 40.

⁴ *Id.*

⁵ Section 8.01-296(1) (Supp. 2006).

⁶ Section 8.01-325 (2000).

⁷ *Id.*

⁸ Section 8.01-325(1); see also VA. SUP. CT. R. 3:6 (providing form for “Proof of Service”).

⁹ *Rowe v. Hardy*, 97 Va. 674, 676, 34 S.E. 625, 625 (1899).

¹⁰ See § 8.01-325(2).

¹¹ See *Washburn v. Angle Hardware Co.*, 144 Va. 508, 514, 132 S.E. 310, 312 (1926).

¹² See *id.*; see also § 8.01-325.

¹³ See *Narrows Grocery Co. v. Bailey*, 161 Va. 278, 170 S.E.730 (1933); 1978-1979 Op. Va. Att’y Gen., *supra* note 3, at 40.

¹⁴ See *id.* and accompanying text.

OP. NO. 06-099

CONSERVATION: AIR POLLUTION CONTROL BOARD – AIR EMISSIONS CONTROL.

Board must include renewable energy set-aside in adopting regulations implementing § 10.1-1328(C) and may construe § 10.1-1328(D) as authorizing renewable energy set-aside. Although Board may authorize voluntary public health set-asides, General Assembly’s apparent intent weighs against authority to include mandatory public health set-aside. Attorneys General historically refrain from opining that statute is unconstitutional unless statute clearly is unconstitutional beyond reasonable doubt. No conclusion that 2006 amendments are unconstitutional.

MR. DAVID K. PAYLOR
DIRECTOR, DEPARTMENT OF ENVIRONMENTAL QUALITY
MARCH 5, 2007

ISSUES PRESENTED

At the request of the State Air Pollution Control Board (“Board”), you ask several questions concerning the Board’s regulatory authority pursuant to Chapters 867 and 920 of the 2006 Acts of Assembly¹ (“2006 Amendment”). Specifically, you ask whether: (1) the Board may include a renewable energy set-aside² or a public health set-aside³ pursuant to § 10.1-1328(C)-(D); (2) the Board is authorized to impose restrictions on the purchase of mercury allowances to demonstrate compliance with the “state-specific” regulation mandated by § 10.1-1328(D); (3) federal law prevents the Board from prohibiting Virginia sources’ compliance with a “state-specific” regulation through the purchase of mercury allowances; (4) federal law preempts § 10.1-1328(D);⁴ (5) federal law preempts the Board from implementing § 10.1-1328(F);⁵ and (6) whether the Commerce Clause of the Constitution of the United States prohibits the Board from adopting the regulations outlined in § 10.1-1328(D) and (F), placing restrictions on the ability of Virginia facilities to purchase mercury allowances from a national emissions market.

RESPONSE

It is my opinion that the Board must include a renewable energy set-aside in adopting regulations implementing § 10.1-1328(C) and may construe § 10.1-1328(D) as authorizing a renewable energy set-aside. It is my opinion, however, that although the Board may authorize voluntary public health set-asides pursuant to § 10.1-1328(C)-(D), the apparent intent of the General Assembly weighs against the Board construing § 10.1-1328(C) or (D) as providing authority to the Board to include a mandatory public health set-aside under either section.

Also, questions (2) through (6), above, ask whether the identified provisions are inconsistent with the United States Constitution and thus unconstitutional either because they are preempted under the Supremacy Clause,⁶ *i.e.*, preempted by federal law, or inconsistent with the Commerce Clause.⁷ Attorneys General historically have refrained from opining that a statute is unconstitutional unless the statute clearly is unconstitutional beyond a reasonable doubt.⁸ Applying that standard, I am unable to conclude that any provision of the 2006 Amendment is unconstitutional.

APPLICABLE LAW AND DISCUSSION

Under the federal Clean Air Act⁹ (“CAA”), the Administrator of EPA must regulate electric utility steam generating units under 42 U.S.C.S. § 7412 (“Hazardous air pollutants”) if he finds that it is appropriate and necessary in accordance with § 7412(n)(1)(A). Regulation under § 7412 entails strict emission limitations for new and existing sources as described in § 7412(d). EPA made such an “appropriate and necessary” finding on December 20, 2000.¹⁰ EPA subsequently revised the December 2000 finding on March 29, 2005, and removed coal- and oil-fired electric utility steam generating units from the list of source categories subject to regulation under § 7412.¹¹ On May 18, 2005, EPA promulgated the Clean Air Mercury Rule¹² (“CAMR”). Pursuant to CAMR, mercury emissions from new and existing coal-fired electric utility steam generating units are regulated pursuant to 42 U.S.C.S. § 7411.¹³ The emissions limitations requirements of § 7411 are not as stringent as would be applicable under § 7412.

EPA promulgates standards of performance applicable to new sources as provided in accordance with 42 U.S.C.S. § 7411(b).¹⁴ Additionally, § 7411(d) authorizes EPA to require states to submit a plan for EPA approval to regulate existing sources in the source category. EPA has promulgated 40 C.F.R. § 60.24(h), which requires such a plan from all fifty states and the District of Columbia. The primary requirement is that the plan contain emissions standards and compliance schedules that demonstrate it will result in compliance with the state’s annual electrical generating unit mercury budget.¹⁵ Virginia’s budget is 0.592 tons for the years 2010 through 2017 and 0.234 tons for the year 2018 and thereafter.¹⁶ States may, instead, adopt regulations substantively identical to EPA’s mercury budget trading program¹⁷ and qualify for automatic approval of the state plan.¹⁸ If EPA does not approve a state’s plan, or if a state does not submit a plan, EPA will prescribe a federal plan for that state pursuant to § 7411(d)(2)(a). EPA has proposed its mercury budget trading program as the federal plan.¹⁹

The 2006 Session of the General Assembly enacted Article 3 (“Air Emissions Control”), Chapter 13 of Title 10.1.²⁰ Article 3 consists of two sections, § 10.1-1327, which contains definitions, and § 10.1-1328, which concerns implementation of EPA’s CAIR²¹ and CAMR.²² Additionally, § 10.1-1328 provides state-specific requirements concerning mercury emissions from certain classifications of owners of electric generating units or facilities.

Section 10.1-1328(C) requires the Board to adopt EPA’s mercury budget trading program rule. As previously noted, Virginia’s adoption of EPA’s mercury budget trading rule automatically is approved by operation of law and implements federal regulation. Virginia’s state-specific CAMR legislation, § 10.1-1328(D), however, directs the Board to adopt a separate state-specific rule that is not to be submitted to EPA. Compliance with the state-specific rule is to be separately determined from compliance with the Board-adopted mercury budget trading rule.²³ The Virginia state-specific CAMR legislation applies to all owners of coal-fired electric generating units (“EGUs”) whose combined mercury emissions in 1999 exceeded 200 pounds.²⁴ The Virginia state-specific CAMR legislation effectively identifies two separate ownership-related classifications of coal-fired EGUs for the state-specific rule.²⁵

Section 10.1-1328(D)(3) prohibits all owners subject to the state-specific rule from demonstrating compliance with the state-specific rule by purchasing allowances.²⁶ You state that EPA has advised the Department of Environmental Quality that it must consider the state-specific rule to determine whether its implementation restricts the ability of affected sources in Virginia from obtaining excess allowances from other sources in order to comply with their reductions under the CAMR trading program.

Additionally, § 10.1-1328(F) requires the Board to “prohibit any electric generating facility located within a nonattainment area from meeting its mercury compliance obligations through the purchase of allowances from another facility.”²⁷

I. PUBLIC HEALTH SET-ASIDES

CAMR imposes a statewide budget (cap) on mercury emissions for the combined affected EGUs within each state.²⁸ Under CAMR’s cap-and-trade program²⁹ a share of the available budget is to be allocated to each existing affected EGU in the form of allowances.³⁰ EPA grants states the discretion to determine the methodology for allocating allowances among affected EGUs, including provisions for set-asides.³¹

The General Assembly, consistent with that federally authorized discretion, has determined a set-aside percentage that reduces the amount of Virginia’s budget that will be available for allocation to existing affected EGUs each year. Section 10.1-1328(C) requires the Board to adopt EPA’s Clean Air Mercury Rule, *i.e.*, EPA’s model mercury budget trading program. Specifically, § 10.1-1328(C) directs the Board to “include a set-aside of mercury allowances for new sources not to exceed 5% of the total state budget for each control period during the first five years of the program and 2% thereafter.” Accordingly, existing affected facilities may only receive 95% of the

allowances that may otherwise be available under CAMR for the first five years and then 98% thereafter. Section 10.1-1328 is silent regarding whether the Board may establish an additional reduction from the overall budget in order to create a “public health” set-aside.

The overriding goal of statutory interpretation is to discern and give effect to legislative intent.³² “A statute must be construed with reference to its subject matter, the object sought to be attained, and the legislative purpose in enacting it[.]”³³ Section 10.1-1328(C)-(D) establishes a dual regulatory program that provides a more stringent state-specific regulation, but also allows affected sources to satisfy EPA’s federally established CAMR requirements by participating in the national mercury trading program. Section 10.1-1328(C) specifically requires that the Board’s regulation adopting CAMR shall “include full participation by Virginia electric generating units in the EPA’s national mercury trading program.” Clause 2 of the 2006 Amendment³⁴ provides guidance in discerning the legislative intent. Clause 2 directs the Department of Environmental Quality to conduct a detailed assessment of mercury deposition in Virginia in order to determine whether additional steps should be taken to control mercury emissions within Virginia.³⁵ The Department must report its final findings to the Chairmen of the House Committee on Agriculture, Chesapeake and Natural Resources and the Senate Committee on Agriculture, Conservation and Natural Resources as soon as practicable, but no later than October 15, 2008.³⁶ Clause 2 appears to confirm the General Assembly’s intent to consider the requested report before requiring or authorizing mercury emission reductions beyond that which it has addressed in §§ 10.1-1328(D) and (F). It is my opinion that this statutory scheme adopted in the 2006 Amendment reflects the General Assembly’s intention that the portion of Virginia’s mercury budget available for allocation to existing affected EGUs will not be reduced further than that which it has specified for the new source set-aside. Accordingly, the addition of a mandatory public health set-aside, which would further reduce the mercury budget available for allocation to existing affected EGUs, would be inconsistent with that intent.

After allowances are allocated to regulated sources, they are available for compliance, banking for future years’ compliance, trading, or voluntary retirement. The federal scheme does not preclude an original holder or a subsequent transferee of an allowance from voluntarily choosing not to use that allowance for compliance demonstration purposes. Thus, it would be consistent with the federal scheme and not inconsistent with the General Assembly’s intent to provide a repository (*i.e.* a voluntary public health set-aside) for the permanent retirement of that allowance so that it may not be used for compliance purposes.

II. RENEWABLE ENERGY SET-ASIDES

Section 10.1-1328(A)(4), which pertains to CAIR,³⁷ a different EPA regulatory cap-and-trade program,³⁸ provides that the Board’s implementing regulations “shall include a 5% set-aside of [nitrogen oxide] allowances during the first five years of the program and 2% thereafter for new sources, *including renewables and energy*

efficiency projects.” (Emphasis added.) On the other hand, § 10.1-1328(C) is silent regarding whether a renewable energy set-aside is required or may be included within the new source set-aside under CAMR. At issue is whether the omission of any reference to a renewable energy set-aside in § 10.1-1328(C) demonstrates the General Assembly’s intent to prohibit the Board from including such a set-aside within the CAMR set-aside for new sources.

Again, I must consider the rules of statutory construction, which provide “[w]hen a statute contains a given provision with reference to one subject, the omission of such provision from a similar statute dealing with a related subject is significant to show the existence of a different legislative intent.”³⁹ However, the provision for a renewable energy set-aside in § 10.1-1328(A)(4) is mandatory making it distinguishable. Additionally, Attorneys General defer to interpretations of the agency charged with administering the law unless such interpretation clearly is wrong.⁴⁰ Therefore, it is my opinion that the Board may interpret the silence in § 10.1-1328(C) as the absence of a mandate to permit a renewable energy set-aside in the CAMR implementing regulation and authorize a renewable energy set-aside. The Board may deem promotion of the development and utilization of renewable energy and energy efficient projects to be consistent with its general statutory authority under Virginia’s Air Pollution Control laws⁴¹ to abate and control air pollution within the Commonwealth. The inclusion of a renewable energy set-aside within the new source set-aside percentage would not further limit the allowances available for allocation to existing sources and would not diminish the ability of those sources to satisfy the federally established requirements in EPA’s national mercury cap-and-trade program. Thus, Virginia may participate fully in the program.

III. ATTORNEYS GENERAL REFRAIN FROM DECLARING STATUTES UNCONSTITUTIONAL UNLESS UNCONSTITUTIONALITY IS CLEAR

You also ask several questions concerning the effect of federal law on the Board’s authority to implement Virginia’s state-specific CAMR legislation, especially in light of certain provisions of the United States Constitution.⁴² Among the questions you raise are concerns regarding whether the 2006 Amendment violates the Supremacy and/or Commerce Clause of the United States Constitution.⁴³ I am unaware of any other potential federal law bases that could reasonably be viewed as invalidating provisions of the 2006 Amendment.⁴⁴

A 1995 opinion of the Attorney General provides an analysis of the role of the Attorney General in opining on the constitutionality of Virginia statutes.

I am aware of no court decision or prior opinion of the Attorney General that resolves this issue.^[45] In assessing ... constitutionality ..., I am guided by the doctrine that a statute is not to be declared unconstitutional unless the court is driven to that conclusion. ““Every reasonable doubt should be resolved in favor of the constitutionality of an act of the legislature.”” Following this

doctrine, it has been a long-standing practice of Virginia's Attorneys General to refrain from declaring a statute unconstitutional unless its unconstitutionality is clear beyond a reasonable doubt. This practice has its origins in well-founded considerations. Unlike a court, the Attorney General has no power to invalidate a statute. Thus, when an Attorney General opines that a statute violates the Constitution, that statute nevertheless remains in force. Further, by opining that a statute is unconstitutional, an Attorney General, in effect, is advising the enforcing state agency to ignore the statute. This an Attorney General should not do unless he is certain beyond a reasonable doubt that a reviewing court would strike down the statute.^[46]

Applying that standard, I am unable to conclude that the 2006 Amendment is unconstitutional in any respect.

CONCLUSION

Accordingly, is my opinion that the Board must include a renewable energy set-aside in adopting regulations implementing § 10.1-1328(C) and may construe § 10.1-1328(D) as authorizing a renewable energy set-aside. It is my opinion, however, that although the Board may authorize voluntary public health set-asides pursuant to § 10.1-1328(C)-(D), the apparent intent of the General Assembly weighs against the Board construing § 10.1-1328(C) or (D) as providing authority to the Board to include a mandatory public health set-aside under either section.

Also, questions (2) through (6), above, ask whether the identified provisions are inconsistent with the United States Constitution and thus unconstitutional either because they are preempted under the Supremacy Clause,⁴⁷ *i.e.*, preempted by federal law, or inconsistent with the Commerce Clause.⁴⁸ Attorneys General historically have refrained from opining that a statute is unconstitutional unless the statute clearly is unconstitutional beyond a reasonable doubt.⁴⁹ Applying that standard, I am unable to conclude that any provision of the 2006 Amendment is unconstitutional.

¹Chapters 867 and 920 of the 2006 Acts of Assembly are identical. *See* 2006 Va. Acts chs. 867, 920, at 1401, 1401-02, 1616, 1616-17, respectively (adding Article 3, Chapter 13 of Title 10.1, §§ 10.1-1327 and 10.1-1328).

²A renewable energy set-aside generally refers to making a certain amount of mercury emission allowances available for distribution to renewable energy units. The Board's recently adopted regulations implementing EPA's Clean Air Interstate Rule ("CAIR") define a renewable energy unit as "an electric generator that began commercial operation after January 1, 2006 and is powered by (i) wind, solar, ocean thermal, wave, tidal, geothermal, or biomass energy, or (ii) fuel cells powered by hydrogen generated by a renewable energy source. Renewable energy does not include energy derived from: (i) material that has been treated or painted or derived from demolition or construction material; (ii) municipal, industrial or other multiple source solid waste; and (iii) co-firing of biomass with fossil fuels or solid waste." DEP'T OF ENVTL. QUAL., Air Regulations – Chapter 140, Part II, at *12, available at <http://www.deq.state.va.us/air/pdf/air-regs/c140p2.pdf> (last visited Jan. 4, 2007) (to be codified at 9 VA. ADMIN. CODE § 5-140-1020) [hereinafter

“CAIR REGS. II”]; *id.* Part III, at *14, available at <http://www.deq.state.va.us/air/pdf/airregs/c140p3.pdf> (last visited Jan. 4, 2007) (to be codified at 9 VA. ADMIN. CODE § 5-140-2020) [hereinafter “CAIR REGS. III”]. It is my understanding that the Board adopted its CAIR regulations on December 6, 2006. Such regulations will not, however, become effective until thirty days after publication in the Virginia Register of Regulations. See VA. CODE ANN. §§ 2.2-4013(D), 2.2-4015(A) (2005). The relevant portions of the federal CAIR program provide a cap-and-trade program for emissions of nitrogen oxides and sulfur dioxides. See *infra* note 38.

³You state that the Board is contemplating setting aside a portion of the total state mercury budget for public health. The allowances in the public health set-aside would be retired and not allocated to regulated entities. For purposes of this opinion, I will refer to such allowances as a “mandatory” public health set-aside. Additionally, for purposes of this opinion, the phrase “voluntary public health set-aside” refers to allowances that have been allocated to regulated entities and which are subsequently voluntarily surrendered to the permitting authority and permanently retired for public health purposes by the original holder or a subsequent transferee. As provided in the Board’s CAIR regulations cap-and-trade program, “[a]ny allowances contributed to the public health set-aside will be permanently retired and will not be available for compliance for any affected unit.” See CAIR REGS. II, *supra* note 2, at *31 (to be codified at 9 VA. ADMIN. CODE § 5-140-1420(F)); CAIR REGS. III, *supra* note 2, at *36 (to be codified at 9 VA. ADMIN. CODE § 5-140-2420(H)).

⁴Section 10.1-1328(D) provides for a state-specific rule in connection with mercury emissions from electric generating units.

⁵Section 10.1-1328(F) prohibits any electric generating facility located in a nonattainment area from meeting its compliance obligations by purchasing allowances from another facility.

⁶The Supremacy Clause of the United States Constitution provides that “[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.” U.S. CONST. art. VI, cl. 2.

⁷“The Congress shall have Power” “[t]o regulate Commerce . . . among the several States[.]” *Id.* art. I, § 8, cls. 1, 3, respectively.

⁸See 1995 Op. Va. Att’y Gen. 164, 165 and opinions cited therein; see also *Motor & Equip. Mfrs. Ass’n v. EPA*, 627 F.2d 1095, 1115 (D.C. Cir. 1979) (“It is generally considered that the constitutionality of Congressional enactments is beyond the jurisdiction of administrative agencies.”); *Westover v. Barton Elec. Dep’t*, 543 A.2d 698, 699, 1988 Vt. LEXIS 26, *3 (Vt. 1988) (“[T]he great majority of state courts have held that administrative agencies have no power to determine the constitutional validity of statutes.”); *First Bank v. Conrad*, 350 N.W.2d 580, 585, 1984 N.D. LEXIS 314, *11-12 (N.D. 1984) (“As a general rule, administrative agencies do not determine constitutional issues, especially those under which they are to act. To make the system of administrative agencies function the agencies must assume the law to be valid until judicial determination to the contrary has been made.”) (citation omitted).

⁹42 U.S.C.S. §§ 7401 to 7671q (LexisNexis 1997 & Supp. 2006).

¹⁰65 Fed. Reg. 79,825 (Dec. 20, 2000).

¹¹70 Fed. Reg. 15,994 (Mar. 29, 2005).

¹²See 70 Fed. Reg. 28,606, 28,606-700 (May 18, 2005).

¹³*Id.* at 28,606.

¹⁴The CAMR standard for mercury for new sources is contained in 40 C.F.R. § 60.45Da and varies depending on the type of coal burned.

¹⁵40 C.F.R. § 60.24(h)(3) (2006).

¹⁶*Id.*

¹⁷See 40 C.F.R. § 60.24(h)(6)(i) (2006) (providing that state may “adopt[] regulations substantively identical to subpart HHHH”). Subpart HHHH is comprised of 40 C.F.R. §§ 60.4101 to 60.4176.

¹⁸ *Id.*

¹⁹ See 71 Fed. Reg. 77,100, 77,100-147 (Dec. 22, 2006) (to be codified at 40 C.F.R., pt. 62, subpt. LLL, §§ 62.15901 to 62.15975).

²⁰ See *supra* note 1.

²¹ See *infra* note 38.

²² The Clean Air Mercury Final Rule amended federal regulations at 40 C.F.R. parts 60, 72, and 75. See 70 Fed. Reg., *supra* note 12, at 28,606-700. Following consideration of several petitions for administrative reconsideration, EPA amended certain provisions of CAMR not pertinent to the questions presented herein. See 71 Fed. Reg. 33,388, 33,388-402 (June 9, 2006).

²³ Section 10.1-1328(D)(4) (2006).

²⁴ Section 10.1-1328(D).

²⁵ See § 10.1-1328(D)(1) (applying to owner of one or more EGUs within Commonwealth whose combined emissions of mercury from such units exceeded 900 pounds in 1999), § 10.1-1328(D)(2) (applying to owner of one or more EGUs within Commonwealth whose combined mercury emissions in 1999 were less than 900 pounds and whose combined capacity within Commonwealth is greater or equal to 600 MW). Theoretically, there could be a third classification, all other EGUs covered by the state-specific rule. I am advised, however, that the first two classifications exhaust the universe of owners of electric generating units that fall within the applicability provision of § 10.1-1328(D) (combined emissions of mercury exceeded 200 pounds in 1999).

²⁶ The owners of EGUs covered by § 10.1-1328(D)(1)-(2), while precluded from demonstrating compliance by purchasing allowances, may demonstrate compliance with the state-specific rule by the aggregation methods described therein.

²⁷ Section 10.1-1328(F) does, however, allow compliance to be demonstrated by the aggregation method described therein.

²⁸ 40 C.F.R. § 60.24(h)(3).

²⁹ See *supra* note 17 and accompanying text.

³⁰ An allowance is an authorization to emit one ounce of mercury during a control period for the year allocated or any calendar year thereafter under the mercury budget trading program. See 40 C.F.R. § 60.4102 (2006) (defining “Hg Allowance”).

³¹ See 40 C.F.R. § 60.24(h)(6)(ii).

³² See *Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983); 1990 Op. Va. Att’y Gen. 155, 155 and opinions cited therein.

³³ *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).

³⁴ See *supra* note 1.

³⁵ *Id.*

³⁶ *Id.*

³⁷ See *supra* note 2.

³⁸ The relevant portions of EPA’s CAIR provide a cap-and-trade program for emissions of nitrogen oxides and sulfur dioxides. See 40 C.F.R. §§ 96.101 to 96.188 (2006) (annual emissions of nitrogen oxides); §§ 96.201 to 96.288 (2006) (annual emissions of sulfur dioxides); §§ 96.301 to 96.388 (2006) (ozone season emissions of nitrogen oxides).

³⁹ *Williams v. Matthews*, 248 Va. 277, 284, 448 S.E.2d 625, 629 (1994).

⁴⁰ 2002 Op. Va. Att’y Gen. 293, 294.

⁴¹ Sections 10.1-1300 to 10.1-1328 (2006).

⁴²In addition to concerns the Board expresses about the Commerce Clause, questions about whether certain provisions of Virginia law are authorized or preempted by federal law are also questions concerning constitutionality under the Supremacy Clause of the United States Constitution.

⁴³Specifically, you ask whether federal law prevents the implementation of Virginia law. I will address the question as an issue of preemption.

⁴⁴See *supra* note 20 and accompanying text.

⁴⁵Since the 1995 opinion was issued, there have been federal district and circuit court decisions. See *Clean Air Markets Group v. Pataki*, 194 F. Supp. 2d 147 (N.D. NY 2002), *aff'd* 338 F.3d 82 (2d Cir. 2003). The litigation is distinguishable factually and legally.

⁴⁶1995 Op. Va. Att'y Gen., *supra* note 8, at 165 (citations omitted).

⁴⁷See *supra* note 6.

⁴⁸See *supra* note 7.

⁴⁹See *supra* note 8.

OP. NO. 07-021

CONSERVATION: VIRGINIA WASTE MANAGEMENT ACT – SOLID WASTE MANAGEMENT.

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

Southeastern Public Service Authority of Virginia may elect not to submit proposed amendment to Department of Environmental Quality that is not necessary or does not conform to Regional Solid Waste Management Plan for Southeastern Virginia. Authority is not entitled to charge fee for services related to processing and reviewing proposed Regional Plan amendment and cannot obtain reimbursement from Department for costs and time devoted to review associated environmental permit.

THE HONORABLE FREDERICK M. QUAYLE
MEMBER, SENATE OF VIRGINIA
JUNE 26, 2007

ISSUES PRESENTED

You ask whether the Southeastern Public Service Authority of Virginia may refuse to submit to the Department of Environmental Quality a proposed amendment that it determines is not necessary or does not conform to the Regional Solid Waste Management Plan for Southeastern Virginia. You also ask whether the Authority is entitled to charge a fee for services relating to processing and reviewing a proposed Regional Solid Waste Management Plan amendment or whether the Authority may obtain reimbursement from the Department for costs and time devoted to the review as part of the process for the associated environmental permit.

RESPONSE

It is my opinion that the Southeastern Public Service Authority of Virginia may elect not to submit to the Department of Environmental Quality a proposed amendment that it determines is not necessary or does not conform to the Regional Solid Waste Management Plan for Southeastern Virginia. It is further my opinion that the Authority is not entitled to charge a fee for services related to processing and reviewing a proposed

Regional Plan amendment. The Authority also cannot obtain reimbursement from the Department for costs and time devoted to the review as part of the process for the associated environmental permit.

BACKGROUND

You relate that the Southeastern Public Service Authority of Virginia (“SPSA”) is an authority created pursuant to the Virginia Water and Waste Authorities Act.¹ As a public authority, SPSA serves as the regional solid waste management organization for eight communities in southeastern Virginia.² In addition, SPSA has been designated as the solid waste planning agency for the region³ (“Regional Planning Agency”), pursuant to the Regulations for the Development of Solid Waste Management Plans⁴ (“Regulations”). You also note that SPSA is authorized to develop, adopt, and promulgate the solid waste management plan required by § 10.1-1411. As the Regional Planning Agency, SPSA conducts solid waste management planning activities on behalf of the jurisdictions under the Regional Solid Waste Management Plan for Southeastern Virginia (“Plan”).⁵ You state that SPSA’s role as Regional Planning Agency is unclear regarding the process of amending the Plan.

APPLICABLE LAW AND DISCUSSION

Section 10.1-1411(A) authorizes the Virginia Waste Management Board⁶ (“Board”) “to promulgate regulations specifying requirements for local and regional solid waste management plans.” Accordingly, the Board promulgated the Regulations.⁷

The purpose of these regulations is to:

1. Establish minimum solid waste management standards and planning requirements for protection of the public health, public safety, the environment, and natural resources throughout the Commonwealth; promote local and regional planning that provides for environmentally sound and compatible solid waste management with the most effective and efficient use of available resources; [and]

....

3. Establish ... regional ... responsibility for meeting and maintaining the minimum recycling rates[.]^[8]

The Governor is authorized to designate regional boundaries to implement regional solid waste management plans.⁹ “The governing bodies of the counties, cities and towns within any region ... shall be responsible for the development and implementation of a comprehensive regional solid waste management plan[.]”¹⁰ To that end, SPSA was designated as the Regional Planning Agency for the Plan.¹¹

The Regulations required that a complete revised solid waste management plan be submitted to the Department of Environmental Quality by July 1, 2004.¹² In its capacity as the Regional Planning Agency, SPSA submitted the Plan to the Department in October 2004. Among other things, the Plan was required to: address the waste management

hierarchy;¹³ include the mandatory plan contents;¹⁴ consider the mandatory objectives;¹⁵ include incorporated data;¹⁶ and provide for public participation.¹⁷

The Department of Environmental Quality reviews each solid waste management plan for content to determine whether the submitter has addressed all the elements required by the Regulations.¹⁸ It is the responsibility of the Regional Planning Agency to conduct all required evaluations and analyses to ensure that the Plan adequately represents the Unit's vision for solid waste management for the next twenty years.¹⁹ In fact, 9 VAC 20-130-70(B) provides that "[a]fter July 1, 2000, no permit for a solid waste management facility shall be issued unless the local or regional applicant has a plan approved in accordance" with the Regulations and "the permit complies with" §§ 10.1-1411 and 10.1-1408(D)(1)(iv) of the Virginia Waste Management Act.²⁰

Likewise, it is the responsibility of the Regional Planning Agency to evaluate any proposed amendment to the Plan although the Regulations do not contain any specific requirement that the Regional Planning Agency send each proposed amendment to the Department of Environmental Quality. The Department is authorized to review and approve an amendment or to return comment on the deficiencies in each amendment.²¹ The Regulations are silent regarding other roles for the Department, yet unambiguously describe in great detail the information and analyses required of the Regional Planning Agency.²² The Regulations classify amendments as major²³ or minor.²⁴ As with the approval of a plan, the Department reviews the amendment for content and consistency with the Regulations.²⁵ Insofar as the Regulations do not confer decision-making authority for plan contents on the Department, it is the responsibility of the Regional Planning Agency to evaluate proposals and determine whether a proposed facility or activity fits with its existing Plan. Once the Regional Planning Agency determines that the proposed facility or activity cannot be integrated with the existing Plan, review by the Department is not required.

You also ask what remedy or right of appeal would the proponent of a new solid waste management facility have in the event that the Regional Planning Agency declines to submit a Plan amendment to the Department of Environmental Quality. Where the Regional Planning Agency, not the Department, makes a decision not to amend the Plan, private parties are left to seek an appropriate judicial or political remedy against the Regional Planning Agency.²⁶

You ask whether SPSA is entitled to charge a fee for services related to processing and reviewing a Plan amendment. Finally, you ask whether SPSA could seek reimbursement from the Department of Environmental Quality for costs associated with reviewing the Plan amendment. I find nothing in the Regulations regarding the collection of fees by the Department or the Regional Planning Agency for reviewing solid waste management plans or amendments. However, 9 VAC 20-130-120, which addresses mandatory plan contents, provides that a solid waste management plan must include a description of the funding and resources necessary to implement the plan, including consideration of fees dedicated to future facility development. Therefore,

the Regional Planning Agency could elect to establish procedures to impose a fee for reviewing a Plan amendment. However, such fee should be dedicated to future facility development and not collected as reimbursement for costs associated with review of amendments.²⁷ In addition, I find no provision in the Regulations or the *Virginia Code* governing reimbursement of SPSA expenses. Therefore, it is my opinion that SPSA may not seek reimbursement for costs associate with review of the Plan.

CONCLUSION

Accordingly, it is my opinion that the Southeastern Public Service Authority of Virginia may elect not to submit to the Department of Environmental Quality a proposed amendment that it determines is not necessary or does not conform to the Regional Solid Waste Management Plan for Southeastern Virginia. It is further my opinion that the Authority is not entitled to charge a fee for services related to processing and reviewing a proposed Regional Plan amendment. The Authority also cannot obtain reimbursement from the Department for costs and time devoted to the review as part of the process for the associated environmental permit.

¹VA. CODE ANN. §§ 15.2-5100 to 15.2-5158 (2003 & Supp. 2006).

²The members of SPSA are the cities of Chesapeake, Franklin, Norfolk, Portsmouth, Suffolk, and Virginia Beach, and the counties of Isle of Wight and Southampton. See 2000 Va. Acts ch. 580 at 1047, 1047-48.

³See 9 VA. ADMIN. CODE § 20-130-210 (2004) (establishing criteria for developing regional planning agency); see also SOUTHEASTERN PUBLIC SERVICE AUTHORITY OF VIRGINIA, REGIONAL SOLID WASTE MANAGEMENT PLAN FOR SOUTHEASTERN VIRGINIA, at *14, available at <http://www.spsa.com/PDFs/publications/Reg.%20Solid%20Waste%20Mgmt%20Plan%20June%2006.pdf> (June 2006) (noting that SPSA is regional solid waste management organization for certain southeastern Virginia communities) [hereinafter "MANAGEMENT PLAN"]; VIRGINIA DEPARTMENT OF ENVIRONMENTAL QUALITY, THE VIRGINIA ANNUAL RECYCLING RATE REPORT, CALENDAR YEAR 2005 SUMMARY (Oct. 2006), at *6, *10, available at http://www.deq.state.va.us/recycle/documents/AnnualReportRRR2005_FINAL_000.pdf (listing reports of solid waste planning units). I also note that § 10.1-1411(A) provides that each regional or locality designated by the Governor as a regional boundary "shall constitute a solid waste planning unit."

⁴VA. ADMIN. CODE tit. 9, ch. 130 (2004) (codified in scattered sections from § 20-130-10 to § 20-130-230).

⁵Created pursuant to § 10.1-1411(A), the Regional Solid Waste Management Plan for Southeastern Virginia is comprised of SPSA member localities of the cities of Chesapeake, Franklin, Norfolk, Portsmouth, Suffolk, and Virginia Beach, the counties of Isle of Wight and Southampton, including the towns of Boykins, Branchville, Capron, Courtland, Ivor, Newsoms, Smithfield, and Windsor. See MANAGEMENT PLAN, *supra* note 3, at *14.

⁶See VA. CODE ANN. § 10.1-1401(A) (2006) (continuing Board, which consists of seven members appointed by Governor).

⁷See *supra* note 4.

⁸9 VA. ADMIN. CODE § 20-130-40.

⁹Section 10.1-1411(A) (2006).

¹⁰*Id.*

¹¹See *supra* note 3 and accompanying text.

¹²9 VA. ADMIN. CODE § 20-130-110(B).

¹³9 VA. ADMIN. CODE § 20-130-30 (requiring plans to consider and address source reduction, reuse, recycle, resource recovery, incineration, and landfilling).

¹⁴ 9 VA. ADMIN. CODE § 20-130-120 (requiring that plans include an integrated waste management strategy, implementation objectives for solid waste management, progress towards objectives and an implementation schedule, funding strategy, public education strategy, public-private partnerships, and how to meet mandatory recycling rates).

¹⁵ 9 VA. ADMIN. CODE § 20-130-140 (requiring that plans include consideration of waste management hierarchy and demonstrate manner in which mandatory objectives will be met).

¹⁶ 9 VA. ADMIN. CODE § 20-130-150 (requiring that plans contain data and analyses for multiple factors, including twenty-year population projections, urban concentrations, geographic conditions, economic growth and development, reuse and recycling markets, transportation conditions, estimates of solid waste generated by households, procedures for evaluating solid waste collection, and assessment of current and predicted solid waste management needs for twenty years and actions to be taken to meet such needs).

¹⁷ 9 VA. ADMIN. CODE § 20-130-130.

¹⁸ 9 VA. ADMIN. CODE § 20-130-110(C).

¹⁹ 9 VA. ADMIN. CODE § 20-130-150.

²⁰ VA. CODE ANN. tit. 10.1, ch. 14 (2006) (codified in scattered sections from § 10.1-1400 to § 10.1-1457).

²¹ 9 VA. ADMIN. CODE § 20-130-175(E).

²² See *supra* notes 13-17, 19 and accompanying text.

²³ “Major amendments shall include any addition, deletion, or cessation of operation of any solid waste facility; any increase in landfill capacity; any change that moves toward implementation of a waste management strategy that is lower in the waste management hierarchy; and any change to membership in the approved area.” 9 VA. ADMIN. CODE § 20-130-175(A)(1).

²⁴ “Minor amendments shall include any change that moves toward implementation of a waste management strategy that is higher in the waste management hierarchy and any nonsubstantive administrative change such as a change in name.” 9 VA. ADMIN. CODE § 20-130-175(A)(2).

²⁵ See 9 VA. ADMIN. CODE § 20-130-175(G).

²⁶ See § 15.2-5114(5) (Supp. 2006) (granting public service authorities, including SPSA, power to sue and be sued).

²⁷ See 2002 Op. Va. Att’y Gen. 233, 238-39 (noting that agency may impose fees only as specifically authorized by General Assembly).

OP. NO. 06-108

CONSTITUTION OF VIRGINIA: EDUCATION (STATE APPROPRIATIONS).

Students enrolled in for-profit career college in two- or four-year degree program are eligible for state-funded financial assistance under Article VIII, § 10 of Virginia Constitution; students enrolled in program leading to certificate or diploma are not eligible for such assistance. General Assembly may appropriate financial assistance funds directly to private, for-profit, nonsectarian, postsecondary career colleges for benefit of students enrolled in degree program.

THE HONORABLE ROBERT TATA
MEMBER, HOUSE OF DELEGATES
FEBRUARY 20, 2007

ISSUES PRESENTED

You inquire concerning the eligibility of students attending private, for-profit, nonsectarian, postsecondary career colleges to participate in state-funded financial assis-

tance programs established under Article VIII, § 10 of the Constitution of Virginia. First, you ask whether students attending such colleges who are enrolled in a two- or four-year program leading to a degree are constitutionally eligible for state-funded financial assistance. You next ask whether students enrolled in nondegree programs¹ at such career colleges are eligible for state-funded financial assistance. Finally, should students in either category be eligible for state-funded assistance, you ask whether the General Assembly may appropriate the funds for the benefit of the students directly to a career college or whether § 10 requires that such funds be appropriated by the General Assembly via an approved financial assistance program that would make the funds available to qualifying students.

RESPONSE

It is my opinion that students enrolled in a for-profit career college in a two- or four-year degree program are constitutionally eligible for state-funded financial assistance under Virginia Constitution Article VIII, § 10. It further is my opinion that students who attend such a school but who are enrolled in a program that leads to a certificate or diploma, rather than a degree, are not eligible for state-funded financial assistance. Finally, it is my opinion that the General Assembly may appropriate financial assistance funds directly to private, for-profit, nonsectarian, postsecondary career colleges for the benefit of students enrolled therein in a two- or four-year degree program.

BACKGROUND

You relate that more than 22,000 students are enrolled in programs at private, for-profit, nonsectarian career colleges in Virginia and are studying nursing, hospital management, criminal justice, homeland security, information technology, and paralegal training as well as other areas of study. You note that some, but not all, career colleges offer programs that lead to degrees ranging from an associate's to a master's degree. When a career college offers a nondegree program, it awards a certificate or diploma to a student who successfully completes that program.

You report that the career colleges about which you inquire are all members of the Virginia Career College Association. Additionally, all but three of these schools offer degree programs. You further report that the three schools that currently offer only nondegree programs are in the process of developing at least one program that will lead to a degree.²

APPLICABLE LAW AND DISCUSSION

Article VIII, § 10 of the Constitution of Virginia provides that the General Assembly “may, ... subject to such limitations as may be imposed by the General Assembly, appropriate funds for educational purposes which may be expended in furtherance of elementary, secondary, collegiate or graduate education of Virginia *students* in public and nonsectarian private schools and institutions of learning.” (Emphasis added.)

Prior opinions of the Attorney General have analyzed Article VIII, § 10 and are particularly relevant to your inquiry.³ The 1983 opinion (“1983 Opinion”) considered

whether students enrolled in proprietary institutions⁴ were eligible under § 10 to participate in the Virginia Work-Study Program⁵ provided the State Council of Higher Education for Virginia elected, by regulation, to permit such students to be included.⁶ The 1983 Opinion noted that in § 10, “[n]o restriction is made as to whether the school is ‘for profit,’ but the legislature is empowered to establish appropriate limitations.”⁷ As a result, the 1983 Opinion concluded that “it is constitutionally permissible for the General Assembly to provide for proprietary (private for profit) schools to be eligible for the Program, provided that the expenditure is in furtherance of ‘collegiate or graduate’ education of Virginia students.”⁸

The 1998 opinion (“1998 Opinion”) considered questions virtually identical to the first two questions you present.⁹ The 1998 Opinion concluded that students attending for-profit, nonsectarian, postsecondary private schools and institutions of learning are eligible to participate in state-funded financial aid programs established under Article VIII, § 10.¹⁰ Additionally, the 1998 Opinion concluded that postsecondary schools and institutions of learning that offer certificates for completion of a curriculum, rather than an approved two- or four-year degree, do not qualify as offering “collegiate” education for purposes of § 10.¹¹

The 1983 and 1998 Opinions, taken together, lead me to conclude that students who are enrolled in a for-profit career college in a two- or four-year program leading to a degree are constitutionally eligible for state-funded financial assistance under Article VIII, § 10 of the Virginia Constitution. Conversely, students enrolled in nondegree programs at such schools or institutions are not eligible. Students at career colleges studying to receive a degree are engaged in collegiate or graduate education while students at such schools enrolled in nondegree programs are not engaged in collegiate or graduate education. Such distinction is significant as § 10 requires the General Assembly to appropriate educational funds “in furtherance of ... collegiate or graduate education.”

Your final question concerns the manner in which the General Assembly may appropriate funds for eligible students under Article VIII, § 10. Section 10 first prohibits the appropriation of public funds to any school or institution that is not owned or exclusively controlled by the Commonwealth or one of its political subdivisions. However, the exceptions that follow the prohibition authorize the General Assembly to appropriate funds to career colleges “for educational purposes ... in furtherance of ... collegiate or graduate education of Virginia students.” Section 10 imposes no restriction on the type of funding, or on making direct appropriations to schools or institutions of learning, or making appropriations to programs or state agencies that would administer such funding available through the student. The only restrictions are that the school must be “public [or] nonsectarian private schools and institutions of learning” and must be used for the “elementary, secondary, collegiate or graduate education of Virginia students.” Nothing in § 10 prohibits the General Assembly from appropriating funds, should it choose to do so, directly to career colleges; the General Assembly may appropriate such funds “for educational purposes ... of Virginia

students,” subject to the restrictions identified in the Virginia Constitution and those imposed by the General Assembly itself through statutes.

CONCLUSION

Accordingly, it is my opinion that students enrolled in a for-profit career college in a two- or four-year degree program are constitutionally eligible for state-funded financial assistance under Virginia Constitution Article VIII, § 10. It further is my opinion that students who attend such a school but who are enrolled in a program that leads to a certificate or diploma, rather than a degree, are not eligible for state-funded financial assistance. Finally, it is my opinion that the General Assembly may appropriate financial assistance funds directly to private, for-profit, nonsectarian, postsecondary career colleges for the benefit of students enrolled therein in a two- or four-year degree program.

¹For purposes of this opinion, a “nondegree program” means a program that leads to a certificate of completion or a diploma as opposed to a two- or four-year degree.

²For purposes of this opinion, you ask that I assume that all the career colleges offer a degree for one or more of their programs.

³See Op. Va. Att’y Gen.: 1998 at 24; 1982-1983 at 97.

⁴The 1983 Opinion interprets “proprietary” schools as including private schools and institutions that generally are operated for profit. 1982-1983 Op. Va. Att’y Gen., *supra* note 3, at 97.

⁵See VA. CODE ANN. §§ 23-38.70, 23-38.71 (2003) (establishing Virginia Work-Study Program and authorizing Council to adopt regulations necessary for administration of program). Since the 1983 Opinion was issued, the General Assembly has abolished the Virginia Work-Study Program. See 2006 Va. Acts ch. 51, at 54, 54 (repealing Chapter 4.7 of Title 23, §§ 23-38.70 to 23—38.71).

⁶1982-1983 Op. Va. Att’y Gen., *supra* note 3, at 97.

⁷*Id.* at 97-98.

⁸*Id.* at 98 (quoting VA. CONST. art. VIII, § 10) (emphasis in original).

⁹1998 Op. Va. Att’y Gen., *supra* note 3, at 24.

¹⁰*Id.* at 25.

¹¹*Id.* at 25-26. This conclusion was based on the fact that the term “collegiate” is not defined in the Virginia Constitution. In the absence of a statutory or judicial definition, a term is given its plain and ordinary meaning given the context in which it was used. See *id.* at 25, 26 n.9. “At the time of the adoption of the 1971 Constitution, the term ‘collegiate’ was defined to mean ‘[o]f, pertaining to, or resembling a college,’ and ‘of the nature of or constituted as a college.’” *Id.* at 25 (citations omitted).

OP. NO. 07-036

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT (SALE OF PROPERTY AND GRANTING OF FRANCHISES BY CITIES AND TOWNS).

COUNTIES, CITIES AND TOWNS: FRANCHISES, PUBLIC PROPERTY, UTILITIES – FRANCHISES; SALE AND LEASE OF CERTAIN PUBLIC PROPERTY.

Mayor of City of Chesapeake is elected member of Chesapeake City Council for purposes of calculating three-fourths majority vote required to sell public land, including when he abstains from voting or is absent during such vote.

MR. RONALD S. HALLMAN
CITY OF CHESAPEAKE ATTORNEY
JULY 23, 2007

ISSUES PRESENTED

You inquire whether the Mayor of the City of Chesapeake is counted as an elected member of the Chesapeake City Council for purposes of calculating the three-fourths majority vote required to sell public land. If so, you inquire regarding circumstances when the mayor abstains from voting or is absent during the vote.

RESPONSE

It is my opinion that the Mayor of the City of Chesapeake is an elected member of the Chesapeake City Council for purposes of calculating the three-fourths majority vote required to sell public land, including when he abstains from voting or is absent during such vote.

BACKGROUND

You relate that the City Council (“Council”) for the city of Chesapeake (“City”) is comprised of eight members and the Mayor, all of whom are elected at large. You state that the Council has considered a resolution to sell fee simple property owned by the City as well as certain riparian rights to the Elizabeth River. You note that the sale of the fee simple property and the riparian rights will be handled separately. You state that the Council has conducted a public hearing on the proposed property sales, and eight members of the Council voted on the proposed sale. Further, you note that the Mayor did not attend the public hearing, did not cast a vote, and previously had declined to participate in the proposed sale due to a perceived conflict of interest. Based upon a six-to-two vote in favor of the sale, you believe the motion failed to receive the required three-fourths majority vote.¹

APPLICABLE LAW AND DISCUSSION

Article VII, § 9 of the Constitution of Virginia mandates that:

No rights of a city or town in and to its waterfront, wharf property, public landings, wharves, docks, streets, avenues, parks, bridges, or other public places, or its gas, water, or electric works shall be sold except by an ordinance or resolution passed by a recorded affirmative vote of three fourths of all members *elected* to the governing body. [Emphasis added.]

Section 15.2-2100(A), which implements Article VII, § 9, provides, in part, that:

No rights of a city or town in and to its waterfront, wharf property, public landings, wharves, docks, streets, avenues, parks, bridges, or other public places, or its gas, water, or electric works shall be sold

except by an ordinance passed by a recorded affirmative vote of three-fourths of all the members *elected* to the council, notwithstanding any contrary provision of law, general or special, and under such other restrictions as may be imposed by law. [Emphasis added.]

A prior opinion of the Attorney General has noted that § 9 seeks to safeguard public property and ensure that it not be appropriated by private self-interests to the detriment of the public without due consideration by council members.² To protect the interest of the public from what has been perceived as “unscrupulous municipal councils,”³ § 9 requires “the recorded vote of an extraordinary majority”⁴ of council members when selling public property. The language of both Article VII, § 9 and § 15.2-2100 clearly and unambiguously places the extraordinary majority necessary to sell public land at three-fourths of *all* the members *elected to a city council*. “Where the language of a statute is clear and unambiguous[,] rules of statutory construction are not required.”⁵

The answer to your inquiry depends on whether the Mayor of Chesapeake is a member of the Council.⁶ Under the City’s revised charter, the Mayor is considered part of the Council.⁷ The Mayor is elected at large and has the same voting privileges as other council members.⁸ Therefore, the Mayor is a member of the Council for purposes of a three-fourths majority vote.⁹

CONCLUSION

Accordingly, it is my opinion that the Mayor of the City of Chesapeake is an elected member of the Chesapeake City Council for purposes of calculating the three-fourths majority vote required to sell public land, including when he abstains from voting or is absent during such vote.

¹ A request by a city attorney for an opinion from the Attorney General “shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney’s legal conclusions.” VA. CODE ANN. § 2.2-505(B) (2005).

² See 2000 Op. Va. Att’y Gen. 44, 45; see also 1990 Op. Va. Att’y Gen. 43, 44 (noting that intent of § 9 is to prevent clandestine moves by council members).

³ 2 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 854 (1974).

⁴ *Id.* at 853.

⁵ *Ambrogi v. Koontz*, 224 Va. 381, 386, 297 S.E.2d 660, 662 (1982).

⁶ See 1984-1985 Op. Va. Att’y Gen. 36, 36

⁷ 1987 Va. Acts ch. 76, at 103, 103 (amending § 3.01 to provide that council consists of mayor and eight members).

⁸ *Id.* at 104 (amending § 3.08 and granting mayor same rights and duties as other council members).

⁹ See 1980-1981 Op. Va. Att’y Gen. 40, 41; see also 1984-1985 Op. Va. Att’y Gen., *supra* note 6, at 36-37 (concluding that where charter did not include mayor as part of council, he did not factor in three-fourths vote required by Article VII, § 9 and § 15.1-307, predecessor to § 15.2-2100).

OP. NO. 07-011

CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE (EXEMPT PROPERTY).

TAXATION: REAL PROPERTY TAX – EXEMPTIONS FOR ELDERLY AND HANDICAPPED – LOCAL DEFERRAL OF REAL ESTATE TAX.

Constitutional amendment is necessary to provide 100% homestead exemption for veterans who are 100% permanently and totally disabled and who do not meet income and financial worth limitations required by Article X, § 6(b) of Constitution of Virginia.

THE HONORABLE L. SCOTT LINGAMFELTER
HOUSE OF DELEGATES
JUNE 1, 2007

ISSUE PRESENTED

You ask whether a constitutional amendment is necessary to provide a 100% homestead tax exemption for veterans who are 100% permanently and totally disabled.

RESPONSE

It is my opinion that a constitutional amendment is necessary to provide a 100% homestead exemption for veterans who are 100% permanently and totally disabled and who do not meet the income and financial worth limitations required by Article X, § 6(b) of the Constitution of Virginia.

BACKGROUND

You relate that during the 2007 Session of the General Assembly you introduced House Joint Resolution 581¹ (“HJ 581”) to propose a constitutional amendment authorizing a general law to provide a homestead tax exemption for veterans who are 100% permanently and totally disabled as a result of service in the armed forces. Additionally, you note that such an amendment would include the surviving spouse of any veteran eligible for the exemption.

APPLICABLE LAW AND DISCUSSION

Article X, § 1 of the Virginia Constitution provides that “[a]ll property, except as hereinafter provided, shall be taxed.” Article X, § 6(b) provides that:

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

Thus, § 6(b) empowers the General Assembly to enact general laws authorizing local governing bodies to provide for the complete or partial exemption of real estate or personal property from local property taxes if such property is “designed for continuous habitation” and is

owned by, and occupied as the sole dwelling of, persons not less than sixty-five years of age or persons permanently and totally disabled as established by general law who are deemed by the General Assembly to be bearing an extraordinary tax burden on said property in relation to their income and financial worth.

The General Assembly has enacted such general laws in Articles 2, §§ 58.1-3210 through 58.1-3218, and 2.1, §§ 58.1-3219 through 58.1-3219.1, 58.1-3219.3, of Chapter 32 of Title 58.1. Specifically, § 58.1-3210(A) authorizes localities to enact ordinances exempting or deferring the taxation of real estate or a combination thereof. Consistent with Article X, § 6(b), § 58.1-3210(A) limits such exemptions and deferrals to real estate owned and occupied as the sole dwelling of persons who are at least sixty-five years of age or who are permanently and totally disabled within the meaning of § 58.1-3217.

Section 6(b) also provides that such exemption is available only to those persons who bear an extraordinary tax burden with respect to the property in relation to their income and financial worth. In §§ 58.1-3210 and 58.1-3211, the General Assembly has established the criteria to determine the persons who bear an extraordinary tax burden on property in relation to their income and worth.²

Section 58.1-3211(1)(a) establishes a restriction for the total combined income from all sources during the preceding calendar year to that earned by the owners of the dwelling using it as their principal residence and any relatives also living in the dwelling. Section 58.1-3211(2) imposes a similar restriction on a qualifying person's net combined financial worth. Consequently, a person will not qualify for such exemption unless he satisfies the requirements in § 58.1-3210, and the income and net worth restrictions established by § 58.1-3211.

The exemption proposed by HJ 581 would not have imposed income limitations or restrictions on a qualifying veteran's income or net combined financial worth. Rather, it would extend the homestead tax exemption to all permanently and totally disabled veterans regardless of income and financial worth. Because Article X, § 6(b) limits homestead exemptions to qualifying individuals who bear an extraordinary tax burden in relation to their income and financial worth, I must conclude that a constitutional amendment is required to authorize an exemption for all veterans who are 100% permanently and totally disabled.

CONCLUSION

Accordingly, it is my opinion that a constitutional amendment is necessary to provide a 100% homestead exemption for veterans who are 100% permanently and totally disabled and who do not meet the income and financial worth limitations required by Article X, § 6(b) of the Constitution of Virginia.

¹See 2007 H.J.R. 581, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?071+ful+HJ581>.

²See VA. CODE ANN. § 58.1-3218 (2004).

OP. NO. 07-025

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

Individual notice requirement is applicable to initial zoning ordinance that imposes regulations which decrease allowed dwelling density.

MR. C. DEAN FOSTER JR.
SCOTT COUNTY ATTORNEY
JUNE 26, 2007

ISSUE PRESENTED

You ask whether § 15.2-2204(B), which requires individual notice of zoning amendments, applies to a locality adopting its first zoning ordinance.

RESPONSE

It is my opinion that the individual notice required by § 15.2-2204(B) is applicable to an initial zoning ordinance that imposes regulations which decrease the allowed dwelling density.

BACKGROUND

You advise that Scott County currently does not have a zoning ordinance. You further advise that the County plans to adopt a zoning ordinance. You note¹ that § 15.2-2204(B) requires individual mailed notices of public hearings for zoning plans, ordinances, or amendments. You relate that you find no case law or other guidance regarding whether an initial zoning ordinance requires a mailing of the individual notices associated with zoning amendments. However, you note that Scott County does not have an existing ordinance so there is nothing to amend. Therefore, you conclude that individual notices are not required.²

APPLICABLE LAW AND DISCUSSION

Chapter 22 of Title 15.2, §§ 15.2-2200 through 15.2-2327, governs planning, subdivision of land, and zoning. Section 15.2-2204(B) provides, in pertinent part, that:

When a proposed amendment of the zoning ordinance involves a change in the zoning map classification of more than 25 parcels of land, or a change to the applicable zoning ordinance text regulations that decreases the allowed dwelling unit density of any parcel of land, then, in addition to the advertising as above required, written notice shall be given by the local planning commission, or its representative, at least five days before the hearing to the owner, owners, or their agent of each parcel of land involved, provided, however, that written notice of such changes to zoning ordinance text regulations shall not have to be mailed to the owner, owners, or their agent of lots shown on a subdivision plat approved and recorded pursuant to the provisions of Article 6 (§ 15.2-2240 et seq.) of [Chapter 22] where such lots are less than 11,500 square feet.

The plain language of the pertinent part of § 15.2-2204(B) provides that notice by mail to landowners is required if it “involves a change in the zoning . . . that decreases the allowed dwelling unit density of any parcel of land.” You note that Scott County does not have a zoning ordinance; however, all the landowners in the county will be affected by the proposed zoning ordinance.³ Thus, it appears that there is no current limitation on the “allowed dwelling unit density.” Therefore, the adoption of an initial zoning ordinance will mean a change that, at least, theoretically decreases that “allowed dwelling unit density” for some, if not all, landowners.

A fundamental rule of statutory construction requires that the fullest possible effect must be given to the legislative intent embodied in the entire statutory enactment.⁴ 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.”⁵ Critical to this balance is ensuring that landowners have notice and opportunity to be heard when zoning ordinances will change the permitted use of land. Such is the essence of due process and necessary before a citizen’s property rights may be adversely affected. Therefore, an individual notice should be mailed to each landowner prior to the consideration of adopting an initial zoning ordinance.

CONCLUSION

Accordingly, it is my opinion that the individual notice required by § 15.2-2204(B) is applicable to an initial zoning ordinance that imposes regulations which decrease the allowed dwelling density.

¹A 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) (2005).

²*Id.*

³*See generally* SCOTT COUNTY PLANNING COMMISSION, A QUESTION AND ANSWER GUIDE TO ZONING IN SCOTT COUNTY, available at <http://scottcountyva.com/Documents/web%20version%20zoning%20brochure%20-%20062304.pdf> (last visited May 11, 2007).

⁴Va. Real Estate Bd. v. Clay, 9 Va. App. 152, 157, 384 S.E.2d 622, 625 (1989).

⁵Bd. of Supvrs. v. Horne, 216 Va. 113, 120, 215 S.E.2d 453, 458 (1975).

OP. NO. 07-016

COUNTIES, CITIES AND TOWNS: POLICE AND PUBLIC ORDER – INTERJURISDICTIONAL LAW-ENFORCEMENT AUTHORITY AND AGREEMENTS.

Local law-enforcement agency may enter into agreement with Department of Homeland Security to enforce selected immigration laws.

THE HONORABLE THOMAS DAVIS RUST
MEMBER, HOUSE OF DELEGATES
MAY 10, 2007

ISSUE PRESENTED

You ask whether a local law-enforcement agency may enter into an agreement with the Department of Homeland Security to enforce selected immigration laws pursuant to § 15.2-1726.

RESPONSE

It is my opinion that pursuant to § 15.2-1726 a local law-enforcement agency may enter into an agreement with the Department of Homeland Security to enforce selected immigration laws.

APPLICABLE LAW AND DISCUSSION

Section 15.2-1726 provides, in part, that:

Any locality may, in its discretion, enter into a reciprocal agreement with any other locality, any agency of the federal government exercising police powers, police of any state-supported institution of higher learning appointed pursuant to § 23-233, or with any combination of the foregoing, for such periods and under such conditions as the contracting parties deem advisable, for cooperation in the furnishing of police services. Such localities also may enter into an agreement for the cooperation in the furnishing of police services with the Department of State Police. The governing body of any locality also may, in its discretion, enter into a reciprocal agreement with any other locality, or combination thereof, for the consolidation of police departments or divisions or departments thereof. Subject to the conditions of the agreement, all police officers, officers, agents and other employees of such consolidated or cooperating police departments shall have the same powers, rights, benefits, privileges and immunities in every jurisdiction subscribing to such agreement, including the authority to make arrests in every such jurisdiction subscribing to the agreement; however, no police officer of any locality shall have authority to enforce federal laws unless specifically empowered to do so by statute, and no federal law-enforcement officer shall have authority to enforce the laws of the Commonwealth unless specifically empowered to do so by statute.

“[A] fundamental rule of statutory construction requires that courts view the entire body of legislation and statutory scheme to determine the ‘true intention of each part.’ In construing statutes, courts should give the fullest possible effect to the legislative intent embodied in the entire statutory enactment.”¹ One must look at the entire statute to ascertain the intent of the General Assembly.²

Section 15.2-1726 sets forth a procedure and gives broad discretion for local law-enforcement agencies to enter into agreements with federal law-enforcement agencies to cooperate in the furnishing of police services. The only limitation § 15.2-1726 im-

poses on local law-enforcement agencies regarding such agreements is that “no police officer of any locality shall have authority to enforce federal laws unless specifically empowered to do so by statute.” Specifically, 8 U.S.C. § 1357(g) authorizes local law-enforcement agencies to enforce immigration laws provided local law-enforcement and federal law-enforcement agencies enter into a written agreement of understanding.³ Thus, under § 15.2-1726, a local law enforcement agency may exercise its discretion to enter into an agreement with the Department of Homeland Security to enforce selected immigration laws.

CONCLUSION

Accordingly, it is my opinion that pursuant to § 15.2-1726 a local law-enforcement agency may enter into an agreement with the Department of Homeland Security to enforce selected immigration laws.

¹Va. 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)).

²See *Commonwealth v. Jones*, 194 Va. 727, 731, 74 S.E.2d 817, 820 (1953) (noting that to derive true purpose of act, “statute should be construed so as to give effect to its component parts”).

³*Cf.* VA. CODE ANN. § 19.2-12 (Supp. 2006) (designating special agent or law enforcement officer of Department of Homeland Security as conservator of the peace); § 19.2-18 (2003) (vesting conservators of the peace with certain powers of arrest to enforce Virginia state law). The reciprocal nature of 8 U.S.C. § 1357(g) and *Virginia Code* §§ 19.2-12 and 19.2-18 are indicative of a situation where a local law-enforcement agency could enter into a reciprocal agreement with a federal law enforcement agency under *Virginia Code* § 15.2-1726.

OP. NO. 07-029

COUNTIES, CITIES AND TOWNS: POWERS OF CITIES AND TOWNS – UNIFORM CHARTER POWERS.

HEALTH: ADMINISTRATION GENERALLY — REGULATION OF MEDICAL CARE FACILITIES.

Limited authority for City Council of City of Manassas to enact ordinance consistent with its charter, general statutory law, and constitutional jurisprudence, regulating abortion clinics, including one similar to health and safety provisions of Senate Bill 146. Whether other localities possess similar authority to adopt such ordinance depends on powers granted to localities by General Assembly. To survive constitutional challenge, such ordinance must be reasonable in scope, clearly define prohibited conduct, and not unduly burden decision-making process.

THE HONORABLE KENNETH T. CUCCINELLI II
MEMBER, SENATE OF VIRGINIA
JULY 10, 2007

ISSUES PRESENTED

You ask whether the City Council for the City of Manassas (“City Council”) has the authority to regulate abortion clinics by adopting an ordinance similar to Senate Bill 146 as introduced, but not enacted into law, during the 2004 Session of the General Assembly (“Senate Bill 146”). You further ask what legal requirements the City Council must consider before adopting such an ordinance.

RESPONSE

It is my opinion that the greater weight of the law suggests that the City Council has limited authority to enact an ordinance consistent with its charter, general statutory law, and constitutional jurisprudence, regulating abortion clinics, including one similar to the health and safety provisions of Senate Bill 146. Further, whether other localities possess similar authority to adopt such an ordinance depends on the powers granted to such localities by the General Assembly. Finally, it is my opinion that in order to survive a constitutional challenge, any ordinance regulating abortion clinics must be reasonable in scope, clearly define prohibited conduct, and not unduly burden a woman's decision-making process.

BACKGROUND

You relate that Senate Bill 146 was introduced during the 2004 Session of the General Assembly, but was not reported by the Senate Education and Health Committee.¹ Senate Bill 146 proposed an amendment to the definition of "hospital" in § 32.1-123 to include "any clinic or other facility performing 25 or more abortions per year. Any such clinic shall be subject to all of the requirements of this article for outpatient surgical hospitals and the regulations of the Board in the same manner as any other hospital."² Such a definition would require abortion clinics to be regulated as outpatient surgical centers.³

APPLICABLE LAW AND DISCUSSION

Virginia adheres to the Dillon Rule of strict construction regarding powers of local governing bodies.⁴ Under the Dillon Rule, 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.⁵ Section 15.2-1102 confers general police powers on cities and towns which are not

expressly prohibited by the Constitution and the general laws of the Commonwealth, and which are necessary or desirable to secure and promote the general welfare of the inhabitants of the municipality and the safety, health, peace, good order, comfort, convenience, morals, trade, commerce and industry of the municipality and the inhabitants thereof[.]

A city is only permitted to act on this general grant of powers if the General Assembly has authorized it to do so.⁶ The General Assembly specifically has conferred on the City of Manassas ("Manassas") all of the powers set forth in § 15.2-1102.⁷ Chapter 5, § 18(S) of the Charter of the City of Manassas authorizes the City Council to pass ordinances to promote the general welfare and

[t]o do all things whatsoever necessary or expedient, and to pass all ordinances, resolutions and bylaws for promoting or maintaining the security, general welfare, comfort, education, morals, peace, government, health, trade, commerce and industries of the city, or its

inhabitants, not in conflict with the Constitution and general laws of the Commonwealth, or the Constitution of the United States.^[8]

The Supreme Court of Virginia and prior opinions of the Attorney General have broadly construed the general grant of police powers to cities and towns in § 15.2-1102, and the analogous grant of authority to counties in § 15.2-1200, when dealing with local regulation of a wide range of activities and subjects.⁹ A local government may, as an exercise of its general police power, regulate topless dancing;¹⁰ regulate the operation of massage salons;¹¹ regulate the use of “common towels”;¹² prohibit the conduct of lotteries and numbers games;¹³ restrict the keeping of vicious dogs;¹⁴ regulate or prohibit the operation of poolrooms;¹⁵ regulate burglar alarm installation access to police department;¹⁶ regulate smoking;¹⁷ and regulate homes for aged, infirm, and disabled adults.¹⁸

Section 15.2-1102 provides that ordinances adopted under this broad police power authority must not be inconsistent with state law. The state and the locality may, however, exercise concurrent jurisdiction unless the state statutes and regulations are so comprehensive that the state “occupie[s] the entire field” of such regulation.¹⁹ City ordinances are not deemed inconsistent with state statutes and regulations unless they are so contradictory that the two cannot coexist.²⁰ Moreover, § 15.2-1102 specifically authorizes local ordinances to promote the health of inhabitants unless expressly prohibited by the Constitution of Virginia or general laws of the Commonwealth. In addition, § 32.1-34 clearly contemplates that local governments will adopt ordinances that are more stringent than state laws or regulations to protect public health.²¹

The General Assembly has enacted legislation providing for the regulation of medical care facilities, including hospitals.²² The current definition of hospitals in the *Virginia Code* does not include abortion clinics.²³ Abortion clinics are exempt from the current state statutory and regulatory framework of hospitals because they are treated as “an office of one or more physicians or surgeons.”²⁴ Although Virginia has enacted legislation regulating medical care facilities, the state cannot be said to occupy the entire field. There is no policy or statute that prohibits local governments, when acting consistent with the Dillon Rule, from implementing regulations that go beyond those of the state government.²⁵

Accordingly, it is my opinion that Manassas has authority under § 15.2-1102 and its charter to enact an ordinance regulating health and safety in abortion clinics. Whether other localities have similar authority would depend on the powers granted to them by charter by the General Assembly.

You next inquire concerning the legal requirements that the City Council must consider before imposing an ordinance regulating abortion clinics. Such an ordinance, if enacted by Manassas, would constitute an exercise of police power that is presumed to be valid.²⁶ The ordinance must, however, be reasonable and not arbitrary, uniform in operation, and must bear a real and substantial relation to public health, safety, morals, or welfare.²⁷

While having the authority to legislate, Manassas must consider the federal constitutional jurisprudence limiting the scope of any statute or ordinance seeking to regulate abortion clinics.²⁸ The Fourth Circuit Court of Appeals has upheld South Carolina's regulation of abortion clinics because it

did not place an undue burden on a women's decision whether to seek an abortion in violation of the liberty interest protected by the Due Process Clause and ... did not distinguish unreasonably between clinics that performed a specific number of abortions and those that did not in violation of the Equal Protection Clause.^[29]

The Fourth Circuit has identified several factors that enabled South Carolina's abortion regulations to withstand constitutional challenge:

(1) the Regulation serves a valid state interest and is little more than a codification of national medical- and abortion-association recommendations designed to ensure the health and appropriate care of women seeking abortions; (2) the Regulation does not "strike at the [abortion] right itself,"; (3) the increased costs of abortions caused by implementation of the Regulation, while speculative, are even yet modest and have not been shown to burden the ability of a woman to make the decision to have an abortion; and (4) abortion clinics may rationally be regulated as a class while other clinics or medical practices are not.^[30]

Specific concerns addressed and dismissed by the Fourth Circuit included the imposition of a threshold requirement of the performance of five abortions a month standard before a facility became subject to regulation.³¹ "[D]rawing the line at [facilities] performing five abortions per month is rational. While anyone could say that it is just as rational to draw the line at ten abortions per month or three abortions per month, this type of line-drawing is typically a legislative function and is presumed valid."³² Therefore, the twenty-five abortions a year standard articulated in Senate Bill 146 would likely survive a court challenge. In considering the harm of increased costs stemming from regulation of abortion clinics, the Court concluded that although the increased cost "might make it 'more difficult' and would make it 'more expensive to procure an abortion,' there is no evidence that it would impose an undue burden on 'a woman's ability to make th[e] decision to have an abortion.'"³³

Any ordinance regulating abortion clinics enacted by Manassas must be reasonable in scope and not unduly burden a woman's decision-making process regarding abortion.³⁴ In addition, any law or regulation providing for monetary penalties or revocation of a permit or license to operate a clinic should be clearly defined to survive a constitutional challenge.³⁵

When implementing any regulatory scheme,³⁶ there should be a reasonable delay in the effective date to permit existing providers an opportunity to comply with the

new requirements or, in the alternative, provide for the grandfathering in of existing providers. Moreover, Manassas would be required to inspect abortion clinics and enforce its own regulations because no authority exists for the State Department of Health to perform these activities on its behalf.³⁷

CONCLUSION

Accordingly, it is my opinion that the greater weight of the law suggests that the City Council has limited authority to enact an ordinance consistent with its charter, general statutory law, and constitutional jurisprudence, regulating abortion clinics, including one similar to the health and safety provisions of Senate Bill 146. Further, whether other localities possess similar authority to adopt such an ordinance depends on the powers granted to such localities by the General Assembly. Finally, it is my opinion that in order to survive a constitutional challenge, any ordinance regulating abortion clinics must be reasonable in scope, clearly define prohibited conduct, and not unduly burden a woman's decision-making process.

¹ See 2004 S.B. 146, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?041+ful+SB146>.

² *Id.*

³ See 12 VA. ADMIN. CODE §§ 5-410-1150 to 5-410-1290 (2005 & Supp. 2007).

⁴ Commonwealth v. County Bd., 217 Va. 558, 573, 232 S.E.2d 30, 40 (1977).

⁵ 1987-1988 Op. Va. Att'y Gen. 146, 146.

⁶ See Bd. of Supvrs. v. Corbett, 206 Va. 167, 173, 142 S.E.2d 504, 508-09 (1965).

⁷ See § 3-a of the Manassas City Charter, which provides that “[t]he powers set forth in §§ 15.1-837 through 15.1-907 of Chapter 18 of Title 15.1 of the Code of Virginia as in force on January one, nineteen hundred seventy-six, are hereby conferred on and vested in the city of Manassas, Virginia and all other powers which are now or may hereafter be conferred upon or delegated to cities under the Constitution and laws of the Commonwealth.” 1976 Va. Acts ch. 721, at 1121, 1121. The general police powers found in § 15.1-839 have been recodified as § 15.2-1102. 1997 Va. Acts ch. 587, at 977, 1048.

⁸ See 1976 Va. Acts, *supra* note 7, at 1125.

⁹ See *infra* notes 10-18 and accompanying text.

¹⁰ *Wayside Rest., Inc. v. Va. Beach*, 215 Va. 231, 208 S.E.2d 51 (1974).

¹¹ *Kisley v. Falls Church*, 212 Va. 693, 187 S.E.2d 168 (1972).

¹² *Nat'l Linen Serv. Corp. v. Norfolk*, 196 Va. 277, 83 S.E.2d 401 (1954).

¹³ *Allen v. Norfolk*, 195 Va. 844, 80 S.E.2d 605 (1954), *modified*, 196 Va. 177, 83 S.E.2d 397 (1954).

¹⁴ *King v. County of Arlington*, 195 Va. 1084, 81 S.E.2d 587 (1942).

¹⁵ *Assaid v. Roanoke*, 179 Va. 47, 18 S.E.2d 287 (1942).

¹⁶ 1992 Op. Va. Att'y Gen. 59.

¹⁷ 1987-1988 Op. Va. Att'y Gen. 143.

¹⁸ 1987-1988 Op. Va. Att'y Gen. 146.

¹⁹ See *King*, 195 Va. at 1087-89, 81 S.E.2d at 590; 1983-1984 Op. Va. Att'y Gen. 86, 87; see also 1989 Op. Va. Att'y Gen. 64, 64-65 (concluding that local governments lacked authority to require fees and permits for operation of hotels, restaurants, and campgrounds; § 35.1-9 specifically superseded all local ordinances regulating hotels, restaurants, and campgrounds; no similar provision exists superseding local government authority to regulate by ordinance health care facilities for protection of public health). The 2006 Session

of the General Assembly considered House Bill 189, which proposed licensure for “abortion clinics.” See 2006 H.B. 189, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?061+ful+HB189EH1+pdf>. The Senate Committee on Education and Health failed to report the bill, and it was defeated. See *id.* (status). An argument can be made that the failure of the General Assembly to enact House Bill 189 is indicative of its intent not to regulate in this area. An alternative argument is that the legislature’s failure to regulate “the entire field” at the state level provides localities with the potential authority to regulate the clinics. See 1991 Op. Va. Att’y Gen. 307, 313 (concluding that failure of General Assembly to enact legislation granting authority for particular action raises inference that General Assembly did not intend entity to have such authority). Since the General Assembly has enacted charters granting localities significant authority to promote health and safety, it is my opinion that this is the more valid argument.

²⁰ 1983-1984 Op. Va. Att’y Gen., *supra* note 19, at 87.

²¹ VA. CODE ANN. § 32.1-34 (2004) (“No county, city or town ordinance or regulation shall be less stringent in the protection of the public health than any applicable state law or any applicable regulations of the [State] Board [of Health].”).

²² See §§ 32.1-123 to 32.1-162.15 (2004 & Supp 2007).

²³ See § 32.1-123 (2004) (“‘Hospital’ means any facility licensed pursuant to [Article 1 of Chapter 5] in which the primary function is the provision of diagnosis, of treatment, and of medical and nursing services, surgical or nonsurgical, for two or more nonrelated individuals, including hospitals known by varying nomenclature or designation such as sanatoriums, sanitariums and general, acute, rehabilitation, chronic disease, short-term, long-term, outpatient surgical, and inpatient or outpatient maternity hospitals.”).

²⁴ Section 32.1-124 (2004); see also *Simopoulos v. Virginia*, 462 U.S. 506, 611 n.3 (1983) (noting that physicians’ offices are excluded from hospital licensing statutes and regulations unless principally used for performing surgery).

²⁵ See *King*, 195 Va. at 1089, 81 S.E.2d at 590-91; 1983-1984 Op. Va. Att’y Gen., *supra* note 19, at 87-88.

²⁶ *Kisley*, 212 Va. at 697, 187 S.E.2d at 171; *Bd. of County Supvrs. v. Carper*, 200 Va. 653, 660, 107 S.E.2d 390, 395 (1959); *National Linen*, 196 Va. at 279, 83 S.E.2d at 403.

²⁷ *Id.* at 280-81, 83 S.E.2d at 403-04.

²⁸ In 1973, the Supreme Court of the United States found that the Fourteenth Amendment prohibited state laws against abortion. See *Roe v. Wade*, 410 U.S. 113 (1973). In 1992, the Court revisited its *Roe* holding. See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). While affirming *Roe*, the Court disregarded the trimester framework and adopted the “undue burden” standard for challenges to abortion laws. *Id.* at 872-74. Subsequently, the Court applied the standard developed in *Roe* and *Casey* and struck down Nebraska’s ban on partial birth abortions because the lack of a health exception constituted an “undue burden.” *Stenberg v. Carhart*, 530 U.S. 914 (2000). Most recently, the Court concluded that the invalidation of New Hampshire’s parental notification law for lack of a health exception was improper. *Ayotte v. Planned Parenthood*, 126 S. Ct. 961 (2006). Rather, the Court held that federal courts should “enjoin only the unconstitutional applications of a statute while leaving other applications in force.” *Id.* at 967.

²⁹ *Greenville Women’s Clinic v. Comm’r, S.C. Dep’t of Health*, 317 F.3d 357, 359 (4th Cir. 2002).

³⁰ *Greenville Women’s Clinic v. Bryant*, 222 F.3d 157, 159 (4th Cir. 2000) (citation omitted).

³¹ *Id.* at 174.

³² *Id.*

³³ *Id.* at 170 (alterations in original) (quoting *Casey*, 505 U.S. at 874).

³⁴ *Id.*

³⁵ For instance, the Fifth Circuit Court of Appeals has affirmed the constitutionality of regulating abortion clinics. See *Women’s Med. Ctr. v. Bell*, 248 F.3d 411 (5th Cir. 2001). The Texas regulations included fines and licensure revocation if the regulations were violated. *Id.* at 422. Thus, the regulations were

quasi-criminal, thereby requiring that the terms be defined ““with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”” *Id.* (quoting *United States v. Clinical Leasing Serv., Inc.*, 925 F.2d 120, 122 (5th Cir. 1991) (quoting *Kolender v. Lawson*, 461 U.S. 352, 357 (1983))). The Fifth Circuit struck down three of the regulations for vagueness. *Id.* at 122-23.

³⁶Of necessity, the City Council must comply with the authority granted to it under the Manassas Charter and any amendments thereto.

³⁷*See* § 32.1-125.1 (2004) (governing inspection of hospitals by state agencies).

OP. NO. 07-065

COUNTIES, CITIES AND TOWNS: VIRGINIA INDOOR CLEAN AIR ACT.

Locality may not impose restrictions on smoking that are more stringent than those authorized by Act; may not ban all smoking in restaurants.

THE HONORABLE BILL JANIS
MEMBER, HOUSE OF DELEGATES
JULY 10, 2007

ISSUE PRESENTED

You inquire whether a locality is authorized to regulate or place restrictions on smoking that are stricter than those imposed by the Virginia Clean Indoor Air Act. Specifically, you ask whether a locality effectively may ban smoking in all restaurants by denying restaurants a zoning permit unless the restaurants agree to be smoke-free.

RESPONSE

It is my opinion that a locality may not impose restrictions on smoking that are more stringent than those authorized by the Virginia Clean Indoor Air Act. It further is my opinion that a locality may not ban all smoking in restaurants.

APPLICABLE LAW AND DISCUSSION

Section 15.2-2803(B), a portion of the Virginia Indoor Clean Air Act¹ (“Act”), provides that “[u]nless specifically permitted in [Chapter 28], ordinances adopted after January 1, 1990, shall not contain provisions or standards which exceed those established in this chapter.”

Further, § 15.2-2801 of the Act, which is titled “[s]tatewide regulation of smoking,”² provides that:

C. Any restaurant having a seating capacity of fifty or more persons shall have a designated no-smoking area sufficient to meet customer demand. In determining the extent of the no-smoking area, the following shall not be included as seating capacity: (i) seats in any bar or lounge area of a restaurant and (ii) seats in any separate room or section of a restaurant which is used exclusively for private functions.

In § 15.2-2800 of the Act, the General Assembly defines “restaurant” as “any building, structure, or area, excluding a bar or lounge area as defined in [Chapter 28], having a seating capacity of fifty or more patrons, where food is available for eating on the premises, in consideration of payment.” Therefore, the Act does not contemplate a total ban on all smoking in restaurants.

The basic issue you raise relates to the legal doctrine of preemption. An ordinance is inconsistent with state law when state law preempts such local regulation either expressly by prohibiting local regulation or by enacting state regulations so comprehensive that the state may be considered to occupy the entire field.³ “[W]hen the General Assembly intends to preempt a field, it knows how to express its intention.”⁴ In this instance, the General Assembly clearly has expressed its intention to preempt local regulation of smoking. Section 15.2-2803(B) provides that ordinances adopted by localities “shall not contain provisions or standards which exceed those established” in the Act. Under current law, localities may not impose smoking restrictions that exceed those imposed by the Act.⁵

CONCLUSION

Accordingly, it is my opinion that a locality may not impose restrictions on smoking that are more stringent than those authorized by the Virginia Clean Indoor Air Act. It further is my opinion that a locality may not ban all smoking in restaurants.

¹VA. CODE ANN. tit. 15.2, ch. 28, §§ 15.2-2800 to 15.2-2810 (2003).

²While the title or headline of a statute “is no part of the act itself, ... it does tell us what the legislature had in mind.” *Sauer v. Monroe*, 171 Va. 421, 425, 199 S.E. 487, 488 (1938); *accord Chambers v. Higgins*, 169 Va. 345, 351, 193 S.E. 531, 533 (1937).

³*See Lynchburg v. Dominion Theatres, Inc.*, 175 Va. 35, 40, 7 S.E.2d 157, 159 (1940); *Op. Va. Att’y Gen.*: 2001 at 141, 142; 1983-1984 at 86, 87; *c.f. King v. County of Arlington*, 195 Va. 1084, 1087-88, 81 S.E.2d 587, 590 (1954) (noting that state did not occupy entire field; therefore, locality could govern by ordinance); *see also Hanbury v. Commonwealth*, 203 Va. 182, 185, 122 S.E.2d 911, 913 (1961) (noting that ordinance conflicting with state law of general character and state-wide application is invalid).

⁴*Res. Conservation Mgmt., Inc. v. Bd. of Supvrs.*, 238 Va. 15, 23, 380 S.E.2d 879, 884 (1989), *quoted in* 1993 *Op. Va. Att’y Gen.* 173, 176.

⁵However, § 15.2-2803(A) provides that ordinances “enacted by a locality prior to January 1, 1990,” may not “be deemed invalid or unenforceable” because they are inconsistent with the Act.

OP. NO. 07-047

COUNTIES, CITIES AND TOWNS: VIRGINIA WATER AND WASTE AUTHORITIES ACT – MISCELLANEOUS.

HIGHWAYS, BRIDGES AND FERRIES: TRANSPORTATION BOARD – MISCELLANEOUS PROVISIONS.

Commonwealth Transportation Commissioner may not permit installation of water line along road acquired by Commonwealth by prescriptive easement when such road merely has been used as public road. Unless prescriptive easement included use of pipeline within right-of-way of such public road, installation of water line creates

additional servitude or burden on owner's land outside scope of existing prescriptive easement; any such use must be examined in light of current eminent domain laws to determine whether taking has occurred that requires just compensation.

THE HONORABLE R. CREIGH DEEDS
MEMBER, SENATE OF VIRGINIA
AUGUST 7, 2007

ISSUE PRESENTED

You ask whether § 15.2-5146 would permit the Commonwealth Transportation Commissioner, acting through the Department of Transportation, to grant permission to the Bath County Service Authority to install a water line serving the public within the confines of a “public road” for which the Commonwealth holds only a prescriptive easement for limited purposes.

RESPONSE

It is my opinion that the Commonwealth Transportation Commissioner may not permit installation of a water line along a road acquired by the Commonwealth by prescriptive easement when such road merely has been used as a public road. Unless the Commonwealth can establish evidence of continuous adverse prescriptive use of an easement for a public pipeline within the right-of-way of such public road, it is my opinion that installation of a water line creates an additional servitude or burden on the owner's land outside the scope of the existing prescriptive easement. Therefore, it is my opinion that any use of the owner's land for purposes of a water line must be examined in light of current eminent domain laws to determine whether a taking has occurred that requires just compensation.¹

BACKGROUND

The road about which you inquire is State Route 687, a secondary highway or road which runs through portions of Bath County. You state that the Bath County Board of Supervisors has appropriated funds to the Bath County Public Service Authority (the “Authority”) for the purpose of expanding its public water system by installing a service line along and under portions of State Route 687. You note that the owner of certain adjoining property on both sides of the road, who owns fee title to the land, objects to the installation. You state that Route 687 has been maintained and used as a public road² for over 100 years, without permission of the present or former landowners. Further, the Department of Transportation (the “Department”) claims a thirty-foot prescriptive easement for the road pursuant to § 33.1-184. You indicate that the public land records do not disclose a grant or deed conveying fee title or an easement for the road to Bath County or the Department. You note that the Department is willing to permit installation of the water line.³

Therefore, you seek an opinion regarding the legal effect of the potential Department grant of permission for the water line to the Authority absent authorization from the owner of the fee title. Further, you ask whether such installation would constitute a taking of the owner's property without just compensation contrary to Article I, § 11 of the Constitution of Virginia.⁴

APPLICABLE LAW AND DISCUSSION

Section 33.1-69 establishes the Department's "control, supervision, management and jurisdiction over the secondary system of state highways." Chapter 51 of Title 15.2, §§ 15.2-5100 to 15.2-5158, comprises the Virginia Water and Waste Authorities Act (the "Act"). Section 15.2-5146 provides, in part, that:

The Commonwealth hereby consents to the use of all lands above or under water and owned or controlled by it which are necessary for the construction, improvement, operation or maintenance of any ... water or waste system; except that the use of any portion between the right-of-way limits of any primary or secondary highway in this Commonwealth shall be subject to the approval of the Commonwealth Transportation Commissioner.^[5]

The broad statutory consent of the Commonwealth in § 15.2-5146 to use "all" its lands for purposes of a water system is subject to the qualification that when such system uses the right-of-way of a primary or secondary highway, the Commissioner's approval is required. It is my understanding that such approval customarily is issued through the Department in the form of a written permit.

The permit or consent process provides the Department with the opportunity to review the engineering plans for the system and coordinate the plans with current highway design and anticipated changes. Additionally, the Department may consider traffic management issues and safety procedures to protect the public during construction. However, the statutory consent process is not intended to affect the landowner's property rights. Although the purpose of a water system is to serve the public,⁶ I see no evidence that the General Assembly intends § 15.2-5146 to authorize the taking or damaging of private property contrary to Article I, § 11 of the Virginia Constitution.

Based on the facts you provide and for purposes of this opinion, I assume that State Route 687 is a public road pursuant to § 33.1-184, which provides that:

[W]hen a way has been regularly or periodically worked by road officials as a public road and used by the public as such continuously for a period of twenty years, proof of these facts shall be conclusive evidence that the same is a public road. In all such cases the center of the general line of passage, conforming to the ancient landmarks where such exist, shall be presumed to be the center of the way and in the absence of proof to the contrary the width shall be presumed to be thirty feet.^[7]

Assuming the criteria of § 33.1-184 are met and Route 687 conclusively is presumed to be a "public road," it is my opinion that the Commonwealth has acquired only a prescriptive easement to use the road for limited purposes reasonably consistent with the character and extent of use during the prescriptive period. "When ... an easement by prescription has been established, the width of the way and the extent of the servitude is

limited to the character of use during the prescriptive period.”⁸ However, “a reasonable increase in the degree of use may be permissible in such an easement.”⁹ For example, creating a bridle path within an existing road easement was held to be of the same nature and character as the original use, the difference being in degree only¹⁰ and lowering the grade of a rural road as an improvement did not constitute an additional servitude.¹¹ However, where the Commonwealth has acquired only the right to pass over and along a road, erection of telegraph poles and wires within the right-of-way or use as a railroad constitutes an additional servitude for which an owner would be entitled to compensation for such a taking.¹²

The scope of authorized public use of State Route 687 under the prescriptive easement includes the right to use the road in the same general manner in which it continuously has been used during the prescriptive period. For the public, this may include transportation by motor vehicles, horse and wagon, or foot traffic. Assuming Route 687 regularly or periodically has been worked by road officials, the Department would have the right to continue to maintain and improve the road to accommodate such modes of transportation. Thus, the facts evidencing the nature or character and extent of the continuous adverse public use of the road during the prescriptive period are critical to determine the scope of such use acquired by the Commonwealth. This is consistent with Virginia common law involving prescriptive easements.

CONCLUSION

Accordingly, it is my opinion that the Commonwealth Transportation Commissioner may not permit installation of a water line along a road acquired by the Commonwealth by prescriptive easement when such road merely has been used as a public road. Unless the Commonwealth can establish evidence of continuous adverse prescriptive use of an easement for a public pipeline within the right-of-way of such public road, it is my opinion that installation of a water line creates an additional servitude or burden on the owner’s land outside the scope of the existing prescriptive easement. Therefore, it is my opinion that any use of the owner’s land for purposes of a water line must be examined in light of current eminent domain laws to determine whether a taking has occurred that requires just compensation.¹³

¹ See generally VA. CODE ANN. § 1-219.1 (Supp. 2007); VA. CODE ANN. §§ 15.2-1800, 15.2-1814 (Supp. 2007); VA. CODE ANN. § 25.1-108 (Supp. 2007).

² For purposes of this opinion, I will assume that the road has been in continual use for the 100-year period.

³ I am advised that the Right-of-Way and Utilities Division in the Department’s Staunton District Office states that it would make any permit granted to the Authority expressly subject to the rights and interests of the current owner of fee title to the land underlying the road.

⁴ Article I, § 11 provides that “the General Assembly shall not pass ... any law whereby private property shall be taken or damaged for public uses, without just compensation, the term ‘public uses’ to be defined by the General Assembly.” The General Assembly has defined the term “public uses” in the context of § 11. See § 1-219.1(A).

⁵ Compare VA. CONST. art. VII, § 8 (requiring prior consent of city or town to use its streets or grounds for gas, water, or other utility uses).

⁶Section 15.2-5100 provides that the Act “shall constitute full and complete authority, without regard to the provisions of any other law for the doing of the acts herein authorized, and shall be liberally construed” to accomplish its purposes. Significantly, however, other provisions in the Act designed to further its purposes expressly grant broad authorization to an authority to acquire lands, or rights in land or water, through the exercise of the right of eminent domain. *See* § 15.2-5114(6) (Supp. 2007). “‘Authority’ means an authority created under the provisions of § 15.2-5102 or Article 6 (§ 15.2-5152 et seq.) of [Chapter 51] or, if any such authority has been abolished, the entity succeeding to the principal functions thereof.” Section 15.2-5101 (Supp. 2007).

⁷*Compare* *Martin v. Moore*, 263 Va. 640, 561 S.E.2d 672 (2002) (noting requirements for establishing private easement by prescription). “The law applicable to establishment of prescriptive easements is settled. In order to establish a private right of way by prescription over property of another, the claimant must prove, by clear and convincing evidence, that the claimant’s use of the roadway in question was adverse, under a claim of right, exclusive, continuous, uninterrupted, and with the knowledge and acquiescence of the owner of the land over which it passes, and that the use has continued for at least 20 years.” *Id.* at 645, 561 S.E.2d at 675.

⁸*Willis v. Magette*, 254 Va. 198, 204; 491 S.E.2d 735, 738 (1997).

⁹*Id.*

¹⁰*Va. Hot Springs Co. v. Lowman*, 126 Va. 424, 101 S.E. 326 (1919). This case recites the general rule that a right-of-way acquired for one purpose cannot be used for another purpose not within the scope of the prescriptive use. *Id.* at 430, 101 S.E. at 328; *see also*, *Luther v. Jeffers*, 387 F. Supp. 182 (W.D.Va. 1974) (holding that prescriptive easement over servient tract for normal rural transportation cannot be converted for use by heavy coal trucks or heavy mining equipment).

¹¹*Anderson v. Stuarts Draft Water Co.*, 197 Va. 36, 87 S.E.2d 756 (1955). *Anderson* involved a highway right-of-way in which an existing pipeline had to be relocated to accommodate a change in the road grade. *Id.* The *Anderson* court noted that a servitude for an urban street generally is considered more comprehensive than a servitude for a rural highway in the country. *Id.* at 41-42, 87 S.E.2d 760-61. In discussing the rights of the owner of the underlying fee, states that such owner has the right to convey to another the right to lay a pipeline under the bed of the road, provided the road is not obstructed. *Id.* at 41, 87 S.E.2d at 760.

¹²*W. Union Tel. Co. v. Williams*, 86 Va. 696, 703, 11 S.E. 106, 108 (1890).

¹³*See supra* note 1.

OP. NO. 06-061

CRIMES AND OFFENSES GENERALLY: CRIMES AGAINST THE PERSON – ASSAULTS AND BODILY WOUNDINGS.

COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS.

Juvenile and Domestic Relations District Court judge may reject plea agreement when arrest warrant is amended from assault and battery against family or household member to ‘simple’ assault.

THE HONORABLE MICHAEL J. VALENTINE
JUDGE, JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT
NINETEENTH JUDICIAL DISTRICT
MARCH 22, 2007

ISSUE PRESENTED

You ask whether a Juvenile and Domestic Relations District Court judge has the authority to reject a plea agreement when an arrest warrant is amended from assault and battery against a family or household member under § 18.2-57.2 to “simple” assault under § 18.2-57.

RESPONSE

It is my opinion that a Juvenile and Domestic Relations District Court judge may reject a plea agreement when an arrest warrant is amended from assault and battery against a family or household member under § 18.2-57.2 to “simple” assault under § 18.2-57.¹

BACKGROUND

You relate that plea agreements are presented to the juvenile and domestic relations district court in which arrest warrants for alleged violations of § 18.2-57.2 are amended to allege violations of § 18.2-57, even though the parties involved are related, have a child in common, or have lived together.² You also relate that you believe such arrest warrants are amended to avoid the dispositional requirements of § 18.2-57.3. You inquire what authority courts have to deny an amendment to an arrest warrant for an alleged violation of § 18.2-57.2. In other words, you ask whether a court may refuse to accept a plea agreement involving the amendment of an arrest warrant from § 18.2-57.2 to § 18.2-57.

APPLICABLE LAW AND DISCUSSION

The General Assembly treats violations of § 18.2-57.2 with great concern.³ 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.⁴ Additionally, charges dismissed pursuant to § 18.2-57.2 are ineligible for expungement under § 19.2-392.2.⁵

If an accused person is convicted of assault and battery against a family or household member, and he has two previous convictions of a violation of § 18.2-57.2 or other enumerated crimes, he is guilty of a Class 6 felony.⁶ The penalty for a conviction of simple assault, however, does not increase for repeat offenses when the victim is a family or household member, and it does not carry the same dispositional requirements for first time offenders.⁷

In the fact situation you present, the plea agreement would amend the warrant from a charge under § 18.2-57.2, which might result in an increased punishment in a subsequent proceeding,⁸ to a charge under § 18.2-57, which does not increase punishment for a subsequent offense.⁹ A prosecutor has broad discretion in the institution and recommended disposition of criminal charges;¹⁰ however, a court generally has the authority to either accept or reject the plea agreement.¹¹ A court may reject a plea agreement if, after considering “the entire criminal event and ... the defendant’s prior criminal record,” it determines that the plea agreement does not “enable[] the court to dispose of the case in a manner commensurate with the seriousness of the criminal charges and the character and background of the defendant.”¹²

CONCLUSION

Accordingly, it is my opinion that a Juvenile and Domestic Relations District Court judge may reject a plea agreement when an arrest warrant is amended from assault

and battery against a family or household member under § 18.2-57.2 to “simple” assault under § 18.2-57.¹³

¹If a warrant charging a violation of § 18.2-57.2 is amended to charge a violation of § 18.2-57, that amendment would not affect the jurisdiction of the juvenile court. Section 16.1-241(J) provides the juvenile court with jurisdiction over all offenses in which the defendant and the victim are household members. An amendment to such warrant would change the potential punishment, but not the status of the defendant or the victim. *See infra* notes 6-7 and accompanying text.

²For purposes of this opinion, I will assume that the parties involved meet the statutory definition of family or household member under § 16.1-228. *See* VA. CODE ANN. § 18.2-57.2(D) (2004) (applying definition of “family or household member” in § 16.1-228 to this section).

³2005 Op. Va. Att’y Gen. 79, 80.

⁴2004 Op. Va. Att’y Gen. 96, 96.

⁵2005 Op. Va. Att’y Gen., *supra* note 3, at 80.

⁶Section 18.2-57.2(B). The other eligible crimes are (a) malicious wounding in violation of § 18.2-51; (b) aggravated malicious wounding in violation of § 18.2-51.2; (c) malicious bodily injury by means of a substance in violation of § 18.2-52; or (d) an offense under the law of any other jurisdiction which has the same elements of any of the above offenses. *Id.* A conviction of a Class 6 felony is punishable by “a term of imprisonment of not less than one year nor more than five years, or in the discretion of the jury or the court . . . , confinement in jail for not more than 12 months and a fine of not more than \$2500, either or both.” Section 18.2-10 (Supp. 2006).

⁷*See* § 18.2-57 (Supp. 2006).

⁸*See supra* note 6 and accompanying text.

⁹*See supra* note 7 and accompanying text.

¹⁰*See In re Horan*, 271 Va. 258, 263-64, 2006 Va. LEXIS 23, *12-14 (2006).

¹¹*See* VA. SUP. CT. R. 3A:8(c)(2) (“[T]he court may accept or reject the agreement, or may defer its decision as to the acceptance or rejection until there has been an opportunity to consider a presentence report.”); *but see* 1997 Op. Va. Att’y Gen. 80, 80-81 (holding that court could not accept plea agreement that did not comply with statute’s plain and unambiguous dispositional requirements).

¹²*State v. Sears*, 542 S.E.2d 863, 867 (W.Va. 2000) (quoting *Myers v. Frazier*, 319 S.E.2d 782, 790-91 (1984)); *see also Wilson v. Commonwealth*, 272 Va. 19, 30, 630 S.E.2d 326, 332 (2006) (noting that trial court judge is free to reject terms of plea agreement).

¹³*See supra* note 1.

OP. NO. 07-012

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

Retired U.S. Army counterintelligence special agents meet definition of ‘qualified retired law enforcement officer’ for purposes of § 926C(c)(2) of Law Enforcement Officers Safety Act of 2004; whether remaining requirements of Act are satisfied is determination of fact and not question of law.

THE HONORABLE CHRISTOPHER A. CORBETT
COMMONWEALTH’S ATTORNEY FOR PATRICK COUNTY
JUNE 26, 2007

ISSUE PRESENTED

You ask whether the federal Law Enforcement Officers Safety Act of 2004 exempts U.S. Army counterintelligence special agents (“Agents”) who have retired from service from the requirement to obtain a permit to carry a concealed handgun in the Commonwealth.

RESPONSE

It is my opinion that U.S. Army counterintelligence special agents who have retired from service meet the definition of a “qualified retired law enforcement officer” for purposes of § 926C(c)(2) of the Law Enforcement Officers Safety Act of 2004. However, whether the remaining requirements of the Act are satisfied is a question of fact and not a question of the interpretation of state or federal law.¹

APPLICABLE LAW AND DISCUSSION

Federal law supersedes and limits state law pursuant to the Supremacy Clause of the Constitution of the United States.² Therefore, the federal act, Law Enforcement Officers Safety Act of 2004³ (“Safety Act”), controls the issue about which you inquire.⁴ Section 926C(c) of the Safety Act defines a “qualified retired law enforcement officer” as

an individual who—

(1) retired in good standing from service with a public agency as a law enforcement officer, other than for reasons of mental instability;

(2) before such retirement, *was 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 had statutory powers of arrest;*

(3)(A) before such retirement, was regularly employed as a law enforcement officer for an aggregate of 15 years or more; or

(B) retired from service with such agency, after completing any applicable probationary period of such service, due to a service-connected disability, as determined by such agency;

(4) has a nonforfeitable right to benefits under the retirement plan of the agency;

(5) during the most recent 12-month period, has met, at the expense of the individual, the State’s standards for training and qualification for active law enforcement officers to carry firearms;

(6) is not under the influence of alcohol or another intoxicating or hallucinatory drug or substance; and

(7) is not prohibited by Federal law from receiving a firearm.
[Emphasis added.]

Section 4-2 of Army Regulation 381-20 outlines investigations under the jurisdiction of Agents.⁵ Additionally, § 8-12(a) of Army Regulation 381-20 grants apprehension authority to Agents.⁶ Since Agents are authorized to investigate and have statutory powers to arrest within their jurisdiction, it is my opinion that the second requirement of the Safety Act is satisfied.⁷

Whether retired Agents satisfy the first,⁸ third,⁹ fourth,¹⁰ fifth,¹¹ sixth,¹² and seventh¹³ qualifications is a factual determination and not a matter of the interpretation of state law.¹⁴ Should retired Agents satisfy the remaining six qualifications, they would meet the definition of a “qualified retired law enforcement officer” for purposes of the Safety Act and would not be subject to the requirements of § 18.2-308.

CONCLUSION

Accordingly, it is my opinion that U.S. Army counterintelligence special agents who have retired from service meet the definition of a “qualified retired law enforcement officer” for purposes of § 926C(c)(2) of the Law Enforcement Officers Safety Act of 2004. However, whether the remaining requirements of the Act are satisfied is a question of fact and not a question of the interpretation of state or federal law.¹⁵

¹ See *infra* note 14 and accompanying text.

² See U.S. CONST. art. VI, cl. 2; *but see* 18 U.S.C.S. § 926C(b) (LexisNexis 2005) (placing limits on application of Safety Act with respect to proscriptions by private property owners and state properties).

³ See Pub. L. No. 108-277, 118 Stat. 865 (codified at 18 U.S.C.S. §§ 926B–926C).

⁴ I note, however, that retired Agents do not meet the requirements for the Commonwealth’s exemption for law-enforcement officers carrying concealed weapons. See VA. CODE ANN. § 18.2-308(B)(7) (Supp. 2006) (providing exemption to local or state law-enforcement officers; statute does not mention or include federal law-enforcement officers).

⁵ See DEP’T OF THE ARMY, ARMY REG. 381-20, MIL. INTELLIGENCE, THE ARMY COUNTERINTELLIGENCE PROGRAM, § 4-2, at *13 (Nov. 15, 1993), available at <http://fas.org/irp////////doddir/army/ar381-20.pdf> (noting examples of crimes to investigate include treason, espionage, and terrorist activities).

⁶ See *id.*, § 8-12(a), at *24 (authorizing Agents “to apprehend any person subject to” Uniform Code of Military Justice regardless of location; citing Rules for Courtmartial 302 as additional authority). Rule 302(a)(1) defines “apprehension” as “the taking of a person into custody.” JOINT SERV. COMM. ON MIL. JUSTICE, MANUAL FOR COURTS-MARTIAL UNITED STATES, Rule 302 (“Apprehension”), at *66 (2005 ed.), available at <http://www.army.mil/usapa/epubs/pdf/mcm.pdf>. “Apprehension is the equivalent of ‘arrest’ in civilian terminology.” *Id.* (“Discussion” Rule 302(a)(1)).

⁷ See 18 U.S.C.S. § 926C(c)(2) (LexisNexis 2005).

⁸ See 18 U.S.C.S. § 926C(c)(1) (LexisNexis 2005) (providing that officer must retire in good standing from agency).

⁹ See 18 U.S.C.S. § 926C(c)(3) (LexisNexis 2005) (providing that officer serve agency for minimum of fifteen years before retirement or retire due to service-related disability).

¹⁰ See 18 U.S.C.S. § 926C(c)(4) (LexisNexis 2005) (providing that officer must have nonforfeitable right to benefits under retirement plan of agency).

¹¹ See 18 U.S.C.S. § 926C(c)(5) (LexisNexis 2005) (providing that officer must meet certain state standards for active law enforcement officers).

¹² See 18 U.S.C.S. § 926C(c)(6) (LexisNexis 2005) (providing that officer may not be under influence of alcohol or narcotics).

¹³ See 18 U.S.C.S. § 926C(c)(7) (LexisNexis 2005) (providing that officer may not be prohibited by federal law from receiving firearm).

¹⁴ 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 (interpreting § 2.1-118, predecessor to § 2.2-505); accord 1991 Op. Va. Att’y Gen. 122, 124.

¹⁵ See *id.* and accompanying text.

OP. NO. 06-093

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING MORALS AND DECENCY – CHARITABLE GAMING.

Definition of ‘instant bingo’ and ‘pull tabs’ does not authorize use of electronic devices that display facsimiles of instant bingo cards or pull tabs; games may not be played using equipment that merely dispenses receipt showing amount of winnings due to player upon completion of game.

MR. HARRY M. DURHAM
INTERIM DIRECTOR, DEPARTMENT OF CHARITABLE GAMING
JUNE 20, 2007

ISSUES PRESENTED

You ask whether the definition of “instant bingo” and “pull tabs” in § 18.2-340.16 allows the playing of instant bingo or pull tabs by using electronic equipment that displays electronic facsimiles of cards.¹ Further, you ask whether such games may be played using equipment that dispenses a receipt showing the amount of any monies due when the player ends the game instead of dispensing a card to the player.

RESPONSE

It is my opinion that the definition of “instant bingo” and “pull tabs” does not authorize the use of electronic devices that display facsimiles of instant bingo cards or pull tabs. It further is my opinion that such games may not be played using equipment that merely dispenses a receipt showing the amount of any winnings due to the player upon completion of the game.

BACKGROUND

House Bill 525 was introduced in the 2006 Regular Session of the General Assembly on January 11, 2006,² and became law on July 1, 2006³ (“2006 Amendments”). Among other things, the 2006 Amendments added “pull tabs” and “seal cards” to the definition of “instant bingo” and removed “pull tabs” and “seal cards” from the definition of “raffle.”⁴ Further, the 2006 Amendments deleted the words “made completely of paper or paper products” from the definition of “instant bingo,” “pull tabs,” or “seal cards.”⁵ You relate that a manufacturer of electronic gaming equipment has approached the Department of Charitable Gaming and the Charitable Gaming Board about distributing equipment to organizations authorized to conduct charitable gaming to play instant bingo and pull tab games electronically. You state that such machines would allow players to play instant bingo and pull tab games by inserting

money into a machine and selecting games from a screen menu. You relate that the player plays a selected game by touching an electronic facsimile of a card that is displayed on the screen. The touch “opens” the card and an electronic facsimile of the open card is displayed to reveal potential winning numbers or symbols. When all games are completed, the machine calculates the player’s winnings or refund and issues a receipt. You state that the player may present the receipt to a member of the organization for payment.

APPLICABLE LAW AND DISCUSSION

Section 18.2-340.15(A) provides that “[c]haritable gaming as authorized herein shall be permitted in the Commonwealth as a means of funding qualified organizations but shall be conducted only in strict compliance with the provisions of [Article 1.1:1 of Chapter 8 of Title 18.2].”

Section 18.2-340.22(A) provides that Article 1.1:1 “permits qualified organizations to conduct raffles, bingo and instant bingo games. All games not explicitly authorized by [Article 1.1:1] or [Charitable Gaming] Board regulations adopted in accordance with § 18.2-340.18 [sic] are prohibited.”⁶

Section 18.2-340.16 of Article 1.1:1 defines “bingo” as

a specific game of chance played with (i) individual cards having randomly numbered squares ranging from one to seventy-five, (ii) *Department-approved electronic devices that display facsimiles of bingo cards and are used for the purpose of marking and monitoring players’ cards as numbers are called*, or (iii) Department-approved cards, in which prizes are awarded on the basis of designated numbers on such cards conforming to a predetermined pattern of numbers selected at random. [Emphasis added.]

Section 18.2-340.19(A)(5) provides that the Charitable Gaming Board may adopt regulations that “[d]efine electronic and mechanical equipment used in the conduct of charitable gaming.” Section 18.2-340.37(A) provides that any person who violates the provisions of Article 1.1:1, Chapter 8 of Title 18.2⁷ is guilty of a Class 1 misdemeanor. Effective July 1, 2006,⁸ the 2006 Amendments to § 18.2-340.16 provide that:

“Instant bingo,” “*pull tabs*,” or “*seal cards*” means a ~~specific game~~ *games* of chance played by the random selection of one or more individually prepacked cards, ~~made completely of paper or paper products~~, with winners being determined by the preprinted or *predetermined* appearance of concealed letters, numbers or symbols that must be exposed by the player to determine wins and losses and may include the use of a seal card which conceals one or more numbers or symbols that have been designated in advance as prize winners. Such cards may be dispensed by electronic or mechanical equipment.^[9]

No specific reference to electronic gaming equipment or electronic facsimiles of cards other than those in §§ 18.2-340.16 and 18.2-340.19(A) appears in Article 1.1:1.

“[T]he primary object of statutory construction [and interpretation] is to ascertain and give effect to legislative intent.”¹⁰ In addition, the plain language of a statute should be given its clear and unambiguous meaning.¹¹ When the General Assembly amends a statutory provision, a presumption arises that the legislature intended to change existing law.¹² A related presumption is that the amendment to a law is intended to have some meaning and is not intended to be unnecessary or vain.¹³ Nevertheless, when the General Assembly includes specific language in one section of an Act but omits language from another section, courts presume that the omission was intentional.¹⁴ Finally, statutes that impose penalties must be strictly construed.¹⁵

The General Assembly has not defined “card” as used in Article 1.1:1. When a particular word in a statute is not defined therein, the word must be given its ordinary meaning.¹⁶ The ordinary meaning of “card” is “a flat stiff piece of paper or thin paperboard suitable for writing or printing.”¹⁷ The deletion of the words “made completely of paper or paper products” from the definitions of “instant bingo” and “pull tabs” presumably was intended to change the law to permit such games to be played on cards made of something other than paper or paper products. However, the use of “Department-approved electronic devices that display facsimiles of bingo cards” in the definition of “bingo” also suggests that the General Assembly specifically would have authorized the use of such devices for the playing of “instant bingo” and “pull tabs” if it had intended the 2006 Amendments to permit the use of such devices to display electronic facsimiles of instant bingo or pull tab cards.¹⁸

Additionally, Article 1.1:1 legalizes certain games that would otherwise be illegal gambling under § 18.2-325. Under § 18.2-340.22, however, only those games “explicitly authorized” by Article 1.1:1 or Board regulations are lawful. Prior opinions of the Attorney General have construed strictly the definitions of “bingo,” “raffle,” and “instant bingo” and have concluded that organizations may conduct only those activities that fall within the specific definitions established in § 18.2-340.16.¹⁹ The definition of “instant bingo” and “pull tabs” does not explicitly authorize those games to be played with electronic devices displaying facsimiles of instant bingo or pull tab cards. Therefore, I must conclude that the definition of “instant bingo” and “pull tabs” does not authorize the use of such electronic devices.

You next ask whether the definition of “instant bingo” and “pull tabs” permits the use of machines that dispense receipts rather than cards. The General Assembly has not defined “dispense” as used in Article 1.1:1.²⁰ The plain meaning of “dispense” is “to deal out in portions: DISTRIBUTE.”²¹ Thus, the definition of “instant bingo” and “pull tabs” would permit the cards used to play such games to be distributed by electronic or mechanical equipment. The term “receipts” is not separately defined in § 18.2-340.16 and is not mentioned in the definition of “instant bingo” and “pull tabs.” There is no mention of “receipts” in Article 1.1:1 that is relevant to your inquiry.²²

The plain meaning of “receipt” is “a writing acknowledging the taking or receiving of goods or money delivered or paid.”²³ Therefore, I conclude that “instant bingo” and “pull tab” games may not be played using equipment that merely dispenses a receipt showing the amount of any winnings due to the player.

CONCLUSION

Accordingly, it is my opinion that the definition of “instant bingo” and “pull tabs” does not authorize the use of electronic devices that display facsimiles of instant bingo cards or pull tabs. It further is my opinion that such games may not be played using equipment that merely dispenses a receipt showing the amount of any winnings due to the player upon completion of the game.

¹For purposes of this opinion, I presume that you use the terms “cards” and “tickets” interchangeably. Because the definition of “instant bingo” and “pull tabs” uses the term “cards” rather than “tickets,” I will use the term “cards” in connection with your inquiry.

²2006 H.B. 525 (status), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=061&typ=bil&val=hb525>.

³*Id.*; see also 2006 Va. Acts ch. 644, at 854.

⁴*Id.* at 854-55 (amending § 18.2-340.16).

⁵*Id.* at 855.

⁶The reference to § 18.2-340.18 appears to contain a typographical error. Section 18.2-340.18 lists the powers of the Department of Charitable Gaming, rather than those of the Charitable Gaming Board. It actually is § 18.2-340.19 that authorizes the Charitable Gaming Board to adopt regulations governing gaming. Section 18.2-340.19(B) provides that “the Board may, by regulation, approve variations to the card formats for bingo games provided such variations result in bingo games that are conducted in a manner consistent with the provisions of [Article 1.1:1]. Board-approved variations may include, but are not limited to, bingo games commonly referred to as player selection games and 90-number bingo.”

⁷The sections comprising Article 1.1:1 are codified in scattered sections.

⁸See VA. CODE ANN. § 1-214(A) (2005) (requiring that “laws enacted at a regular session of the General Assembly . . . shall take effect on the first day of July following the adjournment of the regular session”).

⁹See 2006 Va. Acts, *supra* note 3, at 855 (amending definition of “instant bingo” in § 18.2-340.16).

¹⁰Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983); see also 1994 Op. Va. Att’y Gen. 114, 116.

¹¹See Ambrogi v. Koontz, 224 Va. 381, 386, 297 S.E.2d 660, 662 (1982); 2003 Op. Va. Att’y Gen. 52, 54.

¹²See Wisniewski v. Johnson, 223 Va. 141, 144, 286 S.E.2d 223, 224-25 (1982); City of Richmond v. Sutherland, 114 Va. 688, 693, 77 S.E. 470, 472 (1913); 2003 Op. Va. Att’y Gen., *supra* note 11, at 54.

¹³See Cape Henry Towers, Inc. v. Nat’l Gypsum Co., 229 Va. 596, 600, 331 S.E.2d 476, 479 (1985); Williams v. Commonwealth, 190 Va. 280, 293, 56 S.E.2d 537, 543 (1949); 2003 Op. Va. Att’y Gen., *supra* note 11, at 54.

¹⁴The *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); 2005 Op. Va. Att’y Gen. 84, 86 n.14.

¹⁵ See *Harward v. Commonwealth*, 229 Va. 363, 365, 330 S.E.2d 89, 90 (1985); Op. Va. Att’y Gen.: 1991 at 124, 125; 1990 at 263, 263; 1987-1988 at 489, 490.

¹⁶ See *McKeon v. Commonwealth*, 211 Va. 24, 27, 175 S.E.2d 282, 284 (1970); 2005 Op. Va. Att’y Gen. 62, 65.

¹⁷ WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 337 (1993) [hereinafter “WEBSTER’S UNABRIDGED”].

¹⁸ The General Assembly defines “bingo” and “instant bingo” separately. See VA. CODE ANN. § 18.2-340.16 (Supp. 2006). In the definition of “bingo,” the General Assembly has included Department of Charitable Gaming-approved electronic devices, but did not do so in defining “instant bingo.” See *id.* When the General Assembly uses different language in the same act, it is presumed to mean two different things. See 2004 Op. Va. Att’y Gen. 146, 147.

¹⁹ See, e.g., Op. Va. Att’y Gen.: 1993 at 115 (concluding that buddy bingo does not fall within statutory definitions and is not permitted); 1991 at 122 (concluding, under prior law, that duck race that does not fall within statutory definition is not raffle); 1989 at 173 (concluding that “fish bowl” game that does not meet statutory definition is not permitted under Article 1.1, predecessor to Article 1.1:1); see also *Alcoholic Beverage Control Bd. v. VFW*, 10 Va. App. 165, 390 S.E.2d 202 (1990) (holding that licensee did not meet burden of proof to show that “Nevada Club Cards” met statutory definition of “raffle”).

²⁰ See *supra* note 16 and accompanying text.

²¹ WEBSTER’S UNABRIDGED, *supra* note 17, at 653.

²² The terms “receipt” or “receipts” in relation to income or inventory appear in nine sections in Article 1.1:1. See § 18.2-340.16 (Supp. 2006) (defining “gross receipts” and including in definition of “organization,” any nonprofit organization that generates certain amount of annual gross receipts conducting raffles, such gross receipts, less expenses and prizes, exclusively must be used for charitable, educational, community or religious purposes); § 18.2-340.19(A)(1) (Supp. 2006) (mandating that Charitable Gaming Board adopt regulations requiring organizations to use predetermined percentage of gross receipts for specific purposes identified and allowing Board to adopt graduated scale of percentages of gross receipts to be so used) § 18.2-340.23(A) (Supp. 2006) (exempting specified organizations from certain requirements of charitable gaming statutes when annual gross receipts fail to exceed threshold amount; authorizing Department of Charitable Gaming to require organization to file report when gross receipts exceed specified threshold); § 18.2-340.24(B) (Supp. 2006) (providing that organization whose gross receipts from all charitable gaming exceeds or is expected to exceed \$25,000 in calendar year must acquire tax-exempt status pursuant to § 501(c) of United States Internal Revenue Code; Department may issue interim certification of tax-exempt status); § 18.2-340.26:1(B) (Supp. 2006) (providing that proceeds from sale of instant bingo, pull tabs, or seal cards are not counted as organization’s gross receipts when specific conditions of sale are met); § 18.2-340.28(B) (Supp. 2006) (providing that organizations conducting instant bingo, pull tabs, or seal card games are required to maintain records, including written invoice or receipt from nonmember of organization verifying specific payment and inventory information); § 18.2-340.30 (Supp. 2006) (prescribing requirements for filing reports of organization’s gross receipts); § 18.2-340.31(B) (Supp. 2006) (permitting Department to prescribe and charge an organization for audit and administration fees based on percentage of organization’s gross receipts); § 18.2-340.33 (Supp. 2006) (listing number of prohibited practices with respect to organization’s use of gross receipts).

²³ WEBSTER’S UNABRIDGED, *supra* note 17, at 1894.

OP. NO. 07-057

CRIMINAL PROCEDURE: PRELIMINARY HEARING.

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

Authority for law-enforcement officials to interview health care providers to preserve vital blood samples, gather evidence, and secure chain of custody of evidence for use in trials of suspected cases of DUI maiming or manslaughter. Secondary disclosure by hospital personnel of health records obtained by law-enforcement officials pursuant to valid search warrant incidental to criminal investigation of such cases does not violate privacy requirements.

THE HONORABLE DONALD S. CALDWELL
COMMONWEALTH'S ATTORNEY FOR THE CITY OF ROANOKE
SEPTEMBER 14, 2007

ISSUE PRESENTED

You ask whether § 19.2-187.02 authorizes law-enforcement officials to interview health care providers to preserve vital blood samples, gather evidence, and secure the chain of custody of evidence for use in trials of persons charged with maiming or manslaughter while driving under the influence ("DUI"). Additionally, you ask whether the secondary disclosure by hospital personnel of health records obtained by law-enforcement officials pursuant to a valid search warrant that occurs incidental to a criminal investigation of DUI maiming or manslaughter cases violates the privacy requirements of § 32.1-127.1:03.

RESPONSE

It is my opinion that § 19.2-187.02 authorizes law-enforcement officials to interview health care providers to preserve vital blood samples, gather evidence, and secure the chain of custody of evidence for use in trials of suspected cases of DUI maiming or manslaughter. It further is my opinion that the secondary disclosure by hospital personnel of health records obtained by law-enforcement officials pursuant to a valid search warrant that occurs incidental to a criminal investigation of such cases does not violate § 32.1-127.1:03.

APPLICABLE LAW AND DISCUSSION

Section 19.2-187.02 provides that:

A. Notwithstanding any other provision of law, the written reports or records of blood alcohol tests conducted upon persons receiving medical treatment in a hospital or emergency room are admissible in evidence as a business records exception to the hearsay rule in prosecutions for any violation of § 18.2-266 (driving while intoxicated) or a substantially similar local ordinance, § 18.2-36.1 (involuntary manslaughter resulting from driving while intoxicated), ... § 18.2-51.4 (maiming resulting from driving while intoxicated), ... or § 46.2-341.24 (driving a commercial vehicle while intoxicated).

B. The provisions of law pertaining to confidentiality of medical records and medical treatment shall not be applicable to reports or records of blood alcohol tests sought or admitted as evidence under the provisions of this section in prosecutions as specified in subsection A. Owners or custodians of such reports or records may disclose them, in accordance with regulations concerning patient privacy

promulgated by the U.S. Department of Health and Human Services, without obtaining consent or authorization for such disclosure. *No person who is involved in taking blood or conducting blood alcohol tests shall be liable for civil damages for breach of confidentiality or unauthorized release of medical records because of the evidentiary use of blood alcohol test results under this section, or as a result of that person's testimony given pursuant to this section.* [Emphasis added.]

“[A] fundamental rule of statutory construction requires that courts view the entire body of legislation and statutory scheme to determine the ‘true intention of each part.’ In construing statutes, courts should give the fullest possible effect to the legislative intent embodied in the entire statutory enactment.”¹ One must look at the entire statute to ascertain the intent of the General Assembly.²

When examining § 19.2-187.02 in its entirety, it is apparent that the legislative intent is to allow a business records evidentiary exception to the hearsay rule for the written reports or records of blood alcohol tests as well as to provide authority for law-enforcement officials to interview health care providers to preserve vital blood samples, gather evidence, and secure the chain of custody of evidence for use in trial. Section 19.2-187.02 grants civil immunity to any person involved in taking blood or conducting blood alcohol tests who testifies about such procedures or communicates the findings to law-enforcement personnel. Thus, it follows that because the General Assembly has granted immunity to such individuals, it clearly intends that those same individuals would communicate with law-enforcement officials in DUI cases. Otherwise, there would be no need for the General Assembly to provide immunity.

The General Assembly added § 19.2-187.02 to Title 19.2 in 2002.³ However, even case law from prior to the enactment of § 19.2-187.02 supports the above conclusion. A circuit court has held that the inspection of materials that are necessary to lay a proper foundation for the admissibility of a toxicology report is permitted.⁴

Because § 19.2-187.02 directly provides for a “secondary disclosure” of chain of custody and other relevant information during the investigative process, these disclosures cannot violate the privacy requirements in § 32.1-127.1:03.⁵ Additionally, the Federal Health Insurance Portability and Accountability Act of 1996 (HIPPA) permits such disclosures.⁶

CONCLUSION

Accordingly, it is my opinion that § 19.2-187.02 authorizes law-enforcement officials to interview health care providers to preserve vital blood samples, gather evidence, and secure the chain of custody of evidence for use in trials of suspected cases of DUI maiming or manslaughter. It further is my opinion that the secondary disclosure by hospital personnel of health records obtained by law-enforcement officials pursuant to a valid search warrant that occurs incidental to a criminal investigation of such cases does not violate § 32.1-127.1:03.

¹Va. 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)).

²See *Commonwealth v. Jones*, 194 Va. 727, 731, 74 S.E.2d 817, 820 (1953) (noting that to derive true purpose of act, “statute should be construed so as to give effect to its component parts”).

³See 2002 Va. Acts ch. 749, at 1255, 1255.

⁴*Commonwealth v. Faison*, 51 Va. Cir. 1, 2-3 (1999).

⁵See generally 45 C.F.R. § 164.512(f) (2006).

⁶“There is hereby recognized an individual’s right of privacy in the content of his health records. Health records are the property of the health care entity maintaining them, and, except when permitted or required by this section *or by other provisions of state law*, no health care entity, or other person working in a health care setting, may disclose an individual’s health records.” VA. CODE ANN. § 32.1-127.1:03(A) (Supp. 2007) (emphasis added).

OP. NO. 07-006

CRIMINAL PROCEDURE: PROCEEDINGS ON QUESTION OF INSANITY.

MENTAL HEALTH, MENTAL RETARDATION, AND SUBSTANCE ABUSE SERVICES: JUDICIAL AUTHORIZATION OF TREATMENT.

CONSTITUTION OF THE UNITED STATES: AMENDMENT XIV (DUE PROCESS CLAUSE).

Local court in limited circumstances may issue order, under § 19.2-169.2(A) or 19.2-169.3, authorizing superintendent of regional jail to force individual in his custody to take prescribed medication for treatment of mental illness to restore his competency to stand trial. Court having jurisdiction over such individual’s trial may enter such order to restore competency pursuant to § 19.2-169.2(A) or 19.2-169.3. When court previously has entered order to restore competency, any court with jurisdiction may enter such order pursuant to § 37.2-1101, as limited by § 37.2-1102(3).

THE HONORABLE WILLIAM J. HOWELL
SPEAKER, HOUSE OF DELEGATES
SEPTEMBER 20, 2007

ISSUE PRESENTED

You inquire whether a local court may authorize the superintendent of a regional jail¹ to force individuals in his custody who are awaiting trial or currently serving sentences to take prescribed medication for the treatment of mental illness.

RESPONSE

It is my opinion that a local court in limited circumstances may issue an order under § 19.2-169.2(A) or 19.2-169.3 authorizing the superintendent of a regional jail to force an individual in his custody to take prescribed medication for treatment of mental illness to restore his competency to stand trial. It further is my opinion that the court having jurisdiction over such individual’s trial may enter such an order to restore competency pursuant to § 19.2-169.2(A) or 19.2-169.3. Additionally, when a court previously has entered an order to restore competency, any court with jurisdiction may enter the order pursuant to § 37.2-1101, as limited by § 37.2-1102(3).

BACKGROUND

You state that due to a reduction in psychiatric facilities, regional jails are housing more people with mental illness. You advise that these jails often are not equipped to

provide the psychiatric care required by such persons. Further, you relate that many of the incarcerated persons refuse to take prescribed medications. Such refusal results in mental deterioration requiring transfers to state hospitals where the individuals typically are forced to take the medication.

State psychiatric hospitals often obtain court authorization to administer medication over the objection of patients. You relate that it is not as common for correctional facilities to obtain such authorization. You relate that persons charged with relatively minor offenses may remain incarcerated for extended periods of time because complications related to their mental illness and brought about by their refusal to take medications render them incompetent to stand trial.

APPLICABLE LAW AND DISCUSSION

Courts long have recognized that involuntary medical treatment raises constitutional questions.² Section 19.2-169.2(A) mandates that:

Upon finding pursuant to subsection E of § 19.2-169.1 that the defendant . . . is incompetent, the court shall order that the defendant receive treatment to restore his competency on an outpatient basis or, if the court specifically finds that the defendant requires inpatient hospital treatment, at a hospital designated by the Commissioner of Mental Health, Mental Retardation and Substance Abuse Services as appropriate for treatment of persons under criminal charge.

However, § 19.2-169.2(A) does not necessarily authorize forced administration of antipsychotic medication.³ The Supreme Court of the United States recognizes that individuals have a “significant” constitutionally protected liberty interest in avoiding the unwanted administration of antipsychotic drugs.⁴ The Due Process Clause of the Constitution of the United States⁵ permits a state “to treat a prison inmate who has a serious mental illness with antipsychotic drugs against his will [when] the inmate is a danger to himself or others and his treatment is in the inmate’s medical interest.”⁶

The General Assembly has established a procedure for courts to authorize treatment for individuals who lack capacity to make an informed decision regarding treatment of mental disorders in Chapter 11 of Title 37.2, §§ 37.2-1100 through 37.2-1109.⁷ Section 37.2-1102(3), however, prohibits a court from authorizing the administration of antipsychotic medication for more than 180 days over a person’s objection unless he “is subject to an order of involuntary admission, including involuntary outpatient treatment, previously or simultaneously issued under §§ 37.2-814 through 37.2-819 or Chapter 9 (§ 37.2-900 et seq.) of [Title 37.2], or the provisions of Chapter 11 (§ 19.2-167 et seq.) or Chapter 11.1 (§ 19.2-182.2 et seq.) of Title 19.2.”

However, when the sole and overriding intent for the forcible administration of medication is to restore the defendant’s competency to stand trial, the government may seek an order under § 19.2-169.2(A) or 19.2-169.3,⁸ or § 37.2-1101, as limited by § 37.2-1102, if it meets a four-part test.⁹ The government must be able to prove that: (1) there is an “important governmental interest” at stake; (2) the medication is “substantially likely”

to render the person competent and “substantially unlikely” to have side effects that would significantly interfere with the person’s ability to assist counsel; (3) the involuntary medication is necessary to further the government interest; and (4) the medication is “medically appropriate,” *i.e.*, in the defendant’s best medical interests.¹⁰ The local court must consider the purpose for the forced medication request to determine whether to apply this test.¹¹

You note a particular concern regarding persons charged with minor offenses who remain incarcerated for extended periods as the result of complications related to their refusal to take such prescribed medications. If the state’s interest is restoration of competency to stand trial, the applicable standard is the four-part test articulated in *Sell*.¹² First, the four-part test requires the governmental interest to be “important.”¹³ “An ‘important’ governmental interest exists when the defendant is accused of a ‘serious’ crime and [s]pecial circumstances’ do not undermine the government’s interest in trying him for that crime.”¹⁴ A special circumstance that potentially undermines the governmental interest in prosecuting a criminal defendant includes a situation in which a defendant has been held pretrial for more time than he would likely receive upon conviction.¹⁵ Therefore, under such circumstances, it is less likely that the state can show the governmental interest is “serious.” To satisfy the second and fourth parts of the test, jail authorities must be able to show that the antipsychotic drugs are “substantially likely” to render the person competent and “substantially unlikely” to interfere with the person’s ability to assist in his own defense.¹⁶ In order to receive permission to forcibly medicate persons in custody awaiting trial, the state must specify “the particular medication, including the dose range,”¹⁷ and relate that treatment plan to the particular characteristics of the individual defendant.¹⁸ Further, such treatment plan must address why the treatment is proposed, how long the treatment is to be administered, the criteria by which treatment will be discontinued, the probable benefits, and the possible side effects.¹⁹ The plan must explain how “the benefits of the treatment plan outweigh the costs of its side effects” in restoring competency.²⁰ The court with jurisdiction over an individual’s criminal trial may then enter an order to restore competency under § 19.2-169.2(A) or 19.2-169.3. Additionally, if a court previously has entered an order to restore an individual to competency, any court with jurisdiction may enter such an order pursuant to § 37.2-1101, subject to the limitations in § 37.2-1102(3). Otherwise, I find no other method that complies with due process standards that have been established to force an individual to take antipsychotic medication over his objection merely for treatment purposes.

Whether a state may involuntarily medicate a defendant for the purpose of rendering him competent for sentencing is unresolved.²¹ In deciding sufficiency of counsel, the United States Court of Appeals for the Fourth Circuit specifically refused to address the issue of forced medication for the purpose of restoring competency for sentencing purposes.²² Sentencing, however, is a continuation of the criminal trial process, and the defendant continues to enjoy a constitutional right to counsel.²³ While sentencing might require less involvement by the criminal defendant in comparison to the trial

phase, the sentencing phase nevertheless requires some participation. Thus, it is likely that the principles of the four-part test would apply to a criminal defendant who loses competency awaiting sentencing.

CONCLUSION

Accordingly, it is my opinion that a local court in limited circumstances may issue an order under § 19.2-169.2(A) or 19.2-169.3 authorizing the superintendent of a regional jail to force an individual in his custody to take prescribed medication for treatment of mental illness to restore his competency to stand trial. It further is my opinion that the court having jurisdiction over such individual's trial may enter such an order to restore competency pursuant to § 19.2-169.2(A) or 19.2-169.3. Additionally, when a court previously has entered an order to restore competency, any court with jurisdiction may enter the order pursuant to § 37.2-1101, as limited by § 37.2-1102(3).

¹ Although I use the term "regional jail," the analysis equally is applicable to local jails and jail authorities and their respective administrators.

² *Sell v. United States*, 539 U.S. 166, 178 (2003); *Winston v. Lee*, 470 U.S. 753, 759 (1985); *see also* VA. CODE ANN. § 53.1-40.1(A), (C) (2005) (allowing Director of Department of Corrections to petition certain courts to authorize medical treatment when prisoner is incapable of giving informed consent).

³ For purposes of this opinion, I assume that "prescribed medication" refers to antipsychotic drugs or drugs that would otherwise treat a mental illness.

⁴ *See* *Washington v. Harper*, 494 U.S. 210, 221-23 (1990).

⁵ U.S. CONST. amend. XIV, § 1.

⁶ *Harper*, 494 U.S. at 227.

⁷ I note that § 53.1-40.1, which authorizes the Director of the Department of Corrections to petition courts to authorize medical and mental health treatment for prisoners incapable of giving consent, is only applicable to prisoners sentenced and committed to the Department of Corrections.

⁸ Section 19.2-169.3(A) permits the court to make subsequent review of a defendant's competency: "If the court finds the defendant incompetent but restorable to competency in the foreseeable future, it may order treatment continued until six months have elapsed from the date of the defendant's initial admission under subsection A of § 19.2-169.2." Section § 19.2-169.3(B) further authorizes the court to order continued treatment for additional six month periods, provided a hearing is held at the completion of each such period, and the defendant continues to be incompetent but restorable to competency in the foreseeable future.

⁹ *See Sell*, 539 U.S. at 180-81.

¹⁰ *Id.*

¹¹ *See* *United States v. Baldovinos*, 434 F.3d 233, 240 (4th Cir. 2006).

¹² *See Sell*, 539 U.S. at 180-81.

¹³ *Id.* at 180.

¹⁴ *United States v. Evans*, 404 F.3d 227, 235 (4th Cir. 2005) (alteration in original) (quoting *Sell*, 539 U.S. at 180).

¹⁵ *See id.* at 239. However, this factor is not dispositive. *Id.* There may be an important interest in trying a defendant accused of a serious crime even when the pretrial detention is approaching the maximum statutory penalty for the crime with which he is charged.

¹⁶ *Sell*, 539 U.S. at 181-82.

¹⁷ *Evans*, 404 F.3d at 241.

¹⁸ See *id.* at 242.

¹⁹ *Id.*

²⁰ *Id.*

²¹ See *Baldovinos*, 434 F.3d at 242-43; *cf.* *United States v. Wood*, 459 F. Supp. 2d 451 (E.D. Va. 2006) (holding that *Sell* test controls).

²² *Id.*

²³ See *McConnell v. Rhay*, 393 U.S. 2, 4 (1968).

OP. NO. 06-072

EDUCATION: GENERAL POWERS AND DUTIES OF SCHOOL BOARD.

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

No authority for York County School Board to prohibit possession of firearms at school board meetings that are not held on school property.

MR. JAMES E. BARNETT
COUNTY ATTORNEY FOR YORK COUNTY
JANUARY 29, 2007

ISSUE PRESENTED

You ask whether the York County School Board may prohibit the possession of firearms at school board meetings that are not held on school division property.

RESPONSE

It is my opinion that the *Code of Virginia* does not grant to the York County School Board the authority to prohibit the possession of firearms at school board meetings that are not held on school property.

BACKGROUND

You report that the York County School Board holds its monthly meetings in York Hall, a building owned by the York County, rather than on school grounds or in a school building within the York County School Division. You state that York Hall has two meeting rooms, one large meeting room on the second floor where the School Board conducts its meetings and one small meeting room on the ground floor. You relate that the first floor meeting room remains open for public use while the School Board meeting takes place on the second floor.

APPLICABLE LAW AND DISCUSSION

In order to determine whether the York County School Board may prohibit attendees from bringing firearms to its meetings, I must review the powers granted to local school boards by the General Assembly and examine Virginia’s general laws regarding possession of firearms.

Article VIII, § 7 of the Constitution of Virginia and § 22.1-28 provide that “[t]he supervision of schools in each school division shall be vested in a school board.” The Supreme Court of Virginia has held that local “[s]chool boards . . . constitute public

quasi corporations that exercise limited powers and functions of a public nature granted to them expressly or by necessary implication, and none other.”¹ For many years, Virginia has followed the Dillon Rule of strict construction concerning the powers of local governing bodies, limiting such powers to those conferred expressly by law or by necessary implication from such conferred powers.² “[T]he Dillon Rule is applicable to determine in the first instance, from express words or by necessary implication, whether a power exists at all. If the power cannot be found, the inquiry is at an end.”³ Where a power is found to exist, but the question is whether it has been exercised properly, the “reasonable selection of method” rule may apply, and the inquiry is directed to whether there is implied authority to execute the power in the particular manner chosen.⁴ Therefore, according to the Dillon Rule, I must examine the statutes governing the powers of school boards to determine whether there is an express grant of authority to school boards to ban firearms from their meetings.

The General Assembly has assigned various duties and granted certain powers to local school boards to carry out their constitutional responsibilities.⁵ Section 22.1-71 declares that a school board “is vested with all the powers and charged with all the duties, obligations and responsibilities imposed upon school boards by law.” Section 22.1-79(3) sets out the powers and duties of school boards, including the instruction to “[c]are for, manage and control the property of the school division.” I do not, however, find express authority for a school board to prohibit the possession of firearms at school board meetings held off school division property, nor am I able to find a grant of power from which such authority reasonably may be inferred.

The right of a citizen, with a properly issued permit, to carry a concealed handgun exists generally in the Commonwealth, subject to limited constraints.⁶ The common law right to carry a nonconcealed handgun has not been revoked by the General Assembly.⁷ The General Assembly specifically has set out places where the carrying of a concealed handgun is prohibited.⁸ Of particular importance here is § 18.2-308.1(B), which makes it a class 6 felony for any person to possess a firearm

upon (i) any public, private or religious elementary, middle or high school, including buildings and grounds; (ii) that portion of any property open to the public and then exclusively used for school-sponsored functions or extracurricular activities while such functions or activities are taking place; or (iii) any school bus owned or operated by any such school[.]

Since the York County School Board does not hold its meetings in an elementary, middle, or high school building, or on the grounds thereof, the issue becomes whether school board meetings qualify as “school-sponsored functions.”

A 2000 opinion of the Attorney General has concluded that “the nature and function of the [school] board meeting is a meeting of adults with official business and policy-making duties.”⁹ Further, the 2000 opinion concluded that such meetings are “a fundamentally adult atmosphere rather than ... a student-oriented or school-oriented

atmosphere.”¹⁰ Further, the fact that “students voluntarily attend such meetings to provide input ... does not transform the board’s meetings from a policy and rule-making function into an official school function akin to a graduation ceremony or classroom instruction.”¹¹

The analysis that reached these conclusions was conducted with regard to concerns over the constitutionality of a school board opening its meetings with a prayer.¹² These conclusions, although removed from the constitutional context, are still valid in guiding an analysis of whether § 18.2-308.1(B)(ii) applies to school board meetings and thereby prohibits the possession of firearms. Based on such analysis, I must conclude that it does not. Likewise, since this conclusion is based upon statutory constructions rather than constitutional jurisprudence, the General Assembly is capable of amending the statute to provide a clear grant of authority to school boards to prohibit possession of weapons at their meetings.

CONCLUSION

Accordingly, it is my opinion that the *Code of Virginia* does not grant to the York County School Board the authority to prohibit the possession of firearms at school board meetings that are not held on school property.

¹ *Kellam v. Sch. Bd.*, 202 Va. 252, 254, 117 S.E.2d 96, 98 (1960); *see also* *Commonwealth v. County Bd.*, 217 Va. 558, 574, 232 S.E.2d 30, 40 (1977).

² *See* 1999 Op. Va. Att’y Gen. 101, 102 and citations therein.

³ *County Bd.*, 217 Va. at 575, 232 S.E.2d at 41.

⁴ *Id.*; *see also* 1999 Op. Va. Att’y Gen. 72, 74.

⁵ *See* VA. CODE ANN. tit. 22.1, ch. 7, §§ 22.1-71 to 22.1-87 (2006) (“General Powers and Duties of School Boards”).

⁶ VA. CODE ANN. § 18.2-308 (Supp. 2006).

⁷ *See* § 18.2-287.4 (Supp. 2006) (prohibiting carrying of certain large ammunition capacity weapons); *see also* § 18.2-308 (prohibiting carrying of concealed weapons without permit).

⁸ *See, e.g.*, § 18.2-283 (2004) (places of worship); § 18.2-283.1 (2004) (courthouses); § 18.2-308(J3) (places licensed for on-premises alcoholic beverage consumption); § 18.2-308(O) (where prohibited by private property owner; *see also* VA. CODE ANN. § 15.2-915(A) (Supp. 2006) (limiting ability of locality or local governmental entity to adopt ordinance governing “carrying, storage or transporting of firearms”).

⁹ 2000 Op. Va. Att’y Gen. 109, 110.

¹⁰ *Id.* at 111.

¹¹ *Id.* at 110-11.

¹² *Id.* at 110.

OP. NO. 07-053

EDUCATION: PUPIL TRANSPORTATION – GENERAL PROVISIONS — SYSTEM OF PUBLIC SCHOOLS; GENERAL PROVISIONS.

Local school boards may not charge for transportation of students to and from school.

THE HONORABLE JOHN S. REID
MEMBER, HOUSE OF DELEGATES
AUGUST 29, 2007

ISSUE PRESENTED

You ask whether a local school board may charge a fee to transport students on a school bus to and from school.

RESPONSE

It is my opinion that local school boards may not charge for the transportation of students to and from school.

BACKGROUND

You state that a local school board, in considering its budget, has asked whether it may charge a fee to transport students on a school bus to and from school. You note that the board would not charge a fee for students whose transportation is required by § 22.1-221.

APPLICABLE LAW AND DISCUSSION

Article VIII, § 1 of the Constitution of Virginia directs the General Assembly to “provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth.” In § 22.1-3(A), the General Assembly has responded and directs that “[t]he public schools in each school division shall be free to each person of school age who resides within the school division.”

With one exception, I find no provision of the Virginia Constitution or the *Virginia Code* that requires local school boards to provide transportation for the pupils it serves. Section 22.1-176(A) authorizes “[s]chool boards [to] provide for the transportation of pupils, but nothing herein contained shall be construed as requiring such transportation except as provided in § 22.1-221.” Section 22.1-221(A) requires school boards to provide free transportation to students with disabilities so they may obtain the “benefit of educational programs and opportunities.”

Section 22.1-176(B) is a single purpose statute that authorizes a school board to charge fees for the transportation of pupils in a *single* circumstance:

When a school board provides transportation to pupils for extra-curricular activities, other than those covered by an activity fund, which are sponsored by the pupils’ school apart from the regular instructional program and which the pupils are not required to attend or participate in, the school board may accept contributions for such transportation or *charge each pupil utilizing such transportation a reasonable fee not to exceed his pro rata share of the cost of providing such transportation.* [Emphasis added.]

Section 22.1-176(B) further authorizes a school board to waive such fees for pupils whose parents or guardians are unable to afford them.¹

It is a standard rule of statutory construction that when a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute.² In this matter, the General Assembly has authorized local school boards to charge fees for transportation only when it provides the transportation for optional extracurricular activities.

Local school boards are not permitted to levy fees or charge any pupil except as provided in Title 22.1 or by regulation of the Board of Education.³ Such regulation, 8 VAC § 20-370-10, provides that “[n]othing in this chapter shall be construed to prohibit [a local school board] from making supplies, services, or materials available to pupils at cost. Nor is it a violation to make a charge for a field trip or an educational related program that is not a required activity.” An argument could be advanced that transportation to and from school is a “service” for which school boards may charge. However, if that were correct, the additional statement in § 20-370-10 permitting a school board to charge for field trips or other educational-related programs would be unnecessary as they would be “services” for which fees could be charged. I note that the exception in § 20-370-10 for charging fees for field trips corresponds to the authority in § 22.1-176 to accept contributions for such transportation. Ultimately, the argument relating to an administrative regulation cannot overcome the clear rule of statutory construction regarding specific grants of authority.⁴ Therefore, for the reasons stated, bus transportation to and from school is not a “service” within the meaning of 8 VAC § 20-370-10.

CONCLUSION

Accordingly, it is my opinion that local school boards may not charge for the transportation of students to and from school.

¹I note that § 22.1-176(C) authorizes school divisions to accept contributions to transport pupils on field trips that are part of the school program or sponsored by the school. In my opinion, the authority to accept contributions does not confer the authority to charge fees.

²2006 Op. Va. Att’y Gen. Ann. 29, 30 and opinions cited therein.

³V.A. CODE ANN. § 22.1-6 (2006). I note, however, that local school boards may enter into cost-sharing arrangements with nonpublic schools. See § 22.1-176.1 (Supp. 2007).

⁴See *supra* note 2 and accompanying text.

OP. NO. 07-015

EDUCATION: SYSTEM OF PUBLIC SCHOOLS; GENERAL PROVISIONS.

COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS – JURISDICTION AND VENUE.

Juvenile and domestic relations district courts have original, exclusive jurisdiction to determine custody matters. Court may award custody to nonparent when clear and convincing evidence shows that such determination is in best interests of child. Categories in § 22.1-3 regarding determination of residence in school district are not exclusive. School district may not refuse to provide free education to *bona fide* resident of school division based solely on such categories.

THE HONORABLE FRANK D. HARGROVE SR.
MEMBER, HOUSE OF DELEGATES
JUNE 14, 2007

ISSUES PRESENTED

You inquire concerning the authority of juvenile and domestic relations courts related to custody decisions and the standard of evidence applied thereto. You also inquire regarding the availability of free education for a child who is in the legal custody of someone other than a parent.

RESPONSE

It is my opinion that juvenile and domestic relations district courts have original, exclusive jurisdiction to determine custody matters. While there is a presumption in favor of parents, a court may award custody to a nonparent when clear and convincing evidence shows that such determination is in the best interests of the child. Further, it is my opinion that the categories in § 22.1-3 regarding a determination of residence in a school district are not exclusive. Therefore, a school district may not refuse to provide free education to a *bona fide* resident of the school division based solely on the categories in § 22.1-3.¹

BACKGROUND

You present a situation where a juvenile and domestic relations district court (“Juvenile Court(s)”) has entered an order granting custody of a minor child (“Child”) to family members other than a parent (“Custodians”). The Child resides with the Custodians. The school division where the Custodians reside has advised them that the Child is not entitled to attend public schools free of charge. You relate that the school division based its decision on the fact that there has not been a determination that the Child’s parents are unable to care for him.

APPLICABLE LAW AND DISCUSSION

You first inquire concerning the discretion or authority given to Juvenile Court judges to grant petitions for legal custody. Section 16.1-228 defines “legal custody.” in pertinent part, as

a legal status created by court order which vests in a custodian the right to have physical custody of the child, to determine and redetermine where and with whom he shall live, the right and duty to protect, train and discipline him and *to provide him with* food, shelter, education and ordinary medical care, all subject to any residual parental rights and responsibilities[.] [Emphasis added.]

Section 16.1-241 outlines the jurisdiction and authority of Juvenile Courts and provides that each Court

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

A. The custody, visitation, support, control or disposition of a child:

....

3. Whose custody, visitation or support is a subject of controversy or requires determination.^[2]

Thus, Juvenile Courts clearly are authorized to determine custody matters and may award custody to any party with a legitimate interest when such decision is in the best interests of the child.

Title 16.1 refers the juvenile court to Title 20 to examine the factors involved in determining the child's best interests in regard to custody.³ Courts, whether circuit or district, must promptly adjudicate custody matters, including support and maintenance, prior to other issues in the matter.⁴ These procedures must "insofar as practical, and consistent with the ends of justice, preserve the dignity and resources of family members."⁵ Most importantly, the court is required to give primary consideration to the best interests of the child.⁶ All other considerations are subordinate.⁷ One factor in deciding the best interests of the child for custody purposes is the nature of the child's relationship with each parent, which includes the parents' positive involvement in the child's life and their ability to assess and meet the emotional, intellectual, and physical needs of the child.⁸

You next inquire concerning the standard of evidence to be applied by Juvenile Court judges in making decisions concerning legal custody. While the primacy of the parent-child relationship must be regarded, the court may award custody to any other person with a legitimate interest when the clear and convincing evidence establishes that the child's best interests would be served by such an arrangement.⁹ "Although the presumption favoring a parent over a non-parent is a strong one, it is rebutted when certain factors are established by clear and convincing evidence."¹⁰ These factors include: (1) parental unfitness; (2) a previous order of divestiture; (3) voluntary relinquishment; (4) abandonment; and (5) a finding of specific facts and circumstances that constitutes an extraordinary reason for taking a child from his parents.¹¹ The nonparent bears the initial burden to provide clear and convincing evidence that it is in the child's best interest for the nonparent to have custody.¹² When such initial burden is met, there is no longer a parental presumption, and the determination of the best interests of the child is made according to a preponderance of the evidence.¹³

Finally, you inquire regarding the availability of free education for a child who is in the legal custody of someone other than a parent. The Constitution of Virginia charges the General Assembly to "provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth."¹⁴ In § 22.1-3(A), the legislature directs local school divisions to provide this free education "to each person of school age who resides within the school division." Persons who are within certain categories are "deemed to reside in a school division."¹⁵ These enumerated categories create "presumptions of residency"¹⁶ and, therefore, entitlement to the free education offered by that school division. Prior opinions of the Attorney General have concluded that the list of categories is not exclusive.¹⁷ The

statutory categories merely are factors for school divisions to consider in determining the residence of a child.¹⁸ Situations in addition to those listed in § 22.1-3 may entitle persons residing in a locality to free admission to public schools in the locality.¹⁹ Local school divisions must provide the opportunity to demonstrate a *bona fide* residence and make a determination based on all pertinent facts.²⁰

In the situation you present, the Child lives with the Custodians who were awarded custody by a Juvenile Court. The Custodians and the Child seek a free education in the school division in which they reside; however, the division has concluded that the Child fails to satisfy the terms of § 22.1-3(A)(4), which provides that:

When the parents of such person are unable to care for the person and the person is living, not solely for school purposes, with another person who resides in the school division and is either (i) the court-appointed guardian, or has legal custody, of the person or (ii) acting in loco parentis pursuant to placement of the person for adoption by a person or entity authorized to do so under § 63.2-1200[.] [Emphasis added.]

You note that the school division has determined that neither parent of the Child was found to be unable to care for him. The division reasons that because the Child does not meet all the terms of § 22.1-3(A)(4), he does not qualify for a free education. Such conclusion fails to recognize that the categories listed in § 22.1-3 are not exclusive and that a child may otherwise have a *bona fide* residence in the school division.

A 1987 opinion of the Attorney General previously has examined the responsibilities of Juvenile Courts in handling a custody petition that appears to be filed solely for school placement purposes.²¹ A presumption exists that the best interests of a child are served when the child is in the custody of his natural parent, and a factual showing that a parent is unwilling or unable to care of the child may be required to overcome that presumption.²² Further, the court may consider the child's schooling and whether the change in custody is in the child's best interests or solely for the purpose of obtaining a free public education in a different school district.²³ Additionally, the entry of a custody order does not necessarily mean that a child is eligible for free schooling in the school division where the court-appointed custodian resides.²⁴ A local school board is authorized by statute to make an independent inquiry to determine whether a child is living with the custodian solely for school purposes.²⁵

Thus, a school division examining a person's claim of entitlement to a free education must determine whether the person resides within the school division. Persons falling within the enumerated categories in § 22.1-3 are deemed to reside in the school division. Other persons may be found to reside within the school division based upon the particular facts. If a person is found to reside within the school division, the inquiry is not necessarily at an end. A school division also is authorized to examine whether the child resides within the school division solely for school purposes.²⁶

It appears that the school division about which you inquire erred in regarding the categories of § 22.1-3 to be exclusive. This does not mean that the school division must necessarily reach a different outcome; however, the division must consider all relevant facts in determining whether the Child is a *bona fide* resident of the school district and not residing there solely for school purposes.

CONCLUSION

Accordingly, it is my opinion that juvenile and domestic relations district courts have original, exclusive jurisdiction to determine custody matters. While there is a presumption in favor of parents, a court may award custody to a nonparent when clear and convincing evidence shows that such determination is in the best interests of the child. Further, it is my opinion that the categories in § 22.1-3 regarding a determination of residence in a school district are not exclusive. Therefore, a school district may not refuse to provide free education to a *bona fide* resident of the school division based solely on the categories in § 22.1-3.²⁷

¹ Although your request sets forth a specific fact situation, for many years Attorneys General have declined to render opinions on matters of purely local concern or procedure. *See, e.g.*, 2004 Op. Va. Att’y Gen. 159, 160 and opinions cited therein. Therefore, I will address the issue you present in a general manner.

² *See Peple v. Peple*, 5 Va. App. 414, 418, 364 S.E.2d 232, 235 (1988) (noting that Juvenile Courts have original jurisdiction in custody cases).

³ Section 16.1-278.15(F) (Supp. 2006) (directing Juvenile Court to consider factors in Chapter 6.1 of Title 20 related to custody and visitation).

⁴ VA. CODE ANN. § 20-124.2(A) (Supp. 2006).

⁵ *Id.*

⁶ Section 20-124.2(B); *see also Vissicchio v. Vissicchio*, 27 Va. App. 240, 246, 498 S.E.2d 425, 428 (1998) (quoting *Farley v. Farley*, 9 Va. App. 326, 327-28, 387 S.E.2d 794, 795 (1990) (“In issues of child custody, the court’s paramount concern is always the best interests of the child.”)).

⁷ *See Mullen v. Mullen*, 188 Va. 259, 269, 49 S.E.2d 349, 354 (1948).

⁸ *See* § 20-124.3 (2004) (enumerating factors court must consider in determining child’s best interests). The court must consider several factors, including the age and physical and mental condition of the child and each parent; the child’s developmental needs; the parent-child relationship, especially any positive involvement with the child; the ability to accurately assess and meet the child’s emotional, intellectual, and physical needs; important other relationships, including siblings, peers, and extended family members; the past and future role of each parent in the child’s upbringing and care; the propensity of each parent to support the child’s contact and relationship with the other parent; each parent’s relative willingness and ability to maintain a relationship with the child; the reasonable preference of the child, if appropriate; and any history of family abuse as defined in § 16.1-228. *Id.* The court may also use such other factors as it deems necessary and proper to the determination. *Id.* The judge shall communicate to the parties the basis of the decision either orally or in writing. *Id.*

⁹ Section 20-124.2(B).

¹⁰ *Bailes v. Sours*, 231 Va. 96, 100, 340 S.E.2d 824, 827 (1986).

¹¹ *Id.*

¹² *Mason v. Moon*, 9 Va. App. 217, 223, 385 S.E.2d 242, 246 (1989).

¹³ *Walker v. Fagg*, 11 Va. App. 581, 586, 400 S.E.2d 208, 211 (1991).

¹⁴ VA. CONST. art. VIII, § 1.

¹⁵VA. CODE ANN. § 22.1-3(A) (2006).

¹⁶1983-1984 Op. Va. Att’y Gen. 318, 319.

¹⁷See Op. Va. Att’y Gen. 1987-1988 at 374, 375; 1983-1984, *supra* note 16, at 319; 1974-1975 at 378, 379 (interpreting § 22-218, predecessor to § 22.1-3).

¹⁸*Id.*

¹⁹See *id.*

²⁰1983-1984 Op. Va. Att’y Gen., *supra* note 16, at 319.

²¹1987-1988 Op. Va. Att’y Gen. 342.

²²*Id.* at 343.

²³*Id.*

²⁴*Id.*

²⁵*Id.*

²⁶*Id.*

²⁷See *supra* note 1.

OP. NO. 06-084

EDUCATION: TEACHERS, OFFICERS AND EMPLOYEES – TERMS OF EMPLOYMENT GENERALLY.

Compliance with employee certification regarding prior criminal convictions is applicable to school board contracts for services where contractor or his employees reasonably could be expected to be in presence of students during school hours or during school-sponsored activities; whether particular contract is one for services that requires contractor or his employees to be in presence of students must be determined from terms of contract. School board must require certification information from subcontractors and their employees. Affected persons must certify that they have not been convicted of felonies or offenses involving sexual molestation, physical or sexual abuse or rape of child, and disclose convictions of crimes of moral turpitude. Whether certain crime involves moral turpitude depends on facts and nature of crime; crimes involving dishonesty do involve moral turpitude. Where contractor or relevant employee fails to meet certification requirements, contractor is not eligible for award of contract. Authority for school board to revoke contract in event of materially false certification; revocation of required license is within purview of licensing agency.

THE HONORABLE DANNY W. MARSHALL III
MEMBER, HOUSE OF DELEGATES
JANUARY 5, 2007

ISSUE PRESENTED

You ask several questions concerning § 22.1-296.1(C), which requires local school boards to obtain certifications from contractors and certain others regarding prior criminal convictions.

APPLICABLE LAW AND DISCUSSION

Since 1985,¹ § 22.1-296.1 has established that local school boards’ applications for employment require certain statements of prospective employees regarding their criminal history. In 2006, the statute was amended to address such certification from contractors and their employees (“certification information”):

C. Prior to awarding a contract for the provision of services that require the contractor or his employees to have direct contact with students, the school board shall require the contractor and, when relevant, any employee who will have direct contact with students, to provide certification that (i) he has not been convicted of a felony or any offense involving the sexual molestation or physical or sexual abuse or rape of a child; and (ii) whether he has been convicted of a crime of moral turpitude.

Any person making a materially false statement regarding any such offense shall be guilty of a Class 1 misdemeanor and, upon conviction, the fact of such conviction shall be grounds for the revocation of the contract to provide such services and, when relevant, the revocation of any license required to provide such services. School boards shall not be liable for materially false statements regarding the certifications required by this subsection.

For the purposes of this subsection, “direct contact with students” means being in the presence of students during regular school hours or during school-sponsored activities.^[2]

QUESTION ONE

You ask whether § 22.1-296.1(C) applies to all contractors providing services to a school system. For instance, you ask whether the law applies to soft drink vendors who may walk down a hallway and, therefore, be in the presence of students.

The certification information that a local school board must require of contractors and their employees does not apply to all contracts. Section 22.1-296.1(C) stipulates that school boards must require the certification prior to awarding a contract “for the provision of services that require the contractor or his employees to have direct contact with students.”

To determine whether the requirements of the statute attach to a particular contract, it is necessary first to determine whether the contract is one for the provision of services. Section 22.1-296.1(C) does not define “services.” The conduct of local school boards in contract matters is governed by the Virginia Public Procurement Act.³ The Procurement Act imposes requirements on public bodies’ entering into contracts for, among other things, the purchase of “services.” The Procurement Act defines “services” as “any work performed by an independent contractor wherein the service rendered does not consist primarily of acquisition of equipment or materials, or the rental of equipment, materials and supplies.”⁴ It is my opinion that a local school board should rely on the definition of “services” in the Procurement Act in determining the scope of its responsibilities under § 22.1-296.1(C).

When the proposed contract is for the provision of services, the next inquiry is whether the services require the contractor or his employees to have direct contact with students.

Section 22.1-296.1(C) provides that “*direct contact with students*’ means being in the presence of students during regular school hours or during school-sponsored activities.”

Returning to your example, a contract to provide soft drinks would be a contract for the purchase of goods. Therefore, such a contract is not subject to § 22.1-296.1(C). A contract to maintain vending machines would be a contract for services. Such a contract is subject to the certification requirement if the contractor or his employees are required to have direct contact with students, which would include an expectation that the contractor would be in the presence of students during regular school hours or during school-sponsored activities in order to comply with the contract’s terms. A service contract that restricted service of vending machines to times outside regular school hours and school-sponsored activities (for example, on Saturdays and Sundays) would not be subject to § 22.1-296.1(C).

Consequently, it is my opinion that § 22.1-296.1 applies to school board contracts for services where the contractor or his employees reasonably could be expected to be in the presence of students during school hours or during school-sponsored activities in order to comply with the contract’s terms. It further is my opinion that whether a particular contract is one for services that requires the contractor or his employees to be in the presence of students must be determined from the particular terms of the contract.

QUESTION TWO

You next ask whether the contractor is responsible for affirming certification information for his subcontractors.

Section 22.1-296.1(C) requires local school boards to obtain certification information from contractors and their employees. Subcontractors and their employees are not specifically included; however, a question arises regarding whether certification from subcontractors and their employees is implied.

Every statute is to be read so as to “promote the ability of the enactment to remedy the mischief at which it is directed.” The ultimate purpose of all rules of construction is to ascertain the intention of the legislature, which, absent constitutional infirmity, must always prevail. All rules are subservient to that intent. Further, it is a universal rule that statutes . . . , which are remedial in nature, are to be “construed liberally, so as to *suppress the mischief* and advance the remedy,” as the legislature intended.^[5]

Without certification information from subcontractors and their employees, the legislative intent that public school children be shielded from direct contact with persons with certain criminal histories would be thwarted. Therefore, subcontractors and their employees must be included among the persons from whom the school board must require certification information.

QUESTION THREE

You next inquire whether the statement, “has not been convicted of a felony or any offense involving the sexual molestation or physical or sexual abuse or rape of a child”⁶ applies only when there is a case of sexual molestation or rape or whether it applies to all felony convictions.

The 1985 Session of the General Assembly enacted § 22.1-296.1.⁷ In its original form, § 22.1-296.1 provided that “[a]s a condition of employment for all of its public school employees, every school board shall require on its application for employment certification that the applicant has not been convicted of any offense involving the sexual molestation, physical or sexual abuse or rape of a child.”⁸

In 1996,⁹ the General Assembly amended § 22.1-296.1 to provide that:

As a condition of employment for all of its public school employees, *whether full-time or part-time, permanent, or temporary*, every school board shall require on its application for employment certification that the applicant has not been convicted of *a felony, a crime of moral turpitude, or any offense involving the sexual molestation, physical or sexual abuse or rape of a child.*^[10]

The 1996 amendment makes clear the legislative intent that, for prospective employees of a local school board, the individual must certify that he has not been convicted of: (1) a felony; (2) a crime of moral turpitude; or (3) any offense involving the sexual molestation, physical or sexual abuse or rape of a child.

In 2003, the General Assembly reworded the criminal certification requirement. The 2003 enactment changed the relevant part of § 22.1-296.1(A) to its present form:

As a condition of employment for all of its public school employees, whether full-time or part-time, permanent, or temporary, every school board shall require on its application for employment certification *(i) that the applicant has not been convicted of a felony, ~~a crime of moral turpitude~~, or any offense involving the sexual molestation, physical or sexual abuse or rape of a child; and (ii) whether the applicant has been convicted of a crime of moral turpitude.*^[11]

As a result of the 2003 legislation, an applicant for employment is not required to certify that he has not been convicted of a crime of moral turpitude. Instead, he merely must disclose the fact.

Given the history of amendments to § 22.1-296.1, prospective employees of school boards must certify that they have not been convicted of a felony or of any offense involving the sexual molestation, physical or sexual abuse or rape of a child. Other rules of statutory construction support this conclusion. If the legislature intended “a felony” to be limited to only those felonies involving the sexual molestation, physical or sexual

abuse or rape of a child, then the use of the term “felony” is meaningless, as “any offense” would include such a felony. An important rule of statutory construction is that “every part of a statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary.”¹² The 2006 amendment¹³ requires contractors and their employees to provide the same certification as that required of applicants for employment by the school board. Therefore, such certifications should be given the same interpretation.

Accordingly, it is my opinion that § 22.1-296.1(C) requires affected persons to certify that they have not been convicted of any felony or of any offense involving the sexual molestation, physical or sexual abuse or rape of a child and to disclose whether they have been convicted of any crime of moral turpitude.

QUESTION FOUR

You next inquire what specific crimes would be considered crimes of moral turpitude.

I find no statute or case that contains an exhaustive list of crimes of moral turpitude. Determining whether a particular crime involves moral turpitude begins with an examination of the nature of the crime. The Supreme Court of Virginia has defined a crime involving moral turpitude as “an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow man, or to society in general, contrary to the accepted and customary rule of right and duty between man and man.”¹⁴

The Virginia Supreme Court has held that crimes involving dishonesty, including petty larceny¹⁵ and making a false statement to obtain unemployment benefits,¹⁶ are crimes of moral turpitude that may be used to impeach witnesses. The Virginia Supreme Court and the Court of Appeals of Virginia also have determined that drunkenness and illegal possession of liquor,¹⁷ assault and battery,¹⁸ gambling,¹⁹ transportation of untaxed liquor,²⁰ and indecent exposure²¹ are not crimes constituting moral turpitude.

Therefore, it is my opinion that whether a certain crime involves moral turpitude depends on the facts and the nature of the crime.²² However, crimes involving dishonesty do involve moral turpitude.

QUESTION FIVE

You further ask whether there are there specific guidelines for a school system to follow should a contractor be unable to verify that each employee of the business or an employee of a subcontractor has not committed an act prohibited by § 22.1-296.1(C).

Section 22.1-296.1(C) directs local school boards to require certification information from the contractor and the relevant employees “[p]rior to awarding a contract.” The statute is silent on the school board’s response in the event the certification information is not provided. The bidder or offerer who fails to provide such certification has failed to satisfy a statutory requirement that must be met before a contract is awarded.

Accordingly, it is my opinion that where a contractor or any relevant employee fails to meet the requirements of § 22.1-296.1(C), the contractor is not eligible for an award of the contract.

QUESTION SIX

Finally, you ask whether the school system has the sole responsibility to enforce § 22.1-296.1.

Section 22.1-296.1(C) provides that any person who makes “a materially false statement regarding any such offense shall be guilty of a Class 1 misdemeanor and, upon conviction, the fact of such conviction shall be grounds for the revocation of the contract to provide such services and, when relevant, the revocation of any license required to provide such services.” In a broad sense, this provision embraces three different forms of “enforcement,” i.e., a misdemeanor, contract revocation, and license revocation.

Thus, there are three possible consequences to a materially false certification: (1) prosecution for a misdemeanor; (2) if convicted of a misdemeanor, the contract may be revoked; and (3) such a conviction may result in the loss of a license required to provide the services. Any person having knowledge suggesting that a person has made a materially false statement on a certification may report the relevant information to local law enforcement authorities or to the appropriate office of the Commonwealth’s attorney for prosecution. Persons who have knowledge of a false statement might include school system personnel, but such knowledge is not limited to that group.

In the event of a conviction for a materially false certification, the right to revoke the contract rests with the parties to the contract, the school board and the contractor. Such a conviction may also be the basis to revoke any license required to provide the services. Section 22.1-296.1 does not preclude any person having knowledge of the conviction from reporting it to the licensing agency, which alone has the ability to revoke the license.

Therefore, it is my opinion that in the event of a materially false certification, the school board has the authority to revoke a contract. It further is my opinion that revocation of a required license is within the purview of the licensing agency.

¹See 1985 Va. Acts ch. 487, at 779, 779 (adding § 22.1-296.1 to provide that local school board employment applications require certification that applicant has not been convicted of any offense involving sexual molestation, physical or sexual abuse or rape of child).

²2006 Va. Acts ch. 790, at 1214, 1214.

³See VA. CODE ANN. §§ 2.2-4300 to 2.2-4377 (2005 & Supp. 2006); see also 1982-1983 Op. Va. Att’y Gen. 433, 433 (concluding that school board is “public body” within meaning of § 11-37, predecessor to § 2.2-4301, of Procurement Act).

⁴VA. CODE ANN. § 2.2-4301 (Supp. 2006).

⁵Bd. of Supvrs. v. King Land Corp., 238 Va. 97, 103, 380 S.E.2d 895, 897-98 (1989) (citations omitted) (emphasis in original).

⁶VA. CODE ANN. § 22.1-296.1(C) (2006).

⁷ See 1985 Va. Acts, *supra* note 1.

⁸ See § 22.1-296.1.

⁹ The 1987 Session of the General Assembly also amended § 22.1-296.1. See 1987 Va. Acts ch. 359, at 446, 446. The 1987 amendment made it a Class 1 misdemeanor to make a materially false statement on a certification, which was also grounds for revocation of a teaching certificate. See *id.*

¹⁰ 1996 Va. Acts ch. 960, at 2343, 2343.

¹¹ 2003 Va. Acts ch. 723, at 981, 981. The General Assembly had also amended § 22.1-296.1 in 1997. See 1997 Va. Acts ch. 103, at 147, 148 (adding requirement to subsection B that, for applications for employment requiring direct contact with children, applicant must certify that he “has not been the subject of a founded case of child abuse and neglect”).

¹² *Hubbard v. Henrico Ltd. P’ship*, 255 Va. 335, 340, 497 S.E.2d 335, 338 (1998); see also 2006 Op. Va. Att’y Gen. 19, 28 n.11.

¹³ See *supra* note 2 and accompanying text.

¹⁴ *Tasker v. Commonwealth*, 202 Va. 1019, 1024, 121 S.E.2d 459, 463 (1961) (quoting *Parr v. Commonwealth*, 198 Va. 721, 724, 96 S.E.2d 160, 163 (1957)), quoted in *Great Coastal Express, Inc. v. Ellington*, 230 Va. 142, 147, 334 S.E.2d 846, 850 (1985).

¹⁵ *Bell v. Commonwealth*, 167 Va. 526, 538, 189 S.E. 441, 447 (1937).

¹⁶ *C. & O. Ry. Co. v. Hanes*, 196 Va. 806, 813, 86 S.E.2d 122, 126 (1955).

¹⁷ *Pike v. Eubank*, 197 Va. 692, 700, 90 S.E.2d 821, 827 (1956).

¹⁸ *Burford v. Commonwealth*, 179 Va. 752, 766, 20 S.E.2d 509, 514 (1942).

¹⁹ *Parr*, 198 Va. at 725, 96 S.E.2d at 164.

²⁰ *Burford*, 179 Va. at 765, 20 S.E.2d at 514.

²¹ *Chrisman v. Commonwealth*, 3 Va. App. 89, 100, 348 S.E.2d 399, 405 (1986).

²² *Id.* at 94, 348 S.E.2d at 401 (noting that in determining whether crime is one involving moral turpitude, it is not punishment that makes crime infamous, “but rather the *nature* of the crime”) (emphasis in original); see also *Tasker*, 202 Va. at 1024-25, 121 S.E.2d at 463-64 (contributing to delinquency of minor may or may not involve moral turpitude, depending on facts shown by record on which conviction was based).

OP. NO. 07-018

EDUCATIONAL INSTITUTIONS: UNIVERSITY OF VIRGINIA – BOARD OF VISITORS.

Authority for University of Virginia to provide recreational gym membership to adult living in household of employee or student.

JOHN T. CASTEEN, III
PRESIDENT, UNIVERSITY OF VIRGINIA
JUNE 7, 2007

ISSUE PRESENTED

You ask whether the University of Virginia may provide recreational gym memberships to an adult who is not a spouse and who lives in the household of an employee or student.

RESPONSE

It is my opinion that the University of Virginia is authorized to provide a recreational gym membership to an adult who is not a spouse and who lives in the household of an employee or student.

BACKGROUND

You report that employees and students of the University of Virginia (“University”) along with their spouses and children are eligible to receive recreational gym memberships. You state that the University would like to offer recreational gym memberships to an adult, other than a spouse, living in the household of an employee or student as an additional benefit to employees and students. You note that such benefit would be uniformly offered and applied without regard to the type of relationship that may exist and without regard to the personal or private circumstances of the home.

APPLICABLE LAW AND DISCUSSION

The University of Virginia is a public institution.¹ The University’s Board of Visitors and the President exercise broad statutory authority with respect to the government and management of the University.² However, such authority is not without limits. “It is plain that the University of Virginia is in the strictest sense a public institution ... and that the interest of the public constitutes its ends and aims.”³ It is well established in Virginia that a university, through its governing Board, “has not only the powers expressly conferred upon it, but it also has the implied power to do whatever is reasonably necessary to effectuate the powers expressly granted.”⁴ The proper relationship is that colleges and universities are state agencies, *i.e.* arms of the Commonwealth, tasked with fulfilling the Commonwealth’s commitment to provide education to the students of Virginia.⁵ As such, the broad authority of Virginia colleges and universities does not supersede statutory or case law, public policy, or explicit statements of the General Assembly regarding specific topics.⁶

Sections 23-76 authorizes the Board of Visitors of the University to:

appoint a comptroller and proctor, and employ any other agents or servants, regulate the government and discipline of the students, and the renting of the rooms and dormitories, and, generally, in respect to the government and management of the University, make such regulations as they may deem expedient, not being contrary to law.

The University is also “charged with the care and preservation of all property belonging to the University”⁷ These powers and duties enable the University, within the bounds of the law and public policy of the Commonwealth, to manage its property, including use of that property by employees and students. Such power certainly would include the regulation of eligibility requirements for membership in the University’s recreational facilities.

Currently, the University’s policy governing eligibility for recreational sports memberships provides that full-time students, full-time and part-time faculty and classified staff with benefits, spouses of full-time and part-time faculty and staff with benefits, and children of members all are eligible for membership in the recreational gym facilities.⁸ Thus, the suggested policy change is to allow current members to designate another adult who resides with them for membership eligibility. Such a policy change

is consistent with the University's current practice of allowing individuals other than employees and students to obtain gym membership.

The proposed expansion of gym membership eligibility does not appear to contravene the law regarding University management of property in its care. It provides two basic and objective criteria for eligibility, the potential member must: (1) be an adult; and (2) share a residence with the eligible University employee or student through whom he will claim eligibility.⁹

CONCLUSION

Accordingly, it is my opinion that the University of Virginia is authorized to provide a recreational gym membership to an adult who is not a spouse and who lives in the household of an employee or student.

¹See VA. CODE ANN. § 23-69 (2005); *Phillips v. Rector & Visitors*, 97 Va. 472, 475-76, 34 S.E. 66, 67 (1899).

²See § 23-76 (2006).

³*Phillips*, 97 Va. at 475-76, 34 S.E. at 67.

⁴*Goodreau v. Rector & Visitors*, 116 F. Supp. 2d 694, 703 (W.D.Va. 2000) (quoting *Batcheller v. Commonwealth*, 176 Va. 109, 123, 10 S.E.2d 529, 535 (1940)).

⁵The relationship between the Commonwealth and its universities and colleges is not akin to the relationship between the Commonwealth and cities and counties. The Dillon Rule is not applicable to state agencies. See 2006 Op. Va. Att'y Gen. 5, 10 n.28.

⁶Virginia public colleges and universities are state agencies; they are statutory corporations created and empowered by acts of the General Assembly. As such they are subject to the control of the General Assembly and are limited to the powers granted them. See e.g. *Jones v. Commonwealth*, 267 Va. 218, 222-23, 591 S.E.2d 72, 74-75 (2004); see also § 23-76 (providing that Board of Visitors of University of Virginia "shall be at all times subject to the control of the General Assembly" and authorizing Board to make such regulations as they may deem expedient, not contrary to law); § 23-114 (2006) (providing that Board of Visitors of Virginia Tech "shall at all times be under the control of the General Assembly"); § 23-122 (2006) (providing that Virginia Tech's Board of Visitors may make such regulations as they deem expedient, not contrary to law); § 23-91.24 (2006) (providing that Board of Visitors of George Mason University "shall be subject at all times to the control of the General Assembly"). Similar provisions, often utilizing the exact language, prescribe the authority of the Boards of Visitors of the University of Mary Washington, Virginia Military Institute, Radford University, Virginia State University, Norfolk State University, Longwood University, and the College of William & Mary.

⁷Section 23-76.

⁸See <http://www.virginia.edu/ims/membership/eligibility.html> (last visited May 8, 2007).

⁹However, should the University base its expanded membership eligibility on the personal relationship of the University employee or student and the adult coresident, the policy may violate the Constitution of Virginia if it is deemed to "create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage." VA. CONST. art. I, § 15-A.

OP. NO. 07-034

GENERAL ASSEMBLY: GENERAL ASSEMBLY AND OFFICERS THEREOF.

General Assembly member who is officer of corporation holding ABC license that is subject of administrative board hearing is party under § 30-5.

THE HONORABLE LEO C. WARDRUP JR.
MEMBER, HOUSE OF DELEGATES
OCTOBER 15, 2007

ISSUE PRESENTED

You ask whether a member of the General Assembly who also is an officer of a firm holding ABC licenses and who has participated in the hearing on alleged violations of the *Code of Virginia* related to such licenses is entitled as a matter of right under § 30-5 to a continuance of an administrative appeal hearing.

RESPONSE

It is my opinion that a member of the General Assembly who is an officer of a corporation holding an ABC license that is the subject of a hearing before an administrative board is a party under § 30-5.

APPLICABLE LAW AND DISCUSSION

Section 30-5 provides that:

Any party to an action or proceeding in any court . . . or other tribunal having judicial or quasi-judicial powers or jurisdiction, who is an officer, employee or member of the General Assembly, . . . shall be entitled to a continuance as a matter of right (i) during the period beginning thirty days prior to the commencement of the [General Assembly] session and ending thirty days after the adjournment thereof[.]

Hearings before the Virginia Alcoholic Beverage Control Board¹ (“ABC Board”) on license matters are subject to § 30-5 because they are tribunals having judicial or quasi-judicial powers or jurisdiction.² However, the central question is whether a member of the General Assembly who is an officer of the firm appearing before the ABC Board is a “party to an action” under § 30-5. The Supreme Court of Virginia and the Attorney General have construed § 30-5 liberally.³

The Alcoholic Beverage Control regulations⁴ (“ABC Regulations”) define interested parties:

As used in [Chapter 10], ‘*interested parties*’ shall mean the following persons:

1. The applicant;
 2. The licensee;
 3. Persons who would be aggrieved by a decision of the board;
- and
4. For purposes of appeal pursuant to 3 VAC 5-10-240, interested parties shall be only those persons who appeared at and asserted an interest in the hearing before a hearing officer.^[5]

Under the facts you provide, the member of the General Assembly is an officer of the corporation and has provided evidence at an ABC Board hearing before the hearing officer. He would meet the definition of an “interested party” under 3 VAC § 5-10-120(4) and could testify before the Board on appeal.

Section 30-5 does not necessarily refer to an interested party as provided in the ABC Regulations.⁶ Rather, § 30-5 refers to a “party” without further definition. Generally, a “party” is “[o]ne by or against whom a lawsuit is brought” or “a person who has been named as a party and has a right to control the lawsuit.”⁷ In the situation you present, the General Assembly member is not just a witness at the ABC hearing, but is also an officer in the corporation holding the ABC license.

Additionally, § 30-5 does not apply only to litigation within the court system. Rather, it has application to hearings before boards and commissions with quasi-judicial powers.⁸ By implication, “parties” in these types of proceedings may involve a broader definition than that applied to court proceedings.⁹ Given the liberal interpretation of § 30-5 and the definition of an “interested party” in the ABC Regulations,¹⁰ it appears that a member of the General Assembly who testifies at an ABC Board hearing may be entitled to a continuance of an appeal “as a matter of right” pursuant to § 30-5 provided the hearing is scheduled during the statutory period and other conditions of the statute are satisfied.¹¹ In this instance, the member’s status as an officer of the corporation subject to the ABC proceeding is sufficient for him to be considered a party under § 30-5.

CONCLUSION

Accordingly, it is my opinion that a member of the General Assembly who is an officer of a corporation holding an ABC license that is the subject of a hearing before an administrative board is a party under § 30-5.

¹See VA. CODE ANN. § 4.1-102 (1999) (establishing membership of ABC Board).

²See § 4.1-103(11), (14) (1999) (including among powers of ABC Board authority to hold and conduct hearings and to grant, suspend, and revoke licenses for sale of alcoholic beverages); *but cf.* 1971-1972 Op. Va. Att’y Gen. 212, 212-13 (concluding that General Assembly member was not entitled to automatic continuance before District Committees of Virginia State Bar because such Committees merely perform investigative functions; Committees did not have power to determine rights or privileges of attorneys).

³See 1991 Op. Va. Att’y Gen. 179, 180 and cases and opinions cited therein.

⁴3 VA. ADMIN. CODE §§ 5-10-10 to 5-70-200 (1996 & Supp. 2007).

⁵See 3 VA. ADMIN. CODE § 5-10-120 (1996).

⁶*Id.*

⁷BLACK’S LAW DICTIONARY 1154 (8th ed. 2004).

⁸See *Howell v. Catterall*, 212 Va. 525, 527, 186 S.E.2d 28, 30 (1972).

⁹General rules of statutory construction require that any determination of the intent of the General Assembly be based on the words contained in the statute, unless a literal construction would create an absurd result. See 2006 Op. Va. Att’y Gen. 71, 73, 75 n.2. Since the General Assembly made § 30-5 applicable to proceedings with parties other than the typical plaintiff/defendant designations in a court hearing, it would not appear that the definition of “party” would be so limited.

¹⁰See 3 VA. ADMIN. CODE § 5-10-120.

¹¹VA. CODE ANN. § 30-5 (2001).

OP. NO. 07-019

HEALTH: POSTMORTEM EXAMINATIONS AND SERVICES – CHIEF MEDICAL EXAMINER AND POSTMORTEM EXAMINATIONS.

Nondisclosure provisions of § 32.1-283.2(D) apply to information acquired by physician solely in capacity as member of local or regional child fatality review team.

THE HONORABLE ANTHONY N. SYLVESTER
COMMONWEALTH'S ATTORNEY FOR THE CITY OF HOPEWELL
JUNE 20, 2007

ISSUES PRESENTED

You ask whether the confidentiality and immunity¹ provisions contained in § 32.1-283.2(D) include immunity from administrative proceedings, such as a physician licensing proceeding, for a physician serving on a local or regional child fatality review team. Specifically, you ask whether § 32.1-283.2(D) is applicable to an administrative subpoena.

RESPONSE

It is my opinion that when a physician has acquired information solely in his capacity as a member of a local or regional child fatality review team, the nondisclosure provisions of § 32.1-283.2(D) would apply, and the physician is not subject to administrative subpoena.

APPLICABLE LAW AND DISCUSSION

Section 32.1-283.2(A) provides that “local or regional child fatality teams may be established for the purpose of conducting contemporaneous reviews of local child deaths in order to develop interventions and strategies for prevention specific to the locality or region.” Information and records obtained or created by a local or regional child fatality team (“Team”) regarding the review of a fatality are confidential and are excluded from The Virginia Freedom of Information Act² pursuant to § 2.2-3705.5(9).³

Section 32.1-283.2(D) provides, in pertinent part, that:

All information and records obtained or created regarding the review of a fatality shall be confidential and shall be excluded from the Virginia Freedom of Information Act (§ 2.2-3700 et seq.) pursuant to subdivision 9 of § 2.2-3705.5. All such information and records shall be used by the team only in the exercise of its proper purpose and function and shall not be disclosed. *Such information or records shall not be subject to subpoena, subpoena duces tecum, or discovery or be admissible in any criminal or civil proceeding. . . . No person who participated in the reviews nor any member of the team shall be required to make any statement as to what transpired during the review or what information was collected during the review.* [Emphasis added.]

The Director of the Department of Health Professions has broad authority to conduct investigations on behalf of a health regulatory board such as the Board of Medicine.⁴ Specifically, § 54.1-2506(A) grants to the Director and health regulatory boards “the power to subpoena witnesses and issue subpoenas requiring the production of patient records, business records, papers, and physical or other evidence in the course of any investigation.” Pursuant to § 54.1-2400.2(A)(1), any investigative information so obtained strictly is confidential except as used in a disciplinary proceeding before a board, in any subsequent trial, or any appeal of an action or order. In accordance with § 54.1-2400.2(A)(4), a court may order disclosure “for good cause arising from extraordinary circumstances being shown.” Finally, “[i]n no event shall [such] confidential information . . . be available for discovery or court subpoena or introduced into evidence in any civil action.”⁵

Disciplinary licensure proceedings before the Board of Medicine, like attorney disciplinary proceedings before the Virginia State Bar, are civil in nature.⁶ Section 32.1-283.2(D) expressly provides, in pertinent part, that

All . . . information and records shall be used by the team only in the exercise of its proper purpose and function and shall not be disclosed. Such information or records *shall not be subject to subpoena, subpoena duces tecum, or discovery or be admissible in any criminal or civil proceeding.* If available from other sources, however, such information and records shall not be immune from subpoena, subpoena duces tecum, discovery or introduction into evidence when obtained through such other sources solely because the information and records were presented to the team during a fatality review. [Emphasis added.]

Further, § 32.1-283.2(D) provides that no “member of the team shall be required to make any statement as to what transpired during the review or what information was collected during the review.”

Words and phrases in a statute must be considered in the context used to arrive at a construction consistent with the purpose of the statute.⁷ “[W]hen 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.”⁸ When faced with a choice between a specific and general statute, the former is controlling.⁹ Thus, as long as information is acquired as part of a fatality review and not from other sources, a Team member cannot be required to discuss, voluntarily or by administrative subpoena, information garnered as a result of participation in a fatality review. This would include a licensing proceeding for a physician conducted by the Board of Medicine.

CONCLUSION

Accordingly, it is my opinion that when a physician has acquired information solely in his capacity as a member of a local or regional child fatality review team, the nondisclosure

provisions of § 32.1-283.2(D) would apply, and the physician is not subject to administrative subpoena.

¹I note that § 32.1-283.2(E) specifically provides civil immunity from liability to members of a review team “for any act or omission made in connection with their participation in a child fatality review team review, unless such act or omission was the result of gross negligence or willful misconduct.” Therefore, it is my opinion that § 32.1-283.2(E) would provide immunity from a physician licensing action except in the case of “gross negligence or willful misconduct.”

²VA. CODE ANN. tit. 2.2, ch. 37, §§ 2.2-3700 to 2.2-3714 (2005 & Supp. 2006).

³See VA. CODE ANN. § 32.1-283.2(D) (2005); *see also* § 2.2-3705.5(9) (2005) (excluding “[a]ll information and records acquired during a review of any child death ... by a local or regional child fatality review team established pursuant to § 32.1-283.2”).

⁴See VA. CODE ANN. § 54.1-2506 (2005).

⁵Section 54.1-2400.2(B) (Supp. 2006).

⁶See 1979-1980 Op. Va. Att’y Gen. 168, 170 (noting that actions where licensee may lose right to practice are civil in nature, as in proceedings against attorneys; burden of proof is clear and convincing evidence), *see also, e.g.*, Tucker v. Va. State Bar, 233 Va. 526, 532, 357 S.E.2d 525, 528 (1987) (noting that proceedings to discipline attorneys are civil in nature).

⁷See 1993 Op. Va. Att’y Gen. 192, 195; *see also* Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 339 (1983) (noting that meaning of word finds expression from purport of entire phrase of which it is part); 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.16, at 265 (6th ed. 2000) (“If the legislative intent or meaning of a statute is not clear, the meaning of doubtful words may be determined by reference to their relationship with other associated words and phrases.”).

⁸GasMart Corp. v. Bd. of Supvrs., 269 Va. 334, 350, 611 S.E.2d 340, 348 (2005) (quoting Commonwealth v. Brown, 259 Va. 697, 706, 529 S.E.2d 96, 101 (2000)).

⁹Op. Va. Att’y Gen.: 2005 at 112, 113; 2001 at 59, 60.

OP. NO. 07-069

HIGHWAYS, BRIDGES AND FERRIES: TRANSPORTATION BOARD – ALLOCATION OF HIGHWAY FUNDS – MISCELLANEOUS PROVISIONS.

If requested by Federal Highway Administration, removal by MPO of U.S. Route 29 Bypass from its Six-Year Transportation Improvement Plan would require reimbursement of funds spent on Bypass; amount equal to such reimbursement would be deducted from primary system highway construction funds for Department of Transportation district in which Bypass is located; amount equal to all state funds expended on Bypass would be deducted from primary system highway construction funds allocated to such district.

THE HONORABLE STEPHEN D. NEWMAN
MEMBER, SENATE OF VIRGINIA
OCTOBER 4, 2007

ISSUES PRESENTED

You ask whether the Charlottesville-Albemarle Metropolitan Planning Organization (“MPO”) would risk losing its primary system highway construction funds should it remove the proposed U.S. Route 29 Bypass around Charlottesville (“Bypass”) from its Six-Year Transportation Improvement Plan (“Plan”). If MPO removes the Bypass from its Plan and the federal government requests reimbursement of its funds expended on the Bypass, you ask whether MPO would be required to repay such amount from its primary highway system funds.

RESPONSE

It is my opinion that if MPO removes the Bypass from its Plan and the Federal Highway Administration requires the Commonwealth to reimburse the funds spent on the Bypass, an amount equal to such reimbursement would be deducted from the primary system highway construction funds for the Department of Transportation district in which the Bypass is located. Further, an amount equal to all state funds expended on the Bypass would be deducted from the primary system highway construction funds allocated to such district.

APPLICABLE LAW AND DISCUSSION

Metropolitan planning organizations are authorized by the federal government to carry out transportation planning processes for urbanized areas with a population of more than 50,000 individuals.¹ Metropolitan planning organizations have no specific statutory authority.² Rather, they are intended to be planning bodies and organizations through which federal transportation planning money could pass.³ Section 33.1-23.03:01 provides that metropolitan planning organizations “shall be authorized to issue contracts for studies and to develop and approve transportation plans and improvement programs to the full extent permitted by federal law.” As such, MPO was organized to serve “the City of Charlottesville and the urbanized area of Albemarle County immediately surrounding the City, [and] it is responsible for carrying out continuing, cooperative and comprehensive transportation planning and programming process.”⁴ Your concern is that the MPO opposing the construction of the Bypass potentially removes it from the Plan.

As a condition of receiving federal highway funds, the Commonwealth, through the Department of Transportation, agrees to comply with the terms and conditions in Title 23 of the *Code of the United States* and all applicable regulations, policies, and procedures.⁵ For a right-of-way acquisition project, construction of a road on the right-of-way must be “undertaken by the close of the twentieth fiscal year following the fiscal year in which the project is authorized,” or the Department would have to repay the federal funds expended on the project.⁶ Additionally, for a preliminary engineering project, actual construction of the road or right-of-way acquisition must be “started by the close of the tenth fiscal year following the fiscal year in which the project is authorized,” or the Department must repay federal funds expended on the project.⁷

Consequently, if the proposed Bypass was in the right-of-way acquisition stage, the Commonwealth would not be required to repay federal funds until the twentieth fiscal year following the fiscal year in which the project was authorized by the federal government if construction of the Bypass is not undertaken by that time. If preliminary engineering has been undertaken for the Route 29 Bypass, repayment of federal funds by the Commonwealth would be due at the close of the tenth fiscal year following the fiscal year in which the project was authorized if neither right-of-way acquisition nor actual construction has begun.

Recognizing the importance of U.S. Route 29 to the Commonwealth, § 33.1-223.2:13 provides that:

If the construction of a U.S. Route 29 bypass around any city located in any county that both (i) is located outside Planning District 8 and (ii) operates under the county executive form of government is not constructed because of opposition from a metropolitan planning organization, and the Federal Highway Administration requires the Commonwealth to reimburse the federal government for federal funds expended in connection with such project, an amount equal to the amount of such reimbursement shall be deducted by the Commonwealth Transportation Board from primary system highway construction funds allocated or allocable to the highway construction district in which the project was located. Furthermore, in the event of such nonconstruction, an amount equal to the total of all state funds expended on such project shall be deducted by the Commonwealth Transportation Board from primary system highway construction funds allocated or allocable to the highway construction district in which the project was located.

The city of Charlottesville and Albemarle County are located outside Planning District 8, and Albemarle County has adopted the county executive form of government.⁸ Therefore, § 33.1-223.2:13 applies to the Bypass around Charlottesville in Albemarle County.

CONCLUSION

Accordingly, it is my opinion that if MPO removes the Bypass from its Plan and the Federal Highway Administration requires the Commonwealth to reimburse the funds spent on the Bypass, an amount equal to such reimbursement would be deducted from the primary system highway construction funds for the Department of Transportation district in which the Bypass is located. Further, an amount equal to all state funds expended on the Bypass would be deducted from the primary system highway construction funds allocated to such district.

¹ See 23 U.S.C.S. § 134(d)(1) (Supp. 2007).

² See 1977-1978 Op. Va. Att’y. Gen. 460, 461.

³ *Id.*

⁴ Thomas Jefferson Planning District Commission, “Metropolitan Planning Organization (MPO),” available at <http://www.tjpd.org/transportation/mpo.asp> (last visited Sept. 10, 2007).

⁵ See 23 C.F.R. § 630.112(a) (2007).

⁶ See 23 C.F.R. § 630.112(c)(1) (2007).

⁷ See 23 C.F.R. § 630.112(c)(2) (2007).

⁸ See ALBEMARLE COUNTY, VA., CODE § 2-200, p. 2-14 (1998), available at http://www.albemarle.org/upload/images/forms_center/departments/county_attorney/forms/Albemarle_County_Code_Ch02_Administration.pdf (providing that “county shall operate under the county executive form of organization and government”).

OP. NO. 07-009

HOUSING: UNIFORM STATEWIDE BUILDING CODE – GENERAL PROVISIONS.

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

Local building official's demolition authority regarding unsafe structures supersedes and overrides demolition authority of historic district review board where structure located in historic district is unsafe or unfit for human occupancy.

THE HONORABLE WILLIAM J. HOWELL
SPEAKER, HOUSE OF DELEGATES
JUNE 7, 2007

ISSUE PRESENTED

You ask whether a local building official's opinion regarding demolition of unsafe structures, acting under the authority of §§ 36-98 and 36-103, negates or supersedes a review board's¹ approval requirement for demolition of structures within an historic district established pursuant to § 15.2-2306.²

RESPONSE

It is my opinion that a local building official's demolition authority regarding unsafe structures pursuant to §§ 36-98 and 36-103 supersedes and overrides the demolition authority of a review board pursuant to § 15.2-2306 in cases where a structure located in an historic district is unsafe or unfit for human occupancy.

BACKGROUND

You state that in early 2006, a local building maintenance official issued a notice of unsafe structure to an owner of an historic building located in an historic district governed by an ordinance established pursuant to § 15.2-2306 ("Ordinance"). You report that the notice stated the structure was unsafe and in violation of the Virginia Uniform Statewide Building Code.³ Further, the notice ordered the owner to follow the recommendations set forth in an inspection report or submit a plan to demolish and remove the structure within thirty days. The property owner elected to demolish the building. However, the locality refused to route an application for demolition to the review board established pursuant to the Ordinance.

APPLICABLE LAW AND DISCUSSION

Section 36-98 directs and empowers the Board of Housing and Community Development to adopt and promulgate a Uniform Statewide Building Code⁴ ("Building Code Regulations"). The primary purpose of the Building Code Regulations is "to ensure the protection of the public health, safety and welfare."⁵ The term "building regulations" refers to laws and regulations of the state or ordinances of any locality "relating to construction, reconstruction, alteration, conversion, repair, maintenance, or use of structures and buildings."⁶ As such, "building regulations" do not include "zoning ordinances or other land use controls that do not affect the manner of construction or materials to be used."⁷

Section 36-103 authorizes the Board of Housing and Community Development to promulgate and adopt minimum building regulations for existing buildings as part of the

Building Code Regulations. Pursuant to this statutory authority, the Board has adopted such regulations,⁸ including one to provide for demolition of buildings deemed to be unsafe or unfit for human occupancy.⁹ Section 36-105 directs localities to administer and enforce the Building Code Regulations. Further, § 36-105(A) requires each locality to designate a building department to administer and enforce the building code for new construction and to create “a local board of Building Code appeals.”

A locality also may choose to enforce the building maintenance provisions of the Building Code Regulations.¹⁰ If a locality chooses to enforce the maintenance provisions, “the local governing body shall designate the agency within the local government responsible for such enforcement and appoint a code official.”¹¹ The code official must enforce the Regulations and issue all necessary notices.¹² Such official has discretionary authority to issue notices regarding violations of the maintenance provisions that do not involve unsafe buildings.¹³ However, the official has a *mandatory* duty to inspect unsafe structures or those unfit for human habitation and to provide personal notice to the owner, his agent, or the person in control.¹⁴ Such notice must include the necessary corrective action, and in the case of a notice of demolition, the time period within which this action must occur.¹⁵

Section 36-98 provides that the Building Code Regulations shall supersede the building codes and regulations of localities. However, a 2001 amendment to § 36-98 provides:

Such Code also shall supersede the provisions of local ordinances applicable to single family residential construction that (a) regulate dwelling foundations or crawl spaces, (b) require the use of specific building materials or finishes in construction, or (c) require minimum surface area or numbers of windows; however, such Code shall not supersede ... land use requirements in airport or highway overlay districts, or historic districts created pursuant to § 15.2-2306, or local flood plain regulations adopted as a condition of participation in the National Flood Insurance Program. [Emphasis added.]¹⁶

Relevant to your inquiry is the language providing that the Building Code Regulations shall not supersede land use requirements in historic districts created pursuant to § 15.2-2306. The 2001 amendment permits review boards to consider matters in the Building Code Regulations related to construction which are also related to determining historic significance and architectural compatibility of a structure.¹⁷ Thus, the threshold question is whether the apparently conflicting language of § 36-98 and § 15.2-2306 may be harmonized. General rules of statutory construction require that statutes dealing with the same subject matter be read in harmony with one another.¹⁸

Section 15.2-2306(A)(1) authorizes a locality to adopt an Ordinance to set forth historic landmarks and historic buildings and structures and to establish a review board to administer the Ordinance. The Ordinance may charge the review board with the duty to implement the provisions of the Ordinance and may require approval from the board to demolish buildings regulated by the Ordinance.¹⁹ Review boards have

only two specifically designated functions: (1) to review and approve or disapprove proposed construction, reconstruction, alteration, or restoration of buildings or structures, including signs, within such district as being “architecturally compatible” with the historic landmarks, buildings, or structures in the historic district;²⁰ and (2) to review and approve or disapprove the proposed demolition or moving of an historic landmark, building, or structure within any such district.²¹

A plain reading of the language of § 15.2-2306 reveals that its purpose is to preserve and protect historic buildings and structures and areas of historic and architectural interest. The statute makes no mention of unsafe structures. Rules of statutory construction require that a reasonable construction should be given to a statute to promote the end for which it was enacted.²² In applying such rule to the demolition authority of review boards established pursuant to § 15.2-2306, it is reasonable to conclude that such authority relates to the architectural and historical significance of a building and its compatibility with historic values; it does not relate to unsafe conditions.²³

The general legislative intent of Chapter 22 of Title 15.2, which encompasses § 15.2-2306, is “to encourage localities to improve the public health, safety, convenience and welfare of its citizens.”²⁴ Likewise, the stated legislative intent of the Building Code Regulations is “to protect the health, safety and welfare of the residents of the Commonwealth.”²⁵ In order to harmonize § 15.2-2306 with §§ 36-98 and 36-103 and fulfill the legislative intent, it is necessary to recognize that public safety is a paramount task of government.²⁶ While the role of a review board regarding architectural and historical significance is important, it does not override considerations of public safety.²⁷

CONCLUSION

Accordingly, it is my opinion that a local building official’s demolition authority regarding unsafe structures pursuant to §§ 36-98 and 36-103 supersedes and overrides the demolition authority of a review board pursuant to § 15.2-2306 in cases where a structure located in an historic district is unsafe or unfit for human occupancy.

¹Section 15.2-2306(A)(1) authorizes localities to enact an ordinance to establish a review board, which may be charged with the preservation of historical sites and architectural areas. I note that a review board commonly is known and referred to as an “Architectural Review Board.”

²You request that I interpret a specific local historic ordinance provision. This office historically has declined to render official opinions interpreting local ordinances. *See, e.g.*, 1976-1977 Op. Va. Att’y Gen. 17, 17-18. Further, in instances when a request requires an interpretation of a local ordinance, the Attorney General has declined to respond in order to avoid becoming involved in matters solely of local concern and over which the local governing body has control. *See* Op. Va. Att’y Gen.: 2004 at 68, 71 n.1; 2001 at 65, 71 n.11; 1995 at 240, 241; 1986-1987 at 347, 348. Accordingly, I limit my comments to the scope of authority of a review board regarding demolition provided in § 15.2-2306.

³*See* VA. CODE ANN. §§ 36-97 to 36-119.1 (2005 & Supp. 2006).

⁴13 VA. ADMIN. CODE §§ 5-63-10 to 5-63-550 (Supp. 2006).

⁵13 VA. ADMIN. CODE § 5-63-460(A); *see also* §§ 36-99(A), 36-103 (2005) (providing that building code regulations are to ensure protection of public health, safety, and welfare).

⁶Section 36-97 (2005).

⁷*Id.*

⁸*See supra* note 4.

⁹*See* 13 VA. ADMIN. CODE § 5-63-490 (governing unsafe structures or structures unfit for human occupancy).

¹⁰*See* § 36-105(C) (2005).

¹¹13 VA. ADMIN. CODE § 5-63-480(F).

¹²13 VA. ADMIN. CODE § 5-63-480(M).

¹³13 VA. ADMIN. CODE § 5-63-480(T).

¹⁴*See* 13 VA. ADMIN. CODE § 5-63-490(B), (E).

¹⁵13 VA. ADMIN. CODE § 5-63-490(E).

¹⁶*See* 2001 Va. Acts ch. 525, at 588, 588 (amending § 36-98).

¹⁷*See* *Worley v. Town of Washington*, 65 Va. Cir. 14, 18-19 (2004) (interpreting § 15.1-503.2, predecessor to § 15.2-2306). In dicta, the court states that the 2001 amendment overrules a 1996 opinion of this Office. *See id.* at 22; *see also* 1996 Op. Va. Att’y Gen. 139. The 1996 opinion found that an architectural review board’s authority regarding approval or disapproval of proposed construction, alteration, and repair of a building in a historic district did not include the authority to dictate the types of materials but was limited to determining the compatibility of the character and style of the proposed renovations with existing landmarks and historic structures in the district. *Id.* at 141.

¹⁸1973-1974 Op. Va. Att’y Gen. 478, 479.

¹⁹*See* VA. CODE ANN. § 15.2-2306(A)(1)-(2) (2003).

²⁰*See* § 15.2-2306(A)(1).

²¹*See* § 15.2-2306(A)(2).

²²*See* *Ambrogì v. Koontz*, 224 Va. 381, 389, 297 S.E.2d 660, 664 (1982); *Rich v. Commonwealth*, 198 Va. 445, 449, 94 S.E.2d 549, 552 (1956).

²³This construction of § 15.2-2306 also comports with the framework of the Building Code Regulations with respect to unsafe structures, *i.e.*, the building code official’s duty to issue notices regarding unsafe structures is mandatory and if the structure is to be demolished, the notice must specify the time by which the demolition is to occur. *See* 13 VA. ADMIN. CODE § 5-63-490(B), (E).

²⁴Section 15.2-2200 (2003).

²⁵Section 36-99(A).

²⁶*See* VA. CONST. art. I, § 3 (providing that “government is ... instituted for the common benefit, *protection, and security of the people*” (emphasis added)); *United States v. Perkins*, 363 F.3d 317, 326 (4th Cir. 2004) (noting that public safety is among most basic services of government to its citizens). Therefore, it is reasonable to conclude that the order of a local building officer related to the safety of a structure must supercede that of a review board under an Ordinance.

²⁷Where possible, conflicting statutes are to be harmonized to give effect to both. *See Phipps v. Liddle*, 267 Va. 344, 346, 593 S.E.2d 193, 195 (2004). In this instance, we give effect to both recognizing that public safety is paramount, but once accomplished, architectural and historical values are also important.

OP. NO. 07-086

IMMIGRATION: ENFORCEMENT OF FEDERAL IMMIGRATION LAWS.

CRIMINAL PROCEDURE: ARREST.

Authority for Virginia law-enforcement officers to detain and arrest individuals committing violations of laws of United States and other states, subject to federal/state

limitations; authority extends to violations of federal criminal immigration law. Until law is clarified or ambiguity in federal appellate courts is resolved, enforcement of civil violations of immigration law is unadvisable outside of agreement with federal authorities.

THE HONORABLE KENNETH W. STOLLE
MEMBER, SENATE OF VIRGINIA

THE HONORABLE DAVID B. ALBO
MEMBER, HOUSE OF DELEGATES
OCTOBER 15, 2007

ISSUE PRESENTED

You inquire concerning the authority of Virginia law-enforcement agencies to detain and arrest individuals based on violations of federal immigration law. Specifically, you ask whether there is inherent authority to arrest; and, if so, whether that authority extends both to criminal and civil violations of federal immigration law.

RESPONSE

It is my opinion that Virginia law-enforcement officers have authority to detain and arrest individuals who have committed violations of the laws of the United States and other states, subject to federal and state limitations. It further is my opinion that such authority extends to violations of federal criminal immigration law. Finally, because the federal appellate courts are ambiguous regarding a state's authority to arrest individuals for civil violations of federal immigration law, until the law is clarified, it would not be advisable to enforce such violations outside of the scope of an agreement with federal authorities.

APPLICABLE LAW AND DISCUSSION

The law relating to the authority of state and local law-enforcement agencies to enforce violations of federal immigration law is complex and, in part, unclear. Although it appears that Virginia possesses authority to make arrests for federal criminal violations, including criminal violations of certain federal immigration laws, the authority to enforce civil violations requires clarification by Congress or the federal appellate courts.

I. INHERENT AUTHORITY

The power to enforce federal law belongs exclusively to the President and his subordinates.¹ However, states may cooperate in the enforcement of federal law.² Indeed, such cooperation has taken place since the framing of the Constitution of the United States.³ Thus, to the extent that state and local law-enforcement officers work in cooperation with federal officials, they have inherent authority to enforce federal law.⁴ It is not necessary under federal law to have explicit statutory authority for such enforcement.⁵

Although Congress has enacted legislation in the field of immigration enforcement and preempted state and local enforcement in certain areas, it has not preempted the field. For example, 8 U.S.C. § 1357 expressly authorizes state and local law-enforcement agencies to enter into cooperative agreements with federal agencies for enforcement of federal immigration law. These agreements commonly are known as "287(g)" agreements,

referring to § 287 of the Illegal Immigration Reform and Immigrant Responsibility Act.⁶ Section 1357 further provides that:

Nothing in this subsection shall be construed to require an agreement under this subsection in order for any officer or employee of a State or political subdivision of a State—

(A) to communicate with the Attorney General regarding the immigration status of any individual, including reporting knowledge that a particular alien is not lawfully present in the United States; or

(B) otherwise to cooperate with the Attorney General in the identification, apprehension, detention, or removal of aliens not lawfully present in the United States.⁷

Moreover the federal circuits “have never ruled that the states are preempted from arresting aliens for criminal immigration violations”⁸ and have recognized the states’ authority to make federal arrests, generally.⁹ The United States Court of Appeals for the Fourth Circuit has not addressed the specific issue of whether states possess authority to make arrests for violations of federal immigration law. However, the United States Courts of Appeals for the Ninth and Tenth Circuits have held that when there is cooperation with federal authorities, the “general rule is that local police are not precluded from enforcing federal statutes”¹⁰ and “state and local police officers [have] implicit authority within their respective jurisdictions ‘to investigate and make arrests for violations of federal law, including immigration laws.’”¹¹

The federal circuits are not as clear on the issue of whether the states possess authority to arrest for *civil* violations of federal immigration law. Although no federal appellate court has held that state and local officials are prevented from doing so, several competing authorities suggest that the authorization is not clear. For example, the Ninth Circuit, has assumed, in *dicta*, “that the civil provisions of the [Immigration and Nationalization] Act ... constitute such a pervasive regulatory scheme, as would be consistent with the exclusive federal power over immigration,”¹² thereby limiting state authority to arrests for only criminal immigration violations. The *Gonzales* court¹³ does not adequately explain how the Immigration and Nationalization Act is so pervasive that it preempts civil arrests while leaving unscathed the states’ authority to arrest for criminal violations.

Further complicating matters is the effect of an opinion letter issued by the Office of Legal Counsel¹⁴ (“OLC”) of the United States Department of Justice (“Justice Department”) and the subsequent reversal of a portion of the Department’s position. In a 1996 opinion, OLC concluded that “state and local police lack recognized legal authority to stop and detain an alien solely on suspicion of civil deportability.”¹⁵ The fact that the Attorney General of the United States subsequently reversed the Department’s position¹⁶ does little to clarify this area of the law.

While it is important to note that authority exists for Virginia law-enforcement officers to arrest for criminal violations of federal law,¹⁷ there are significant unanswered questions regarding arrest procedures. When acting under the authority of 8 U.S.C. § 1357, federal procedure would apply. Similarly, Virginia law provides a procedure to detain and initially process a limited group of criminal illegal aliens in the Commonwealth until federal authorities can take custody of such aliens or until a specified period of time has elapsed.¹⁸ That process, however, does not apply to the vast majority of aliens who are unlawfully present in the United States and are in violation of federal criminal law pursuant to 8 U.S.C. § 1325.¹⁹ Ostensibly, under their inherent authority to arrest and with the knowledge of sufficient facts, Virginia law-enforcement officers could detain an alien who has unlawfully entered the United States and is present within the Commonwealth. However, without proper training in applicable federal criminal procedure, it would be difficult for such officers to arrest solely on the basis of a federal criminal violation without assistance from federal authorities. Additionally, as explained hereafter in greater detail, there are state law limitations on the exercise of such authority.

II. EXPRESS CONGRESSIONAL AUTHORITY

In addition to the authority previously discussed, Congress has enacted statutes that expressly permit states and localities to enforce certain immigration laws.²⁰

A. 8 U.S.C. § 1252C

Section 1252c(a) expressly authorizes states and localities to arrest and detain individuals provided the individual: (1) is illegally present in the United States; and (2) has previously been convicted of a felony and deported or left the United States after such conviction. Additionally, a state or locality must confirm the status of the individual with Immigration and Customs Enforcement prior to arrest or detainment. To facilitate cooperation, § 1252c(b) compels the United States Attorney General to share information that would assist state and local law-enforcement officials in the performance of these duties.

B. 8 U.S.C. § 1324

Section 1324(c) expressly allows “all ... officers whose duty it is to enforce criminal laws” to arrest for violations of 8 U.S.C. § 1324, the “anti-harboring” statute. Specifically, § 1324(a)(1)(A) mandates punishment for persons who knowingly (or in some instances who demonstrate a reckless disregard): (1) transport an alien into the United States through an undesignated point of entry; (2) transport an alien within the United States; (3) harbor, conceal, or otherwise shield an alien from detection; or (4) encourage an alien to enter the United States in violation of federal law. Because state and local law-enforcement officers have the duty to enforce criminal laws, they would encompass the group expressly designated by Congress in § 1324(c) to enforce § 1324.

C. 8 U.S.C. § 1357(G)

Section 1357(g)(1) expressly authorizes the United States Attorney General to enter into agreements with states and localities to permit qualified officers or employees to serve as immigration officers in relation to the investigation, apprehension, or detention

of aliens. Importantly, § 1357(g)(1) provides authorization beyond any inherent arrest authority or other express authority granted in other federal statutes because it includes both criminal and civil authority for the investigation and apprehension of aliens. Two important caveats to consider are that the state or local agency will bear the cost of federal enforcement activities, and such activities must be consistent with both state and local law. The rationale behind § 1357(g)(1) is that due to the vast number of aliens in the United States compared to the relatively few federal immigration officers, state and local law-enforcement officers may be utilized for the detection and the apprehension of aliens. Further, § 1357(g)(10) provides that the express authority granted to states in no way diminishes their inherent authority to assist in immigration enforcement.²¹

D. 8 U.S.C. § 1103(A)(10)

Although § 1103(a)(10) contains a mechanism for triggering its application, it also involves an express grant of power to states or localities. If the United States Attorney General determines that an actual or imminent influx of aliens requires an immediate federal response, he may authorize any state or local law-enforcement officer to perform certain federal immigration functions. The head of the state or local law-enforcement agency must consent to the “emergency” provision before it may be utilized.

III. PERTINENT VIRGINIA AUTHORITY

The federal statutes analyzed above outline the basic parameters of the federal immigration enforcement power delegated to states and localities. Specifically, these statutes and authority delineate the “outer boundaries” of acceptable state enforcement action in the area.²² However, the delegation of authority from the federal government to states and localities is contingent upon the specific limitations of a state’s or locality’s own laws and regulations.²³ Thus, to enforce federal immigration laws or to legislate in areas where no federal regulations exist, federal approval coupled with state authorization is required.²⁴

The General Assembly of Virginia has enacted several statutes pursuant to federal authority that provide guidelines and parameters for state and local action. Although not an exhaustive list, the following statutes detail the major substantive procedures and constraints that Virginia has enacted.

A. VA. CODE ANN. § 15.2-1726

Section 15.2-1726 authorizes localities to enter into agreements for cooperation in the furnishing of police services, generally. It sets forth a procedure and gives broad discretion for local law-enforcement agencies, including the state police, to enter into agreements with federal law-enforcement agencies to cooperate in the furnishing of police services.²⁵ However, local law-enforcement agencies cannot enforce federal law unless authority is provided by federal statute.²⁶ In the context of immigration enforcement policy, § 15.2-1726 would provide authority to Virginia law-enforcement officers to execute the express federal authorization under 8 U.S.C. § 1357(g).²⁷

B. VA. CODE ANN. §§ 19.2-81.6 & 19.2-82(B)

Collectively, §§ 19.2-81.6 and 19.2-82(B) formalize authority for Virginia law-enforcement officers to exercise the express grant of arrest authority given to state and local

law-enforcement officers by 8 U.S.C. § 1252c. Specifically, §§ 19.2-81.6 and 19.2-82(B) authorize state and local law-enforcement officers, in the course of their regular duties, to detain an individual illegally present in the United States who previously has been convicted of a felony and has been deported or left the county upon such conviction. In § 19.2-82(B), Virginia specifically restricted the use of this federal authority by mandating that such a person may only be held for a maximum of seventy-two hours.

C. VA. CODE ANN. § 15.2-1704

Section 15.2-1704 delineates the powers and duties of local law-enforcement officers and provides certain constraints. First, under § 15.2-1704(A), local law-enforcement officers are vested with the power to prevent and detect crime, apprehend criminals, safeguard life and property, preserve peace, and enforce “state and local laws, regulations and ordinances.” In limiting the authority of local law-enforcement officers to the enforcement of state and local laws, regulations, and ordinances, § 15.2-1704(A) ostensibly prohibits such officers from enforcing federal laws and regulations. However, the responsibilities granted to local law-enforcement officers “for the prevention and detection of crime, the apprehension of criminals, the safeguard of life and property, [and] the preservation of peace”²⁸ appears to provide the necessary authority to cooperate in the enforcement of federal laws and regulations despite the limiting language.²⁹ Furthermore, this limiting language does not affect the ability of the state or localities to enter into agreements with federal authorities, as specifically detailed in § 15.2-1726 and 8 U.S.C. § 1357(g).

Additionally, § 15.2-1704(B) provides that

[a] police officer has no authority in civil matters, except (i) to execute and serve temporary detention and emergency custody orders ..., (ii) to serve an order of protection ..., (iii) to execute all warrants or summons as may be placed in his hands by any magistrate for the locality ..., and (iv) to deliver, serve, execute, and enforce orders of isolation and quarantine[.]

The bar for local police officers to participate in civil matters appears to limit the enforcement of federal civil immigration violations outside the scope of any agreement under § 15.2-1726 and 8 U.S.C. § 1357(g). The statutory language employed in granting specific exceptions to this general rule may allow such federal civil enforcement by local law-enforcement officers to occur.³⁰ However, in light of the current judicial uncertainty³¹ regarding the scope of federal authority granted to localities to make arrests based solely on suspicion of a civil violation, coupled with the specific limitations in § 15.2-1704, would make local enforcement of federal civil immigration laws imprudent at this juncture.

D. VA. CODE ANN. § 15.2-530

Section 15.2-530 delineates the powers and duties of sheriffs. Specifically, “[t]he sheriff shall exercise the powers conferred and perform the duties imposed upon sheriffs by general law.” Similar to the analysis regarding § 15.2-1704, the ability of

sheriffs to enforce federal civil immigration law, without a specific statutory grant, is unclear. However, in the absence of specific powers and duties, as in § 15.2-1704 for local law-enforcement officers, a stronger argument exists that sheriffs are permitted to conduct such civil enforcement activities. Again, the prudent course of conduct is that sheriffs refrain from enforcement of federal civil immigration law outside the scope of § 15.2-1726 and 8 U.S.C. § 1357(g) until such authority is clarified by federal courts or statute. For example, a specific mandate from Congress or direction from the appellate courts would provide such clarification coupled with any necessary amendments to the *Virginia Code*.

E. VA. CODE ANN. § 52-8

Section 52-8 outlines the powers and duties of the Virginia state police. In pertinent part, § 52-8 provides that state police officers “are vested with the powers of a sheriff for the purpose of enforcing all the criminal laws of this Commonwealth.” Because the powers of state police officers are tied to those of sheriffs, the previous analysis for § 15.2-530 would apply equally to state police officers.

IV. SUMMARY

Virginia, as a sovereign within the constitutional framework of dual sovereignty, has the inherent authority to cooperate with the federal executive branch in the enforcement of criminal violations of federal immigration, unless otherwise expressly preempted. Although the Fourth Circuit has not issued a ruling on states’ inherent authority, the Ninth and Tenth Circuits have ruled that the states’ authority to arrest for criminal violations has not been preempted by federal action.³² However, it is unclear whether arrest authority extends to civil violations of federal immigration law. Absent an express agreement with federal authorities to make arrests for civil violations of federal immigration laws, it is my opinion that Virginia law-enforcement officers should refrain from making such arrests for such civil violations until the law is clarified. Additionally, Congress has granted express authority to the states to assist in the enforcement of federal immigration law; however, Virginia law limits the ability of Virginia law-enforcement officers to arrest and detain individuals for violations of federal immigration.

CONCLUSION

Accordingly, it is my opinion that Virginia law-enforcement officers have authority to detain and arrest individuals who have committed violations of the laws of the United States and other states, subject to federal and state limitations. It further is my opinion that such authority extends to violations of federal criminal immigration law. Finally, because the federal appellate courts are ambiguous regarding a state’s authority to arrest individuals for civil violations of federal immigration law, until the law is clarified, it would not be advisable to enforce such violations outside of the scope of an agreement with federal authorities.

¹Printz v. United States, 521 U.S. 898 (1997).

²See, e.g., 8 U.S.C.S. § 1357 (LexisNexis 1997 & Supp. 2007).

³ *Printz*, 521 U.S. at 907-12.

⁴ *United States v. Janik*, 723 F.2d 537, 548 (7th Cir. 1983).

⁵ *United States v. Santana-Garcia*, 264 F.3d 1188, 1194 (10th Cir. 2001).

⁶ See U.S. Immigration & Customs Enforcement, “Fact Sheets,” at <http://www.ice.gov/pi/news/factsheets/070622factsheet287gprogover.htm> (last visited Oct. 5, 2007).

⁷ 8 U.S.C.S. § 1357(g)(10) (LexisNexis (1997)).

⁸ Jeff Session & Cynthia Hayden, *Symposium: Globalization, Security & Human Rights: Immigration in the Twenty-first Century: The Growing Role for State & Local Law Enforcement in the Realm of Immigration Law*, 16 STAN. L. & POL’Y REV. 323, 332 (2005).

⁹ *Janik*, 723 F.2d at 548 (noting that court has never invalidated such arrest; thus, inferring that “[state] officers have implicit authority to make federal arrests”).

¹⁰ *Gonzales v. Peoria*, 722 F.2d 468, 474 (9th Cir. 1983).

¹¹ *Santana-Garcia*, 264 F.3d at 1194 (quoting *United States v. Vasquez-Alvarez*, 176 F.3d 1294, 1295 (10th Cir. 1999)).

¹² *Gonzales*, 722 F.2d at 474-75.

¹³ *Id.* at 475 (noting that statutes relating to criminal activities “are few in number and relatively simple in their terms”).

¹⁴ Mem. Op. Off. Legal Counsel, U.S. Dep’t of Justice, for U.S. Att’y, S. Dist. Cal., “Assistance by State and Local Police in Apprehending Illegal Aliens,” available at <http://www.usdoj.gov/olc/immstopto1a.htm> (Feb. 5, 1996).

¹⁵ *Id.* at *10.

¹⁶ See “Attorney General Prepared Remarks on the National Security Entry-Exit Registration System,” p. 5 (June 6, 2002), available at <http://www.usdoj.gov/archive/ag/speeches/2002/060502agpreparedremarks.htm> (stating that “we are asking state and local police to undertake voluntarily – arresting aliens who have violated criminal provisions of Immigration and Nationality Act or civil provisions that render an alien deportable, and who are listed on the NCIC — is within the inherent authority of the states”); see also *Clear Law Enforcement for Criminal Alien Removal Act of 2003: Hearing on H.R. 2671 Before the H. Comm. On the Judiciary* (Oct. 1, 2003) (statement of Kris W. Kobach, Professor of Law, University of Missouri-Kansas City), p. 2, available at <http://judiciary.house.gov/HearingTestimony.aspx?ID=238> (last visited Sept. 28, 2007) (noting that Counsel issued “an erroneous 1996 opinion,” which was corrected by unpublished opinion in 2002).

¹⁷ See *supra* notes 8-9 and accompanying text.

¹⁸ See VA. CODE ANN. § 19.2-81.6 (2004) (authorizing enforcement of immigration laws of the United States); § 19.2-82(B) (2004) (establishing procedure for arrest without warrant and providing limitation of seventy-two hours).

¹⁹ Pursuant to 8 U.S.C. § 1325(a)(3), a first offense for improper entry by an alien into the United States is punishable by up to six months imprisonment while a subsequent offense is punishable up to two years.

²⁰ Sessions & Hayden, *supra* note 8, at 341-42 (noting that “[w]hile most sections of the INA do not expressly delineate which law enforcement officers have the authority to enforce them, several sections expressly recognize general state and local authority to enforce federal immigration law”); see also 8 U.S.C.S. § 1252c(a) (LexisNexis 1997) (granting authority “to the extent permitted by relevant State and local law”).

²¹ See *supra* note 7 and accompanying text.

²² See generally Jay T. Jorgensen, Comment, *The Practical Power of State and Local Governments to Enforce Federal Immigration Laws*, 1997 BYU L. REV. 899, 920-21 (1997). “[T]he only question that remains to be resolved where Congress explicitly grants state and local authority to enforce the [Immigration and Nationality Act]’s provisions is whether state and local immigration enforcement is authorized by state law.” *Id.* at 920.

²³ See *Gonzales*, 722 F.2d at 475-77 (requiring that state law grant state police authority that is delegated from federal government).

²⁴ *Id.*

²⁵ See 2007 Op. Va. Att’y Gen. 51, 52.

²⁶ *Id.*

²⁷ Such authority exists in the context of “287g” agreements pursuant to 8 U.S.C. § 1357(g)(1) and general agreements to cooperate pursuant to § 1357(g)(10).

²⁸ VA. CODE ANN. § 15.2-1704(a) (Supp. 2007).

²⁹ While authority arguably exists within the existing language of § 15.2-1704, clarification by the General Assembly ultimately may be necessary.

³⁰ See VA. CODE ANN. § 15.2-1704(B)(iii) (authorizing execution of all warrants or summons from magistrates).

³¹ See *supra* notes 8-13 and accompanying text.

³² See *supra* notes 10-11 and accompanying text.

OP. NO. 07-038

PENSIONS, BENEFITS, AND RETIREMENT: VIRGINIA RETIREMENT SYSTEM – LOCAL RETIREMENT SYSTEMS.

ADMINISTRATION OF GOVERNMENT: DEPARTMENT OF LAW – GENERAL PROVISIONS (OFFICIAL OPINIONS OF ATTORNEY GENERAL).

Creation and funding of limited liability company to manage investments for local government retirement system fund may be reasonable and appropriate exercise of governmental powers under Dillon Rule, provided such investments conform to standards of § 51.1-803. Whether such company may own and manage real property outside of Virginia as acceptable investment is question of fact and not appropriate issue on which to render opinion.

MR. STUART E. KATZ
CITY ATTORNEY FOR NEWPORT NEWS
JULY 10, 2007

ISSUE PRESENTED

You ask whether the creation and funding of a limited liability company for the purpose of owning and managing real property outside of Virginia as an investment for the Newport News Employees’ Retirement Fund is a reasonable and appropriate exercise of local government powers under the Dillon Rule.¹

RESPONSE

It is my opinion that the creation and funding of a limited liability company to manage investments for a local government retirement system fund may be a reasonable and appropriate exercise of governmental powers under the Dillon Rule, provided such investments conform to the standards of § 51.1-803. Whether such a limited liability company may own and manage real property outside of Virginia as an acceptable investment pursuant to § 51.1-803 is a question of fact and not an appropriate issue on which to render an opinion.²

BACKGROUND

You relate that the Charter of the City of Newport News authorizes the establishment of a local retirement fund known as the City of Newport News Employees’ Retirement

Fund. You also note that the charter authorizes the City “[t]o establish a system of pensions.”³ Pursuant to that authority, you relate that the City has established the City of Newport News Employees’ Retirement Fund,⁴ governed by a board of trustees⁵ (“board”). You state that the City has granted the board full power to invest all assets of the Retirement Fund.⁶ You relate that the board plans to invest a percentage of its assets in real estate. Such real estate investments may involve the purchase and sale of land on which timber groves will be harvested and sold. You further convey that the board will need to enter into an agreement with an individual or entity familiar with timber operations to manage the investment operations. To protect the Retirement Fund and the City from potential liability arising from the ownership of the real estate investment, the board wishes to form a limited liability company to own the real estate. You state that the board will maintain ultimate control over the limited liability company.

APPLICABLE LAW AND DISCUSSION

The overriding goal of statutory interpretation is to discern and give effect to legislative intent.⁷ The Commonwealth follows the Dillon Rule of strict construction “that municipal corporations 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.”⁸ “[W]here a grant of power [by the General Assembly] 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, . . . would be unreasonable.”⁹ However, an established corollary to Dillon’s Rule provides that:

“Where the state legislature grants a local government the power to do something but does not specifically direct the method of implementing that power, the choice made by the local government as to how to implement the conferred power will be upheld as long as the method selected is reasonable.”¹⁰

The authority to establish a retirement system for local government employees is expressly contained in §§ 15.2-1510,¹¹ 51.1-800,¹² and 51.1-801.¹³ Those statutes do not specify the manner by which local governments may invest retirement fund assets. However, the intent of the investment powers granted by the General Assembly is unambiguous. Local governments must invest their retirement system fund assets “with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent person acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of like character and with the same aims.”¹⁴ Further, local government retirement systems are to diversify the investment of their assets “to minimize the risk of large losses unless under the circumstances it is clearly prudent not to do so.”¹⁵

Based upon the powers that the General Assembly has conferred to local governments to manage their retirement systems, it would be permissible to establish and fund

a limited liability company as a means to implement investment powers provided such investments conform to the standards of care and diversification mandated by § 51.1-803(A). Further, the Supreme Court of Virginia has determined that when a grant of power is silent regarding a method for implementation, such as with § 51.1-803, “[a]ny doubt in the reasonableness of the method selected is resolved in favor of the locality.”¹⁶

Whether the particular real estate investment about which you inquire conforms to the standards of care and diversification mandated upon local government retirement systems by § 51.1-803 is a question of fact. Attorneys General traditionally have declined to render official opinions when the request involves a question of fact rather than one of law.¹⁷

CONCLUSION

Accordingly, it is my opinion that the creation and funding of a limited liability company to manage investments for a local government retirement system fund may be a reasonable and appropriate exercise of governmental powers under the Dillon Rule, provided such investments conform to the standards of § 51.1-803. Whether such a limited liability company may own and manage real property outside of Virginia as an acceptable investment pursuant to § 51.1-803 is a question of fact and not an appropriate issue on which to render an opinion.¹⁸

¹ See *infra* note 8.

² See Op. Va. Att’y Gen.: 2004 at 163, 164 n.2; 1999 at 132, 132; 1986-1987 at 1, 6 (noting that authority of Attorney General to issue official advisory opinions is limited to questions of law).

³ See 1978 Va. Acts ch. 576, at 886, 888 (quoting § 2.02(H)).

⁴ See NEWPORT NEWS, VA., CODE § 31-20 (2005), available at <http://www.municode.com/Resources/gateway.asp?pid=14013&sid=46>.

⁵ NEWPORT NEWS, VA., CODE § 31-72 (2005)

⁶ NEWPORT NEWS, VA., CODE § 31-80(a) (2005)

⁷ 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).

⁸ *City of Richmond v. Confrere Club*, 239 Va. 77, 79, 387 S.E.2d 471, 473 (1990); see also *Commonwealth v. County Bd.*, 217 Va. 558, 574, 232 S.E.2d 30, 40 (1977); *Winchester v. Redmond*, 93 Va. 711, 714, 25 S.E. 1001, 1002 (1896).

⁹ *County Board*, 217 Va. at 577, 232 S.E.2d at 42.

¹⁰ *Arlington County v. White*, 259 Va. 708, 712, 528 S.E.2d 706, 708 (2000) (quoting *Virginia Beach v. Hay*, 258 Va. 217, 221, 518 S.E.2d 314, 316 (1999)).

¹¹ “Any locality may establish a system for the retirement of injured or superannuated officers and employees[.]” VA. CODE ANN. § 15.2-1510 (2003).

¹² “Every county and city, and every town having a population of 5,000 or more, shall provide a retirement system for those officers and employees ... either (i) by establishing and maintaining a local retirement system ... or (ii) by participating directly in the Virginia Retirement System.” VA. CODE ANN. § 51.1-800(A) (Supp. 2007).

¹³“The governing body of any county, city, or town may, by ordinance adopted by a recorded vote of a majority of the members elected, establish a retirement system.” Section 51.1-801 (2005).

¹⁴Section 51.1-803(A) (2005).

¹⁵*Id.*

¹⁶*White*, 259 Va. at 712, 528 S.E.2d at 708 (quoting *Hay*, 258 Va. at 221, 518 S.E.2d at 316).

¹⁷*See supra* note 2.

¹⁸*Id.*

OP. NO. 07-077

PROFESSIONS AND OCCUPATIONS: CEMETERY OPERATORS, PERPETUAL CARE TRUST FUNDS AND PRENEED BURIAL CONTRACTS.

No requirement to establish perpetual care trust fund for EcoEternity Forest.

THE HONORABLE TIMOTHY D. HUGO
MEMBER, HOUSE OF DELEGATES
AUGUST 21, 2007

ISSUE PRESENTED

You inquire whether § 54.1-2316 applies to an EcoEternity Forest or a Green Cemetery (“EcoEternity Forest”) and requires a perpetual care trust fund in the amount of \$50,000 for such EcoEternity Forest.

RESPONSE

It is my opinion that § 54.1-2316 does not apply to an EcoEternity Forest and does not require the establishment of a perpetual care trust fund.

BACKGROUND

You state that an EcoEternity Forest is a natural forest where ashes are buried, and the forest is allowed to mature without any human intervention. Further, you explain that customers of the EcoEternity Forest purchase a 99-year lease right to have their cremated ashes buried in a biodegradable urn at the base of a tree in the EcoEternity Forest. You relate that the forest is left undisturbed, and there are no headstones or footstones placed in the natural forest. Within four years, you note that the urn will totally degrade, and there will be no evidence of the ashes. Further, you relate that the forest will take its natural course of growth and development over the 99-year lease period. Lastly, you explain that an EcoEternity Forest does not require perpetual care and no mowing, trimming, grass planting, road repairs, fence repairs, or other maintenance will be offered or required to maintain such cemetery.

APPLICABLE LAW AND DISCUSSION

Chapter 23.1 of Title 54.1, §§ 54.1-2310 through 54.1-2342, regulates cemetery operators and perpetual care trust funds. An EcoEternity Forest is considered a cemetery¹ under Title 54.1; therefore, an EcoEternity Forest operator must comply with Chapter 23.1 and must obtain a license² from the Cemetery Board.³

You inquire whether a perpetual care trust fund⁴ is required for an EcoEternity Forest to comply with § 54.1-2316, which provides that:

It shall be unlawful to sell or offer for sale in the Commonwealth any grave or entombment right in a cemetery and, in connection therewith, to represent to the public in any manner, express or implied, that the entire cemetery or any grave or entombment right therein will be perpetually cared for, unless adequate provision has been made for the perpetual care of the cemetery and all graves and entombment rights therein as to which such representation has been made.

Each cemetery company shall establish in a Virginia trust company or trust subsidiary or a federally insured bank or savings institution doing business in the Commonwealth, an irrevocable trust fund in the amount of at least \$50,000 before the first lot, parcel of land, burial or entombment right is sold. This fund shall be designated the perpetual care trust fund.

Section 54.1-2312 provides certain exemptions from Chapter 23.1; however, I find no specific exemption for an EcoEternity Forest. According to the definition and description of an EcoEternity Forest that you provide, there is no perpetual care in an EcoEternity Forest. Since no mowing, trimming, grass planting, road repairs, or fence repairs are required, no perpetual care is needed for an EcoEternity Forest.

The first paragraph of § 54.1-2316 prohibits representation to the public during the sale of any grave or entombment right in a cemetery that perpetual care will be provided unless adequate provision is made for such perpetual care. You indicate that no representation about perpetual care would be made to the public about the EcoEternity Forest. Since there will be no representation to the public that the EcoEternity Forest is a perpetual care cemetery, there is no need to provide for such care.

The second paragraph of § 54.1-2316 states that a cemetery company⁵ “shall establish ... an irrevocable trust fund in the amount of at least \$50,000 before [selling] the first lot, parcel of land, burial or entombment right.” Because the EcoEternity Forest that you describe does not offer perpetual care, there is no requirement to establish an irrevocable perpetual care trust fund for the care of the EcoEternity Forest.

CONCLUSION

Accordingly, it is my opinion that § 54.1-2316 does not apply to an EcoEternity Forest and does not require the establishment of a perpetual care trust fund.

¹The term “cemetery” means “any land or structure used or intended to be used for the interment of human remains.” VA. CODE ANN. § 54.1-2310 (2005).

²See § 54.1-2311 (2005) (requiring license to engage in business of cemetery company).

³See § 54.1-2313 (2005) (establishing Cemetery Board and setting forth its powers and duties).

⁴A “perpetual care trust fund” is “a fund created to provide income to a cemetery to provide care, maintenance, administration and embellishment of the cemetery.” Section 54.1-2310.

⁵See § 54.1-2310 (defining “cemetery company”).

OP. NO. 06-106

PROFESSIONS AND OCCUPATIONS: PSYCHOLOGY.

Board of Psychology’s general practice standards do not authorize licensed applied psychologist, regardless of specialized training, to perform neuropsychological testing or render expert opinion relating to such testing; such acts constitute practice of clinical psychology requiring licensure as clinical psychologist. Licensed applied psychologist must also be licensed clinical psychologist to provide neuropsychological testing.

THE HONORABLE H. MORGAN GRIFFITH
MEMBER, HOUSE OF DELEGATES
FEBRUARY 20, 2007

ISSUES PRESENTED

You ask whether the regulation governing the general practice standards promulgated by the Virginia Board of Psychology authorizes an individual licensed as an applied psychologist who claims to have special individual training in neuropsychological testing, assessment, and diagnosis of brain injury to perform acts within the scope of practice of a clinical psychologist. Specifically, you ask whether such an individual may conduct diagnostic testing and measure and assess neuropsychological functioning in order to render an expert opinion.

RESPONSE

It is my opinion that the general practice standards established by the Board of Psychology do not authorize a licensed applied psychologist, regardless of specialized training, to perform neuro-psychological testing or render an expert opinion relating to such testing since these acts constitute the practice of clinical psychology requiring licensure as a clinical psychologist. Finally, it is my opinion that a licensed applied psychologist who wishes to provide neuropsychological testing must apply for and be licensed as a clinical psychologist.

BACKGROUND

You advise that the Brain Injury Services of Southwest Virginia program (“Program”), through funds allocated by the Virginia Department of Rehabilitative Services, determines eligibility for case management and other services for brain injury survivors. Eligibility for Program services requires definitive documentation of brain injury. However, where the brain trauma is unclear, clinical and neuropsychological assessment to confirm the diagnosis and to provide guidance to Program managers is obtained from either a doctor of medicine, doctor of osteopathic medicine, or a licensed clinical psychologist with experience and training relating to brain injury.

You relate that a licensed applied psychologist claiming to have special individual training in neuropsychological testing, assessment, and diagnosis of brain injury has requested that

the Program find her competent and legally authorized to provide neuropsychological testing and assessment of brain injury. You ask whether the general practice standards would permit a licensed applied psychologist to provide neuropsychological testing.

APPLICABLE LAW AND DISCUSSION

Chapter 36 of Title 54.1¹ governs the practice of psychology. Section 54.1-3600 defines an “applied psychologist” as “an individual licensed to practice applied psychology” and a “clinical psychologist” as “an individual licensed to practice clinical psychology.” Further, § 54.1-3600 defines the “practice of applied psychology” as the “application of the principles and methods of psychology to improvement of organizational function, personnel selection and evaluation, program planning and implementation, individual motivation, development and behavioral adjustment, as well as consultation on teaching and research.” Finally, under § 54.1-3600, the “practice of clinical psychology” “includes, but is not limited to:”

1. “Testing and measuring” which consists of the psychological evaluation or assessment of personal characteristics such as intelligence, abilities, interests, aptitudes, achievements, motives, personality dynamics, psychoeducational processes, neuropsychological functioning, or other psychological attributes of individuals or groups.

2. “Diagnosis and treatment of mental and emotional disorders” which consists of the appropriate diagnosis of mental disorders according to standards of the profession and the ordering or providing of treatments according to need. Treatment includes providing counseling, psychotherapy, marital/family therapy, group therapy, behavior therapy, psychoanalysis, hypnosis, biofeedback, and other psychological interventions with the objective of modification of perception, adjustment, attitudes, feelings, values, self-concept, personality or personal goals, the treatment of alcoholism and substance abuse, disorders of habit or conduct, as well as of the psychological aspects of physical illness, pain, injury or disability.

3. “Psychological consulting” which consists of interpreting or reporting on scientific theory or research in psychology, rendering expert psychological or clinical psychological opinion, evaluation, or engaging in applied psychological research, program or organizational development, administration, supervision or evaluation of psychological services.

The Board of Psychology’s regulation in 18 VAC § 125-20-40 provides, in pertinent part, that “[i]ndividuals licensed in one licensure category who wish to practice in another licensure category shall submit an application for the additional licensure category in which the licensee seeks to practice.” The Board’s general practice standards regulation in 18 VAC § 125-20-150(B) provides that:

Persons licensed by the board shall:

1. Provide and supervise only those services and use only those techniques for which they are qualified by training and appropriate experience. Delegate to their employees, supervisees, residents and research assistants only those responsibilities such persons can be expected to perform competently by education, training and experience. Take ongoing steps to maintain competence in the skills they use[.]

The respective scopes of practice for clinical psychology and applied psychology are defined expressly in § 54.1-3600. Clinical psychology includes psychological evaluation or assessment of neuropsychological functioning, diagnosis and treatment of mental and emotional disorders, and rendering expert psychological or clinical psychological opinions and evaluations.² Applied psychology, however, is different in that its scope of practice pertains to the “application of the principles and methods of psychology to improvement of organizational function, personnel selection and evaluation, program planning and implementation, individual motivation, development and behavioral adjustment, as well as consultation on teaching and research.”³

Statutes must be construed to reflect legislative intent.⁴ An analysis of legislative intent includes appraisal of the subject matter and purpose of the statute, as well as its express terms.⁵ “The plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow or strained construction.”⁶ Words and phrases in a statute must be considered in the context in which they are used to arrive at a construction consistent with the purpose of the statute.⁷

By statutory definition,⁸ the practice of applied psychology neither includes nor authorizes neuropsychological testing or the rendering of expert opinions in the field of clinical psychology. Such functions expressly are included within the practice of clinical psychology. An individual licensed as an applied psychologist who claims to be qualified to provide such testing must submit an application for the “additional licensure category” in which the licensee seeks to practice.⁹ Therefore, a licensed applied psychologist claiming to possess specialized training beyond the licensed scope of practice is required to apply to the Board of Psychology for additional licensure as a clinical psychologist.

Additionally, the general practice standards in 18 VAC § 15-20-150(B)(1) do not otherwise authorize an individual licensed as an applied psychologist to perform neuropsychological testing or render expert opinions in the field of clinical psychology. It is well-settled that the interpretation given a statute by the administrative agency charged with its administration and enforcement is entitled to great weight.¹⁰ Similarly, the General Assembly is presumed to be cognizant of such an administrative construction of a statute¹¹ and that such agency interpretation is entitled to deference.¹²

CONCLUSION

Accordingly, it is my opinion that the general practice standards established by the Board of Psychology do not authorize a licensed applied psychologist, regardless

of specialized training, to perform neuropsychological testing or render an expert opinion relating to such testing since these acts constitute the practice of clinical psychology requiring licensure as a clinical psychologist. Finally, it is my opinion that a licensed applied psychologist who wishes to provide neuropsychological testing must apply for and be licensed as a clinical psychologist.

¹Chapter 36 is codified in scattered sections. *See* VA. CODE ANN. §§ 54.1-3600 to 54.1-3606.1, 54.1-3611, 54.1-3614, 54.1-3616 (2005).

²*See* § 54.1-3600 (defining “practice of clinical psychology”).

³*Id.* (defining “practice of applied psychology”).

⁴*See* *Branch v. Commonwealth*, 14 Va. App. 836, 839, 419 S.E.2d 422, 424 (1992).

⁵*See* *Vollin v. Arlington Co. Electoral Bd.*, 216 Va. 674, 679, 222 S.E.2d 793, 797 (1976); *see also* *Wood v. Henry Co. Pub. Sch.*, 255 Va. 85, 94-95, 495 S.E.2d 255, 260-61 (1998) (discussing statutory construction rules of *ejusdem generis* and *noscitur a sociis*).

⁶*Vollin*, 216 Va. at 679, 419 S.E.2d at 797.

⁷*See* *Op. Va. Att’y Gen.*: 1995 at 205, 207; *id.* at 123, 127.

⁸*See* § 54.1-3600 (defining “practice of applied psychology”).

⁹*See* VA. ADMIN. CODE § 125-20-40 (2004) (requiring individual licensed in one licensure category and wishing to practice in another licensure category to obtain additional licensure).

¹⁰*Forst v. Rockingham Poultry Mktg. Coop.*, 222 Va. 270, 276, 279 S.E.2d 400, 403 (1981); *Winchester TV Cable Co. v. State Tax Comm’r*, 216 Va. 286, 290, 217 S.E.2d 885, 889 (1975); *Miller v. Commonwealth*, 180 Va. 36, 42, 21 S.E.2d 721, 723 (1942); 1995 *Op. Va. Att’y Gen.* 250, 252; 1991 *Op. Va. Att’y Gen.* 161, 167.

¹¹*Miller*, 180 Va. at 42, 21 S.E.2d at 723.

¹²*Forst*, 222 Va. at 276, 279 S.E.2d at 403; 1991 *Op. Va. Att’y Gen.* 20, 22.

OP. NO. 07-070

PROFESSIONS AND OCCUPATIONS: VETERINARY MEDICINE.

COMMON LAW AND RULES OF CONSTRUCTION: RULES OF CONSTRUCTION AND DEFINITIONS.

No authority for Virginia locality to regulate veterinary medicine within its borders absent specific grant from General Assembly. Ordinance declaring cosmetic alterations of companion animals unlawful exceeds authority granted to locality.

THE HONORABLE EDWARD T. SCOTT
DELEGATE, HOUSE OF DELEGATES
SEPTEMBER 25, 2007

ISSUE PRESENTED

You ask whether a Virginia locality may dictate veterinary procedures within its jurisdiction. Specifically, you ask whether an ordinance enacted by the city of Norfolk (“Norfolk”) declaring unlawful certain conduct regarding cosmetic alterations of companion animals exceeds the authority granted to a locality.

RESPONSE

It is my opinion that a Virginia locality has no authority to regulate veterinary medicine within its borders absent a specific grant from the General Assembly. It further is my

opinion that an ordinance declaring that cosmetic alterations of companion animals are unlawful exceeds the authority granted to a locality.

APPLICABLE LAW AND DISCUSSION

Norfolk enacted ordinance 6.1-78.1 on November 21, 2006 (the “Ordinance”) to provide that:

It shall be unlawful for any person to cosmetically alter any companion animal. The only exception to this shall be for procedures performed under proper anesthesia, by a veterinarian licensed in the Commonwealth. For purposes of this section, “tail docking”, “ear cropping”, “debarking” and “declawing” shall be considered cosmetic alterations. “Micro-chipping”, “tattooing”; and “ear tipping” shall not be considered cosmetic alterations.^[1]

Chapter 38 of Title 54.1, §§ 54.1-3800 through 54.1-3813, and regulations promulgated thereunder² govern the practice of veterinary medicine in the Commonwealth. Section 54.1-3800 provides that “[a]ny person shall be deemed to be practicing veterinary medicine who performs the diagnosis, treatment, correction, *change*, relief or prevention of animal disease, deformity, defect, injury, or *other physical or mental conditions; including the performance of surgery* or dentistry.” (Emphasis added.) Additionally, “[n]o person shall practice veterinary medicine . . . unless such person has been licensed by the Board [of Veterinary Medicine].”³ By regulation, “[s]urgery” means treatment through revision, destruction, *incision or other structural alteration of animal tissue*.⁴ Therefore, the practice of veterinary medicine includes performing surgical procedures on animals. The cosmetic alterations declared unlawful by the Ordinance constitute veterinary surgical procedures pursuant to state regulations governing the practice of veterinary medicine⁵ (“veterinary regulations”).

Section 54.1-3801(1) provides an exemption from the requirements of Chapter 38, including the license requirement in § 54.1-3805, for “[t]he owner of an animal and the owner’s full-time, regular employee caring for and treating the animal belonging to such owner.” Therefore, an owner or an employee caregiver of a companion animal meeting such criteria may practice veterinary medicine, including surgery, on such owned animal without violating the veterinary regulations.

The Ordinance declares that cosmetic alterations, including surgical alterations, of companion animals by “any person” except licensed veterinarians is unlawful. Because “any person” would include an owner or an employee caregiver of an animal meeting the criteria in § 54.1-3801, the Ordinance contradicts Virginia law statutorily permitting such conduct. Localities may not enact ordinances that are “inconsistent with the Constitution and laws of the United States or of the Commonwealth.”⁶ If, however, both a statute and ordinance on a particular topic “can stand together, courts are obliged to harmonize them, rather than nullifying the ordinance.”⁷ However, the Ordinance declares acts unlawful that expressly are permitted by §§ 54.1-3801 and 54.1-3805. “[A] local government may ‘not forbid what the legislature has expressly licensed, authorized, or required.’”⁸ Thus, state law preempts the Ordinance with respect to an owner or an employee caregiver of an animal.

Further, the Commonwealth follows the Dillon Rule of strict construction “that municipal corporations 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.”⁹ As previously noted, Chapter 38 governs the practice of veterinary medicine, and the Board of Veterinary Medicine has exclusive authority to regulate this practice in the Commonwealth.¹⁰ Chapter 38 does not expressly grant localities the right to further regulate such practice. Thus, the Ordinance violates the Dillon Rule since it constitutes the regulation of the practice of veterinary medicine. That regulatory authority has not been expressly or impliedly granted to localities under the Constitution of Virginia or by the General Assembly.

CONCLUSION

Accordingly, it is my opinion that a Virginia locality has no authority to regulate veterinary medicine within its borders absent a specific grant from the General Assembly. It further is my opinion that an ordinance declaring that cosmetic alterations of companion animals are unlawful exceeds the authority granted to a locality.

¹NORFOLK, VA., CODE, § 6.1-78.1 (2007), available at http://library2.municode.com:80/mcc/home.htm?view=home&doc_action=setdoc&doc_keytype=tocid&doc_key=b8acde812b014e5ef124eca5916ee762&infobase=10121. You note that the phrase “and certified to be medically necessary to preserve the animal’s health and safety by said veterinarian” was deleted from the end of the second sentence by amendment dated January 30, 2007.

²See VA. CODE ANN. § 54.1-3804 (2005) (requiring Board of Veterinary Medicine to establish requirements and standards for veterinary programs).

³Section 54.1-3805 (2005).

⁴18 VA. ADMIN. CODE § 150-20-10 (2007) (emphasis added).

⁵See 18 VA. ADMIN. CODE §§ 150-20-10 to 150-20-210 (2007) (codified in scattered sections).

⁶VA. CODE ANN. § 1-248 (2005).

⁷*Bd. of Supvrs. v. Pumphrey*, 221 Va. 205, 207, 269 S.E.2d 361, 362 (1980); see also *King v. County of Arlington*, 195 Va. 1084, 1091, 81 S.E.2d 587, 591 (1954) (noting that where statute and ordinance can “stand together,” court has duty to harmonize, not nullify).

⁸*Blanton v. Amelia County*, 261 Va. 55, 64, 540 S.E.2d 869, 874 (2001) (quoting cases for which court did not provide citations).

⁹*City of Richmond v. Confrere Club*, 239 Va. 77, 79, 387 S.E.2d 471, 473 (1990), quoted in 2007 Op. Va. Att’y Gen. 116, 117; see also *Commonwealth v. Arlington County Bd.*, 217 Va. 558, 573-74, 232 S.E.2d 30, 40 (1977); *Winchester v. Redmond*, 93 Va. 711, 714, 25 S.E. 1001, 1002 (1896).

¹⁰See § 54.1-2400 (2005) (noting general powers and duties of health regulatory boards); § 54.1-3804 (noting specific powers of Board of Veterinary Medicine).

OP. NO. 06-107

RULES OF SUPREME COURT OF VIRGINIA: JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS.

COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS – ADJUDICATION – CONFIDENTIALITY AND EXPUNGEMENT.

Requirement that juvenile and domestic relations district courts allow self-represented individuals full access to court files of cases to which they are parties; no requirement to provide notice of such individuals' rights of access to court files.

THE HONORABLE ONZLEE WARE
MEMBER, HOUSE OF DELEGATES
FEBRUARY 20, 2007

ISSUE PRESENTED

You ask under what circumstances a juvenile and domestic relations district court should provide or withhold full access to court files or reports for self-represented parties. Primarily, you are concerned with custody cases, and whether due process requires the court to notify self-represented parties of rights of access to pleadings, orders, or reports routinely furnished to others.

RESPONSE

It is my opinion that juvenile and domestic relations district courts must allow self-represented individuals full access to the court files of cases to which they are parties. However, it further is my opinion that juvenile courts are not required to provide such self-represented litigants with notice regarding their rights of access to such court files.

BACKGROUND

You relate that constituents have informed you of inconsistent practices by juvenile and domestic relations district courts (“juvenile courts”) regarding access to case files and reports by self-represented individuals. You note a particular concern with such practices by juvenile courts in custody cases. You state that persons other than self-represented individuals routinely are provided access to such files and reports. You ask whether the Due Process Clauses of the Constitutions of the United States and Virginia would require juvenile courts to provide notice to self-represented parties regarding their rights of access to files and records.

APPLICABLE LAW AND DISCUSSION

Rule 8:2 of the Rules of the Supreme Court of Virginia states that a party who appears in court pro se, or self-represented, is considered his or her own “counsel of record.”¹ The court must provide copies of studies and reports in juvenile matters to the counsel of record, which includes pro se litigants.² In addition, pleadings must be served on each counsel of record.³ Because a self-represented litigant is considered the counsel of record pursuant to the Rules, statutory provisions regarding access to information by a counsel of record also are applicable to such self-represented litigant. Chapter 11 of Title 16.1, §§ 16.1-226 through 16.1-361, governs records, information, and matters related to juvenile proceedings. For example, juvenile court clerks must furnish copies of investigations and evaluations of juveniles to “all attorneys representing parties in the matter before the court” within the specified time limits.⁴

You note that § 16.1-300 addresses records; however, it specifically deals with confidentiality of Department of Juvenile Justice records instead of court records. The

Department's "social, medical, psychiatric and psychological reports and records of children who are or have been (i) before the court, (ii) under supervision, or (iii) receiving services from a court service unit or who are committed to the Department of Juvenile Justice"⁵ are confidential. Inspection of such information is limited to specific individuals and entities, *i.e.*, "[t]he child's parent, guardian, legal custodian or other person standing in loco parentis and the child's attorney."⁶ However, the Department is permitted to withhold this information from inspection by a child's parent, guardian, legal custodian or other person standing in loco parentis when it deems that disclosure would be detrimental to the child or a third party, provided the appropriate juvenile court concurs with such determination.⁷

Section 16.1-305 specifically addresses the confidentiality of court records in juvenile matters. Section 16.1-305(A) provides that social, medical, and psychiatric or psychological reports must be filed in juvenile case files. Additionally, all juvenile case files shall be open for inspection only to the specified individuals or entities, including the "attorney for any party."⁸ Further, § 16.1-305(B) requires that this information "shall also be made available to the parties to the proceedings and their attorneys." In addition to these types of records in case files, "[a]ll other juvenile records, including the docket, petitions, motions and other papers filed with a case, transcripts of testimony, findings, verdicts, orders and decrees shall be open to inspection only by those persons and agencies designated in subsections A and B of this section."⁹ Since a self-represented litigant would be both a party to the proceeding and pro se counsel, he would qualify for access under § 16.1-305(A)-(B).

Prior opinions of the Attorney General point to § 16.1-305 as the controlling statute in determining who may inspect juvenile court records.¹⁰ For example, one opinion notes that the release of information contained in juvenile case files held by the juvenile and domestic relations district courts is governed by § 16.1-305, which provides that juvenile case files and records shall be open for inspection only to specified individuals.¹¹

You also inquire whether due process requires that self-represented litigants be notified about access to juvenile court files. Due process requires that a person have reasonable notice and opportunity to be heard before an impartial tribunal prior to any binding determination that affects his rights of life, liberty, or property.¹² A pro se litigant's procedural right of access to juvenile court files does not involve reasonable notice of a hearing or opportunity to be heard before an impartial tribunal, nor does it affect such rights. Thus, no constitutionally protected interest is involved, and the failure to provide such notice is not a violation of the due process clause of the United States Constitution¹³ or the Virginia Constitution.¹⁴ Additionally, I find no statutory requirement that juvenile courts must provide notice about a pro se litigant's right to access court files.

CONCLUSION

Accordingly, it is my opinion that juvenile and domestic relations district courts must allow self-represented individuals full access to the court files of cases to which they

are parties. However, it further is my opinion that juvenile courts are not required to provide such self-represented litigants with notice regarding their rights of access to such court files.

¹“Counsel of Record’ in any pending case includes an attorney who has signed a pleading in the case or who has notified the clerk or judge that the attorney appears in the case and shall also include a guardian ad litem and a party who appears in court pro se.” VA. SUP. CT. R. 8:2(b)(2).

²“Copies of all studies and reports pursuant to §§ 16.1-269.2 [admissibility of statements by a juvenile, investigation and reports], 16.1-273 [social history investigations], 16.1-274 [time for filing reports, copies to attorneys], 16.1-275 [physical and mental examinations, medical care] and 63.2[-1524] [examinations of children alleged to be abused or neglected], when received by the court shall be furnished by the court to counsel of record, and upon request shall be mailed to such counsel. Counsel of record shall return such reports to the clerk upon the conclusion of the hearing and shall not make copies of such report or amended report or any portion of either.” *Id.* at 8:5.

³“All pleadings not otherwise required to be served shall be served on each counsel of record by delivering, dispatching by commercial delivery service, transmitting by facsimile or mailing a copy to each on or before the day of filing.” *Id.* at 8:8(e).

⁴See VA. CODE ANN. § 16.1-274(A) (Supp. 2006) (providing also when additional information is discovered, amended report must be filed and sent to each person receiving original report).

⁵Section 16.1-300(A) (Supp. 2006).

⁶Section 16.1-300(A)(3).

⁷Section 16.1-300(B).

⁸Section 16.1-305(A)(3) (Supp. 2006).

⁹Section 16.1-305(C).

¹⁰See *infra* note 11.

¹¹See 1985-1986 Op. Va. Att’y Gen. 116, 116; see also Op. Va. Att’y Gen.: 1989 at 151, 152 (concluding that under § 16.1-305, juvenile court case files are confidential except for persons specified in statute); 1983-1984 at 211, 212 (concluding that social history, medical, psychological, or psychiatric reports prepared at direction of court become “property” of court and part of its record); 1980-1981 at 217, 218 (noting that § 16.1-305 allows inspection of court records only by certain enumerated persons); 1977-1978 at 219, 219 (concluding that § 16.1-305 provides for inspection of juvenile court records only by persons enumerated therein); *id.* at 217, 217 (concluding that § 16.1-305 only allows certain enumerated parties to inspect court records dealing with juvenile).

¹²See *Comm’n of Fisheries v. Hampton Rds. Oyster Packers & Planters Ass’n*, 109 Va. 565, 585, 64 S.E. 1041, 1048 (1909); *Ward Lumber Co. v. Henderson-White Mfg. Co.*, 107 Va. 626, 630, 59 S.E. 476, 478 (1907).

¹³U.S. CONST. amend. XIV, § 1.

¹⁴VA. CONST. art. I, § 11.

OP. NO. 06-097

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

Authority for county, city, or town to provide tax exemptions or deferrals only for real estate or manufactured homes owned by and occupied as sole dwelling of person at least sixty-five years of age or person permanently and totally disabled. Phrase ‘owned by’ refers to persons to whom tax relief may be granted as determined on case-by-case basis.

THE HONORABLE ROBERT S. WERTZ JR.
COMMISSIONER OF THE REVENUE FOR LOUDOUN COUNTY
JANUARY 29, 2007

ISSUES PRESENTED

You seek clarification regarding the eligibility of persons seeking an exemption or deferral of taxes on real property pursuant to § 58.1-3210. Further, you inquire concerning the meaning of the phrase “owned by” used in § 58.1-3210(A).

RESPONSE

It is my opinion that § 58.1-3210(A) authorizes a county, city, or town to provide tax exemptions or deferrals only for real estate and manufactured homes owned by and occupied as the sole dwelling of a person who is at least sixty-five years of age¹ or a person found to be permanently and totally disabled as defined in § 58.1-3217.² It further is my opinion that the phrase “owned by” refers to those persons to whom tax relief may be granted, which must be determined on a case-by-case basis.³

BACKGROUND

You indicate that elderly and disabled people in your county sometimes own real estate with their children, siblings, or friends. You also indicate that the variety of ways to hold title to property is increasingly elaborate, making it difficult to determine ownership. Therefore, you seek clarification of the exemption authorized by § 58.1-3210.

APPLICABLE LAW AND DISCUSSION

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

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

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

It is a basic requirement of statutory construction that all parts of a statute dealing with a particular subject must be read as a whole.⁴ Moreover, the Supreme Court of Virginia has held that “[a] statute should be construed so as to give effect to its component parts. Its meaning should not be derived from single words isolated from the true purpose of the Act.”⁵

Section 58.1-3210 provides that:

A. The governing body of any county, city or town may, by ordinance, provide for the exemption from, deferral of, or a combination program of exemptions from and deferrals of taxation of real estate and manufactured homes as defined in § 36-85.3, or any portion thereof, and upon such conditions and in such amount as the ordinance may prescribe. Such real estate shall be owned by, and be occupied as the sole dwelling of anyone at least sixty-five years of age or if provided in the ordinance, anyone found to be permanently and totally disabled as defined in § 58.1-3217. Such ordinance may provide for the exemption from or deferral of that portion of the tax which represents the increase in tax liability since the year such taxpayer reached the age of sixty-five or became disabled, or the year such ordinance became effective, whichever is later. *A dwelling jointly held by a husband and wife may qualify if either spouse is sixty-five or over or is permanently and totally disabled.*

B. For purposes of this article, any reference to real estate shall include manufactured homes. [Emphasis added.]

Section 58.1-3210 cannot be interpreted to allow tax relief when a qualifying individual⁶ jointly owns real property with persons who do not qualify or who are not the spouse of the qualifying individual. Such an interpretation would render superfluous the last sentence in subsection A. Superfluous sentences are disfavored by the rules of statutory construction.⁷ Therefore, when read as a whole, § 58.1-3210(A) requires that in order for real estate to qualify for this tax relief, the following requirements must be met: (1) the locality must, by ordinance, provide for such tax relief; (2) all owners of the real estate must be either at least sixty-five years of age or permanently and totally disabled;⁸ and (3) the real estate must be occupied as the sole dwelling of the qualifying individual.

You also inquire concerning the meaning of the phrase “owned by” as used in § 58.1-3210(A).⁹ This phrase is not subject to an exact definition. Section 58.1-3210 uses the phrase “owned by” to describe those to whom tax relief may be granted.¹⁰ Each request for an exemption must be analyzed to determine if the real estate involved actually is owned by a qualifying individual or individuals. Exemptions under this statute must be strictly construed and, in doubtful cases, resolved against authorizing the exemption.¹¹ The Virginia Supreme Court has held that:

The Constitution of Virginia, as revised in 1971, provides that “[e]xemptions of property from taxation ... shall be strictly construed.” This rule of strict construction stems from the Commonwealth’s announced policy “to distribute the tax burden uniformly and upon all property.” Therefore, statutes granting tax exemptions are construed strictly against the taxpayer, and “[w]hen a tax statute is susceptible of two constructions, one granting an exemption and the

other not granting it, courts adopt the construction which denies the exemption.” Indeed, “where there is any doubt, the doubt is resolved against the one claiming exemption,” and “to doubt an exemption is to deny it.”¹²

You also ask whether the tax relief under § 58.1-3210(A) is available when the children, siblings, or friends of a qualifying individual jointly own real estate with the qualifying individual. If the exemption has been intended to apply to situations where real property is jointly owned by multiple owners when only one owner is a qualifying individual, the General Assembly would have so provided as it did for joint ownership by husbands and wives. The statutory maxim of *expressio unius est exclusio alterius* “provides that mention of a specific item in a statute implies that omitted terms were not intended to be included within the scope of the statute.”¹³ Therefore, the relief pursuant to § 58.1-3210(A) is available only when all the joint owners are also qualifying individuals.¹⁴

CONCLUSION

Accordingly, it is my opinion that § 58.1-3210 authorizes a county, city, or town to provide tax exemptions or deferrals only for real estate or manufactured homes owned by and occupied as the sole dwelling of a person who is at least sixty-five years of age¹⁵ or a person found to be permanently and totally disabled as defined in § 58.1-3217.¹⁶ It further is my opinion that the phrase “owned by” refers to those persons to whom tax relief may be granted, which must be determined on a case-by-case basis.¹⁷

¹For purposes of § 58.1-3210(A), in order to qualify for the exemption, all of the property owners must be at least sixty-five years old or permanently and totally disabled, unless such property is a dwelling jointly held by a husband and wife. In such cases, the exemption applies if either spouse is sixty-five years or over or permanently and totally disabled. See VA. CODE ANN. § 58.1-3210(A) (2004).

²Section 58.1-3217 provides that “[f]or purposes of [Article 1, Chapter 32 of Title 58.1], the term ‘permanently and totally disabled’ shall mean unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment or deformity which can be expected to result in death or can be expected to last for the duration of such person’s life.”

³Any determination must be strictly construed. In doubtful cases, the analysis must be resolved against qualification for the tax exemption. See *infra* note 11 and accompanying text.

⁴1986-1987 Op. Va. Att’y Gen. 154, 155.

⁵*Commonwealth v. Jones*, 194 Va. 727, 731, 74 S.E.2d 817, 820 (1953).

⁶For purposes of this opinion, a “qualifying individual” means a person who is at least sixty-five years of age or a person found to be permanently and totally disabled as defined in § 58.1-3217.

⁷“Words in a statute should be interpreted, if possible, to avoid rendering words superfluous.” *Cook v. Commonwealth*, 268 Va. 111, 114, 597 S.E.2d 84, 86 (2004).

⁸However, when a dwelling is jointly owned by a husband and wife, the real estate may qualify if either spouse is a qualifying individual. See § 58.1-3210(A).

⁹The meaning of the phrase “or any portion thereof” located in the first sentence of § 58.1-3210(A), which provides that “[t]he governing body of any county, city or town may, by ordinance, provide for the exemption from, deferral of, or a combination program of exemptions from and deferrals of *taxation* of real estate and manufactured homes..., or any portion thereof, and upon such conditions and in such amount

as the ordinance may prescribe,” apparently has caused confusion. (Emphasis added.) It is a “fundamental canon of statutory construction that a qualifying phrase refers solely to its immediate antecedent.” *Nat’l Coalition for Students v. Allen*, 152 F.3d 283, 288 n.6 (1998). Therefore, the phrase “or any portion of” modifies the term “taxation” and does not modify the words “owned by” located in the second sentence of § 58.1-3210(A). The phrase “or any portion thereof” should not be interpreted to authorize tax relief for any qualifying individual who owns only a portion of the real estate for which an exemption is sought, because “portion” as it is used in § 58.1-3210(A) relates to the tax and not to the real estate or ownership of the title to the real estate. Additionally, the Virginia Supreme Court has stated that where there is any doubt, it must be resolved against the person claiming a tax exemption. *See infra* note 11 and accompanying text; *see also infra* note 13 and accompanying text (discussing maxim of *expressio unius est exclusio alterius*).

¹⁰ *See* 1971-1972 Op. Va. Att’y Gen. 428, 428 (noting that § 58-760.1, predecessor to § 58.1-3210, used words “owned by,” “owners,” and “owning title or partial title” to describe those to whom tax relief could be granted).

¹¹ *See* Op. Va. Att’y Gen.: 1999 at 205, 206 (concluding that exemptions must be strictly construed and real estate cooperative association was owner of certain real estate, not the proprietary lessees); 1998 at 127, 127; 1994 at 117, 119 (noting that exemptions pursuant to § 58.1-3210 “must be strictly construed”); 1982-1983 at 532, 533 (noting that exemptions under § 58-760.1, predecessor to § 58.1-3210, are to be narrowly construed).

¹² *Commonwealth v. Wellmore Coal Corp.*, 228 Va. 149, 153-54, 320 S.E.2d 509, 511 (1984) (alteration in original) (citations omitted).

¹³ *Turner v. Wexler*, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992).

¹⁴ *But see supra* note 8.

¹⁵ *See supra* note 1.

¹⁶ *See supra* note 2.

¹⁷ *See supra* note 3.

OP. NO. 07-060

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

No inclusion of unrelated resident’s income in calculations to determine whether owner’s residential real estate qualifies for elderly or disabled tax exemption or deferral; income exemption in § 58.1-3211(1)(b) is not applicable to unrelated resident.

THE HONORABLE ROSS A. MUGLER
COMMISSIONER OF THE REVENUE FOR THE CITY OF HAMPTON
SEPTEMBER 5, 2007

ISSUES PRESENTED

You ask whether the income of a person residing in the residential property with, and who is unrelated¹ to, the property owner (an “unrelated resident”) must be included when calculating whether such owner’s property qualifies for an exemption or deferral from taxes. You further ask whether the income exception applicable to an owner’s relatives² pursuant to § 58.1-3211(1)(b) is applicable to an unrelated resident.

RESPONSE

It is my opinion that the income of an unrelated resident should not be included in calculations to determine whether an owner’s residential real estate qualifies for an

elderly or disabled tax exemption or deferral. It further is my opinion that the income exemption in § 58.1-3211(1)(b) is not applicable to an unrelated resident.

APPLICABLE LAW AND DISCUSSION

Article 2, Chapter 32 of Title 58.1, §§ 58.1-3210 through 58.1-3218, governs exemptions from real property tax for the elderly and disabled. Subject to certain limitations, Article 2 authorizes a county, city, or town to exempt or defer real estate taxes relating to dwellings owned or jointly owned by an individual or individuals who are at least 65 years old or who are permanently and totally disabled. Specifically, § 58.1-3210(A) provides, in part, that:

The governing body of any county, city or town may, by ordinance, provide for the exemption from, deferral of, or a combination program of exemptions from and deferrals of taxation of real estate and manufactured homes as defined in § 36-85.3, or any portion thereof, and upon such conditions and in such amount as the ordinance may prescribe. Such real estate shall be owned by, and be occupied as the sole dwelling of anyone at least 65 years of age or if provided in the ordinance, anyone found to be permanently and totally disabled as defined in § 58.1-3217.

Section 58.1-3211 provides that:

Any exemption or deferral program enacted by a county, city or town pursuant to § 58.1-3210 shall be subject to the following restrictions and conditions:

1. a. Subject to subdivision 1 b of this section, the total combined income received from all sources during the preceding calendar year by (i) owners of the dwelling who use it as their principal residence and (ii) *owners' relatives who live in the dwelling*, shall not exceed the greater of \$50,000, or the income limits based upon family size for the respective metropolitan statistical area, annually published by the Department of Housing and Urban Development for qualifying for federal housing assistance pursuant to § 235 of the National Housing Act (12 U.S.C. § 1715z). As an alternative option, a county, city, or town may provide that the total combined income received from all sources during the preceding calendar year by (a) owners of the dwelling who use it as their principal residence and (b) *owners' relatives who live in the dwelling* shall not exceed the county's or city's median adjusted gross income of its married residents.

....

Any amount up to \$10,000 of income of *each relative* who is not the spouse of an owner living in the dwelling and who does not qualify for the exemption provided by subdivision 1 b hereof

may be excluded in determining total combined income. The local government may exclude up to \$5,000 of any permanent or temporary disability benefit, from whatever source, received by an owner. The local government may also exclude up to \$10,000 of income for an owner who is permanently disabled.

b. Notwithstanding subdivision 1 a of this section, if a person qualifies for an exemption or deferral under [Article 2], and if the person can prove by clear and convincing evidence that the person's physical or mental health has deteriorated to the point that the only alternative to permanently residing in a hospital, nursing home, convalescent home or other facility for physical or mental care is to have a *relative* move in and provide care for the person, and if a *relative* does then move in for that purpose, then none of the income of the *relative or of the relative's spouse* shall be counted towards the income limit, provided the owner of the residence has not transferred assets in excess of \$10,000 without adequate consideration within a three-year period prior to or after the *relative* moves into such residence. [Emphasis added.]

Section 58.1-3210(A) authorizes a locality to exempt or defer local real estate taxes on residential real property owned by the elderly or disabled. However, § 58.1-3211(1)(a) places net combined financial worth limitations on the *owner(s)* of the residential real property as well as any of the *owners' relatives* living with the owner(s) to be eligible for an exemption or deferral. Additionally, § 58.1-3211.1(A) authorizes a prorated exemption or deferral from taxes where all the owners do not qualify as elderly or disabled owners. Section 58.1-3211.1(A) applies the net worth limitations to all *owners* of the residential real property at issue, not just those related to the elderly or disabled owners residing in the dwelling:

A. The governing body of the county, city, or town may, by ordinance, also provide for an exemption from or deferral of (or combination program thereof) real estate taxes for dwellings jointly held by two or more individuals not all of whom are at least age 65 or (if provided in the ordinance) permanently and totally disabled, provided that (i) the dwelling is occupied as the sole dwelling by all such joint owners, and (ii) the net combined financial worth of all such joint owners, including the present value of all equitable interests and computed without any exclusion for the dwelling or for any other asset notwithstanding the provisions of § 58.1-3211, as of December 31 of the immediately preceding calendar year, does not exceed [certain enumerated amounts.]

Section 58.1-3211.1(A) does not mention relatives. By comparison, § 58.1-3212 expressly mentions relatives and provides that:

Notwithstanding the provisions of subdivisions 1 and 2 of § 58.1-3211, the governing body of a county, city or town may by ordinance specify lower (i) income and financial worth figures, (ii) disability compensation reduction figures, if applicable, and (iii) reductions for income of *relatives living in the dwelling*, other than those set forth in § 58.1-3211. [Emphasis added.]

“When the General Assembly uses two different terms in the same act, it is presumed to mean two different things.”³ Sections 58.1-3211 and 58.1-3212 include the word “relatives,” while § 58.1-3211.1 includes the phrase “joint owners” without any reference to relatives or other persons living in such residence. Based on the distinct differences in the language of the statutes in Article 2, it is clear that if the General Assembly had intended the limitations and conditions in §§ 58.1-3211.1(A) and 58.1-3212 to apply to unrelated residents, it would not have specified “owners’ relatives” or phrases relating to “relatives.”⁴

CONCLUSION

Accordingly, it is my opinion that the income of an unrelated resident should not be included in calculations to determine whether an owner’s residential real estate qualifies for an elderly or disabled tax exemption or deferral. It further is my opinion that the income exemption in § 58.1-3211(1)(b) is not applicable to an unrelated resident.

¹For purposes of this opinion, I use the term “unrelated” to mean a person who is not related to another person by blood or marriage. Similarly, an “unrelated resident” is a person who resides with, but is not related by blood or marriage to, the elderly or disabled owner of residential real estate.

²The statutes providing tax relief to the elderly or disabled do not define the term “relative.” See VA. CODE ANN. tit. 58.1, ch. 32, art. 2, §§ 58.1-3210 to 58.1-3218 (2004 & Supp. 2007). One of the evident purposes of the General Assembly in providing legislation for tax relief to the elderly and handicapped was to assist those persons living on small incomes with no other substantial resources. See Op. Va. Att’y Gen.: 1984-1985 at 335, 335; 1981-1982 at 354, 355. Exemptions provided pursuant to § 58.1-3210 must be strictly construed. See 1984-1985 Op. Va. Att’y Gen., *supra*, at 335; 1982-1983 Op. Va. Att’y Gen. 579, 580 (interpreting § 58.1-760.1, predecessor to § 58.1-3210). The term “relative” must be construed broadly to include those related by blood or marriage so that only applicants with a very limited household income are eligible for tax relief. See 1984-1985 Op. Va. Att’y Gen., *supra*, at 335 (concluding that niece was relative for purposes of § 58.1-3211).

³*Forst v. Rockingham Poultry Mktg. Coop., Inc.*, 222 Va. 270, 278, 279 S.E.2d 400, 404 (1981), *quoted in* *Simon v. Forer*, 265 Va. 483, 490, 578 S.E.2d 792, 796 (2003); *Greenberg v. Commonwealth*, 255 Va. 594, 601, 499 S.E.2d 266, 270 (1998).

⁴Instead, the General Assembly could have applied the limitations on income to all persons residing with an elderly or disabled owner. When the General Assembly intends to enact a mandatory requirement, it knows how to express its intention. See Op. Va. Att’y Gen.: 2003 at 147, 149; *id.* at 60, 61.

OP. NO. 06-095

TAXATION: REAL PROPERTY TAX – REASSESSMENT/ASSESSMENT (VALUATION) PROCEDURE AND PRACTICE – REASSESSMENT/ASSESSMENT CYCLES.

CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE (ASSESSMENTS).

Sale of real property after January 1 does not impact real property assessments for current tax year; sale price may be incorporated into fair market value determination for property during annual assessment that follows year of such sale.

THE HONORABLE KRISTEN J. AMUNDSON
MEMBER, HOUSE OF DELEGATES
MARCH 5, 2007

ISSUE PRESENTED

You inquire whether it is constitutional to assess real property at the time of sale at its fair market value and include the sale price as evidence of the fair market value of the property during the regular annual assessment cycle.

RESPONSE

It is my opinion that the sale of real property after January 1 does not impact real property assessments for the current tax year. It further is my opinion that the sale price of such property may be incorporated into a determination of the fair market value for the property during the annual assessment that follows the year of such sale.

BACKGROUND

You relate that Fairfax County assesses real property annually. You also state that Fairfax County assesses new home sales on an annual basis regardless of the date of sale. You note that a jurisdiction would enhance its tax revenue if it makes real property assessment adjustments at the time of new home sales.

APPLICABLE LAW AND DISCUSSION

Article X, § 2 of the Constitution of Virginia governs the assessment of property and provides that “[a]ll assessments of real estate and tangible personal property shall be at their fair market value, to be ascertained as prescribed by law.” A 1993 opinion of the Attorney General (“1993 Opinion”) has discussed the timing of the assessment process and explains that “[b]ecause the property tax is a tax on value, it must be levied by reference to a specific date on which that value is ascertained; for the tax to be uniform, the date must be the same for everyone in the locality.”¹

Section 58.1-3281 provides that the beginning of the tax year for the assessment of real estate taxes is January 1. Further, the owner of the real estate on January 1 is assessed for the taxes for the year that begins that day.²

Additionally, the 1993 Opinion notes that since the status of real property is determined as of January 1, “a change in ownership or value after that date is not recognized until the following tax day, for the following tax year.”³ Therefore, a new property owner is not assessed at the time of purchase because the property was assessed on January 1 for that tax year. As the 1993 Opinion explains, “[i]t is for this reason that contracts for sale of real estate usually require the taxes to be prorated between the buyer and the seller, based on the proportion of the tax year that each owns the property.”⁴ Although the selling price of real property is indicative of fair market value, it does not impact the current year’s annual reassessment cycle because the assessment for that tax year

occurred on January 1. Any change in fair market value evidenced by an actual sale of property may be incorporated into the annual reassessment on “the following tax day, for the following tax year.”⁵

CONCLUSION

Accordingly, it is my opinion that the sale of real property after January 1 does not impact real property assessments for the current tax year. It further is my opinion that the sale price of such property may be incorporated into a determination of the fair market value for the property during the annual assessment that follows the year of such sale.

¹1993 Op. Va. Att’y Gen. 243, 245.

²See Va. Code Ann. § 58.1-3281 (2004); *see also* § 58.1-3253(B) (2004) (providing that when locality enacts ordinance authorizing annual assessment of real estate, “all real estate shall thereafter be assessed as of January 1 of each year, except as provided in Chapter 30 of [Subtitle III (“Local Taxes”) of Title 58.1]”).

³See 1993 Op. Va. Att’y Gen. *supra* note 1, at 246.

⁴*Id.*

⁵*Id.*

OP. NO. 07-099

TAXATION: REVIEW OF LOCAL TAXES – BILL IN EQUITY FOR SALE OF DELINQUENT TAX LANDS — REAL PROPERTY TAX – REASSESSMENT/ASSESSMENT (VALUATION) PROCEDURE AND PRACTICE.

Subsurface mineral lands constitute real estate, and treasurer may initiate judicial sale of such mineral lands charged with delinquent taxes. Procedure for judicial sale of subsurface mineral lands is not affected by separate ownership and payment of taxes for surface lands overlying minerals or where mineral owners are not Virginia residents.

THE HONORABLE ANNA L. FOX
ALLEGHANY COUNTY TREASURER
DECEMBER 4, 2007

ISSUE PRESENTED

You ask whether a treasurer may take action to initiate a sale of subsurface mineral lands¹ charged with delinquent taxes assessed pursuant to § 58.1-3286. Further, you ask whether a treasurer must take different or additional steps to effect a judicial sale for such delinquent subsurface mineral lands when different taxpayers own the surface lands overlying the minerals or when such mineral owners are not Virginia residents.

RESPONSE

It is my opinion that subsurface mineral lands constitute real estate, and a treasurer may initiate a judicial sale of such mineral lands charged with delinquent taxes. Further, it is my opinion that the procedure for a judicial sale of subsurface mineral lands is not affected by separate ownership and payment of taxes for the surface lands overlying the minerals or where the mineral owners are not Virginia residents.

BACKGROUND

You relate that Alleghany County has assessed taxes on the subsurface “minerals in place”² for approximately forty-nine parcels of mineral lands. In some cases, you note that the taxes related to the mineral lands have been delinquent since 1997. However, you relate that the county has collected the applicable taxes for the surface lands of these forty-nine mineral parcels. You state that the owner of the surface lands often is not the same taxpayer as the owner of the subsurface minerals. You relate that many of these subsurface mineral owners are not residents of Virginia and do not have identifiable Virginia assets to subject to administrative collection under § 58.1-3919, § 58.1-3941, or § 58.1-3952.

APPLICABLE LAW AND DISCUSSION

Localities in Virginia enjoy the exclusive authority to assess property taxes on “[r]eal estate, coal and other mineral lands.”³ A locality’s assessments of “taxable real estate” must conform to the requirements of Title 58.1, Chapter 32.⁴ Reading Chapter 32, it is clear that taxes on “coal and other minerals” represent a particular class of property taxes on “real estate.” For example, § 58.1-3287 mandates that “whenever there is a general reassessment of real estate in any county or city, *mineral lands and minerals* shall be included in the general reassessment, but shall be separately assessed from *other real estate*.” (Emphasis added.) Based on the General Assembly’s use of the word “other” in this context, “mineral lands” and “minerals” are subclasses of the broader category of “real estate.”⁵ Additionally, the Supreme Court of Virginia has recognized that unextracted minerals or minerals in place are “real estate.”⁶

Additionally, the Virginia Supreme Court has held that ownership of the surface may be separate from ownership of the minerals underlying the surface.⁷ Recognizing the common law distinction between these separate interests in land, the General Assembly in § 58.1-3286 has required local commissioners of the revenue to assess separately the fair market values for surface lands and subsurface minerals in place.⁸ Indeed, § 58.1-3286 specifically contemplates the situation you describe where one property owner owns the surface of the land while another owns the subsurface minerals.⁹

Section 58.1-3965(A) allows “[t]he officer charged with the duty of collecting taxes for [a] locality”¹⁰ to institute a judicial proceeding to sell real estate “for the purpose of collecting all delinquent taxes on such property.” A judicial sale is available “[w]hen any taxes on *any real estate* in a county, city or town are delinquent on December 31 following the second anniversary of the date on which such taxes have become due.”¹¹ Since subsurface minerals comprise a category of “real estate,”¹² they are subject to judicial sale when such taxes remain delinquent beyond the statutory period.¹³ A judicial sale remains an available remedy for the nonpayment of taxes on real property, including subsurface minerals, for twenty years from the end of the year when the locality assesses those taxes.¹⁴

Section 58.1-3967 provides that a proceeding for judicial sale of property for delinquent taxes, is instituted by filing a “bill in equity”¹⁵ “in the circuit court of the county or city in which such real estate is located, to subject the real estate to the lien

for such delinquent taxes.” The fact that the owner of the subsurface minerals is not a Virginia resident does not alter the remedies available to a county treasurer seeking to collect delinquent taxes or to initiate a tax sale proceeding.¹⁶

CONCLUSION

Accordingly, it is my opinion that subsurface mineral lands constitute real estate, and a treasurer may initiate a judicial sale of such mineral lands charged with delinquent taxes. Further, it is my opinion that the procedure for a judicial sale of subsurface mineral lands is not affected by separate ownership and payment of taxes for the surface lands overlying the minerals or where the mineral owners are not Virginia residents.

¹You specifically inquire about the authority of a local treasurer to employ procedures to collect delinquent taxes on “subsurface mineral lands.” A prior opinion of the Attorney General indicates that “mineral lands,” as that term applies to properties subject to property tax assessment by localities pursuant to § 58.1-3286, comprise “two categories of property, the surface property and the subsurface minerals.” 1993 Op. Va. Att’y Gen. 221, 224. In keeping with that interpretation and my understanding of your request, I use the term “subsurface minerals,” for which you indicate the taxes are delinquent, to describe the minerals underlying the surface property.

²For purposes of this opinion, I use the term “minerals in place” to mean minerals that have not been removed from the ground underlying the surface.

³VA. CONST., art. X, § 4; *see also* VA. CODE ANN. § 58.1-3000 (2004) (parallel statutory provision).

⁴Section 58.1-3200 (2004).

⁵*See* 1975–1976 Op. Va. Att’y Gen. 370, 371 (noting that Virginia historically has segregated to localities power to levy property taxes on real estate, *including coal and other mineral lands*).

⁶*Warren v. Clinchfield Coal Corp.*, 166 Va. 524, 528, 186 S.E. 20, 22 (1936).

⁷*See, e.g., Ventro v. Clinchfield Coal Corp.*, 199 Va. 943, 951, 103 S.E.2d 254, 260 (1958).

⁸1993 Op. Va. Att’y Gen., *supra* note 1, at 222–23.

⁹“[A]fter a severance of the mineral and surface estates, the surface owner cannot acquire title to the minerals merely by virtue of his possession of the surface[.]” *Ventro*, 199 Va. at 952, 103 S.E.2d at 261 (citation omitted).

¹⁰County treasurers have the duty to collect delinquent county taxes “by distress or otherwise.” Section 58.1-3919 (2004) (emphasis added).

¹¹Section 58.1-3965(A) (2004) (emphasis added).

¹²*See supra* notes 5-8 and accompanying text.

¹³*See* § 58.1-3965(A).

¹⁴Section 58.1-3940(B) (2004).

¹⁵Since 2006, however, the Rules of the Supreme Court of Virginia have recognized “one form of civil case, known as a civil action.” VA. SUP. CT. R. 3:1. A civil action is commenced when a party commences by filing a “complaint” in the appropriate circuit court. VA. SUP. CT. R. 3:2. Rule 3:1 indicates this change in nomenclature applies “unless otherwise provided by law.” The General Assembly amended § 58.1-3967 after the changes to Rules 3:1 and 3:2 became effective. *See* 2006 Va. Acts ch. 616, at 800, 800-01. However, the amendments to § 58.1-3967 did not alter the requirement designating the filing of a “bill in equity.” *Id.*; *see also* § 58.1-3967 (Supp. 2007). The question of whether a “complaint” or a “bill in equity” is the appropriate pleading in an action under § 58.1-3965 is beyond the scope of your request. Therefore, I decline to render an opinion on that matter.

¹⁶“When property subject to taxation is located in a county, city or town different from that in which the owner of such property resides, . . . the treasurer shall have the same remedies for the collection of all such taxes, levies and other charges in all respects as if the person owing the same resided in the officer’s own county, city or town.” Section 58.1-3946 (2004).

OP. NO. 07-044

TAXATION: VIRGINIA COMMUNICATIONS SALES AND USE TAX.

COUNTIES, CITIES AND TOWNS: FRANCHISES, PUBLIC PROPERTY, UTILITIES – FRANCHISES; SALE AND LEASE OF CERTAIN PUBLIC PROPERTY.

Virginia Communications Sales and Use Tax Act does not reduce amount of franchise fees owed under existing franchise agreements; no impairment of contract as prohibited by Virginia Constitution. No prohibition against locality collecting balance of unpaid franchise fee liability pursuant to existing agreement.

THE HONORABLE HARRY B. BLEVINS
MEMBER, SENATE OF VIRGINIA
SEPTEMBER 5, 2007

ISSUES PRESENTED

You inquire whether the reduction in the amount of franchise fees payable to localities under existing franchise agreements that has occurred under the Virginia Communications Sales and Use Tax Act¹ constitutes an impairment of contract prohibited by Article I, § 11 of the Constitution of Virginia. Further, you inquire whether the Act prohibits localities from directly collecting any unpaid balance of franchise fees remaining after payment to the Department of Taxation.

RESPONSE

It is my opinion that the Virginia Communications Sales and Use Tax Act does not reduce the amount of franchise fees owed under existing franchise agreements. Therefore, the Act does not constitute an impairment of contract as prohibited by Article I, § 11 of the Constitution of Virginia. It further is my opinion that the Act does not prohibit a locality from collecting the balance of any franchise fee liability that remains unpaid pursuant to an existing agreement.

BACKGROUND

You inquire concerning the duties of commissioners of revenue to collect certain tax revenue. You relate a concern regarding the potential for impairment of contracts pursuant to the Virginia Communications Sales and Use Tax Act² that became effective on January 1, 2007.³ You note that the Act has established a new statewide “communications tax.”

You state that the Department of Taxation has made its first distribution of franchise fees and communication taxes to Virginia localities. You relate that the localities within your district have suffered a loss of approximately twenty-four percent in franchise fee revenues. Although you expect the amount of such losses to decline with increased efficiencies in collections procedures, you believe that localities with cable franchise agreements are at risk for continued losses. Finally, you state that

some cable companies have claimed exemptions from the communications tax and have not remitted all of the fees that normally would be paid under the controlling franchise agreement.

Therefore, you inquire whether the diminution of franchise fees due to localities under valid franchise agreements is an impairment of contract under the Virginia Constitution. You also inquire whether such localities may collect the additional payment obligations from the cable companies pursuant to valid franchise agreements in effect prior to January 1, 2007.

APPLICABLE LAW AND DISCUSSION

Prior to January 1, 2007, localities were authorized to impose local consumer utility taxes on telephone and cable services, as well as business license taxes on telephone and telegraph companies, video programming excise taxes, and the E-911 tax.⁴ Beginning January 1, 2007, the Virginia Communications Sales and Use Tax Act replaced the local taxes with a new statewide “communications tax” of five percent on the sales price of all communications services, including cable, satellite, radio, television, and electronic services other than internet and electronic mail.⁵

Under the Virginia Communications Sales and Use Tax Act, communications service providers collect the tax from consumers⁶ and pay it to the Tax Commissioner.⁷ The Commissioner deposits the taxes into the Communications Sales and Use Tax Trust Fund.⁸ Section 15.2-2108.1:1 represents a correlating amendment to the Act.

Article I, § 11 of the Virginia Constitution provides “that the General Assembly shall not pass any law impairing the obligation of contracts.” Section 15.2-2108.1:1(C) provides that:

Notwithstanding any other provision of law, no new or renewed cable franchise entered into on or after January 1, 2007, shall include a franchise fee as long as cable services are subject to the Virginia Communications Sales and Use Tax (§ 58.1-645 et seq.)...

1. All cable franchises in effect as of January 1, 2007, shall remain in full force and effect, and *nothing in this section shall impair any obligation of any such agreement*; provided, however, that any requirement in such an existing franchise for payment of a monetary franchise fee based on the gross revenues of the franchisee shall be fulfilled in the manner specified in subdivision 2.

2. Each cable operator owing monetary payments for franchise fees, ... shall include with its monthly remittance of the Communications Sales and Use Tax a report, by locality, of the amounts due for franchise fees accruing during that month. The Department of Taxation shall, on behalf of the cable operator ... distribute to each [locality] the amount reported by each locality’s franchisee(s). *Such payments shall reduce the cable operator’s*

franchise fee liability. The monthly distributions shall be paid from the Communications Sales and Use Tax Trust Fund before making the other calculations and distributions required by § 58.1-662. Until distributed to the individual localities, such amounts shall be deemed to be held in trust for their respective accounts.

3. A locality's acceptance of any payment under subdivision 2 shall not prejudice any rights of the locality under the applicable cable franchises (i) to audit or demand adjustment of the amounts reported by its franchisee, or (ii) to *enforce the provisions of the franchise by any lawful administrative or judicial means.* [Emphasis added.]

It is a general rule of statutory construction that the words of a statute are to be given their usual, commonly understood meaning.⁹ However, “[w]here the language of a statute is clear and unambiguous[,] rules of statutory construction are not required.”¹⁰ Based on a plain reading of the Virginia Communications Sales and Use Tax Act and § 15.2-2108.1:1(C)(3), cable operators owing franchise fees to localities no longer make payments directly to such localities. Rather, cable operators report such fee liabilities to the Department of Taxation. The Department, on behalf of the cable operators, distributes payments to the respective localities. The Department applies such payments to the cable operator's franchise fee liability. Therefore, the Act does not reduce the amount of franchise fees that accrue under existing franchise agreements. Instead, the Act merely defines an alternate payment plan for tracking the accrual of franchise fees and the subsequent payoff of those liabilities. Since the Act does not reduce the franchise fees that accrue under an existing franchise agreement, it is my opinion that there is no impairment of contract.

The loss of franchise income that you describe following the first distributions by the Department of Taxation may result from two causes. First, you recognize that inefficiencies in collections procedures following the new reporting and payment methods may explain a portion of such losses. Second, you mention that some cable operators have claimed exemptions from the communications tax and have not remitted all of the fees that normally would be paid under existing franchise agreements. These factors, separately or in combination, may account for the losses you describe.

You also inquire whether the Virginia Communications Sales and Use Tax Act prohibits localities from directly collecting the remainder of the franchise fees not paid to the Department of Taxation. A locality's acceptance of any payment under § 15.2-2108.1:1(C)(2) “shall not prejudice any rights of the locality under the applicable cable franchises . . . to enforce the provisions of the franchise by any lawful administrative or judicial means.”¹¹ In my opinion, this broad language contemplates ongoing enforcement actions by the locality as appropriate, including collection proceedings by administrative or judicial means.

CONCLUSION

Accordingly, it is my opinion that the Virginia Communications Sales and Use Tax Act does not reduce the amount of franchise fees owed under existing franchise agreements.

Therefore, the Act does not constitute an impairment of contract as prohibited by Article I, § 11 of the Constitution of Virginia. It further is my opinion that the Act does not prohibit a locality from collecting the balance of any franchise fee liability that remains unpaid pursuant to an existing agreement.

¹See *infra* note 2.

²See 2006 Va. Acts ch. 780, at 1112, 1124-29 (codified at VA. CODE ANN. tit. 58.1, ch. 6.2, §§ 58.1-645 to 58.1-662 (Supp. 2007)).

³See *id.*, cl. 8, at 1131. However, I note that § 58.1-656 has a different effective date. See *id.*, cl. 7, at 1131.

⁴See generally §§ 58.1-3812, 58.1-3813.1, 58.1-3818.1 to 58.1-3818.7 (2004); see also 2006 Va. Acts, *supra* note 2, cl. 2, at 1130 (repealing §§ 58.1-3812, 58.1-3813.1, and 58.1-3818.1 to 58.1-3818.7).

⁵See VA. CODE ANN. § 58.1-648(A) (imposing sales or use tax of 5% on customers of communications services); § 58.1-647 (defining “communications services”); § 58.1-648(C) (providing exemption from tax for Internet access and electronic mail services).

⁶See § 58.1-651(A). I note that the Tax Commissioner may authorize a person using taxable communication services to make direct payment of the communications tax to the Commonwealth. See § 58.1-658(A).

⁷See §§ 58.1-654(A), 58.1-659(B).

⁸See § 58.1-662(A) (creating Fund within “Department of the Treasury”); § 58.1-662(D) (directing Commissioner to certify communication tax revenues).

⁹See Op. Va. Att’y Gen.: 1985-1986 at 69, 69; *id.* at 65, 66; *id.* at 24, 25.

¹⁰Ambrogì v. Koontz, 224 Va. 381, 386, 297 S.E.2d 660, 662 (1982).

¹¹VA. CODE ANN. § 15.2-2108.1:1(C)(3) (Supp. 2007).



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