

OPINIONS  
OF THE  
ATTORNEY GENERAL  
AND  
REPORT  
TO THE  
GOVERNOR OF VIRGINIA  
**2008**



COMMONWEALTH OF VIRGINIA  
OFFICE OF THE ATTORNEY GENERAL  
AT RICHMOND



THE 2008  
REPORT OF THE ATTORNEY GENERAL

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LETTER OF TRANSMITTAL

May 1, 2009

The Honorable Timothy M. Kaine  
Governor of Virginia

Dear Governor Kaine:

I am pleased to present to you the *Report of the Attorney General* for 2008. The citizens of this Commonwealth may be proud of the accomplishments of the dedicated public servants who work for the Office of the Attorney General. With pride in the accomplishments of the lawyers and staff, I present to you a small glimpse of the accomplishments from the past year.

**2008 LEGISLATIVE ACCOMPLISHMENTS**

During the 2008 Session of the General Assembly, the Office of the Attorney General worked to implement legislation to protect all Virginians. Legislation supported by the Attorney General recognized the fiscal realities of our time and focused on a more effective government and important reforms to address specific problems in Virginia. Based on the work of the Supreme Court of Virginia's Mental Health Commission, several critical mental health reforms were enacted. Among the initiatives passed were bills requiring jail officials to determine the legal status of all inmates and requiring a presumption of no bond for illegal aliens charged with certain offenses. The agenda also included a significant reform of antiquated animal fighting laws in Virginia. Finally, several new measures secured an increased accountability in government.

The Office also fought for a stronger and more responsive mental health system. Newly passed legislation changes the standards for Emergency Custody Orders, Temporary Orders of Detention, and involuntary commitment to threat of serious physical harm to self or others. In addition, new legislation provides that a person who meets the criteria for involuntary commitment may be ordered to mandatory outpatient treatment if less restrictive alternatives to involuntary inpatient treatment are appropriate and are available. Other legislation dealt with the transfer of critical mental health information to the Central Criminal Records Exchange (CCRE) with respect to firearms. That law requires information regarding involuntary admission to a facility or for mandatory outpatient treatment be forwarded to the CCRE for purposes of determining an individual's eligibility to possess, purchase, or transfer a firearm. This bill also makes it illegal for a person found incompetent to stand trial and ordered to mental health treatment to possess or purchase a firearm. Finally, the bill makes it illegal for a person who was the subject of a temporary detention order, and subsequently agreed to voluntarily admission for mental health treatment, to possess or purchase a firearm.

In order to reduce the fiscal and societal costs associated with crime and incarceration, the Office's initiative to reduce prisoner recidivism also was enacted. This legislation requires the Department of Corrections to develop and implement a reentry program for eligible inmates. Each plan would identify educational, vocational, therapeutic, and other programs in the public and private sectors that are necessary to prepare the person for successful transition from prison to society. The plan will include mentor pairing to the extent possible to stop the revolving door of our criminal justice system.

This Office introduced successful legislation to help combat illegal immigration and protect the safety of Virginia's citizens. One such law prohibits public contractors from knowingly employing illegal aliens. Another law establishes a presumption against bail for illegal aliens who commit crimes. Further, for certain individuals, an officer must make an immigration alien query with the federal Bureau of Immigration and Customs Enforcement (ICE). Officers must report persons found to be here illegally to the Local Inmate Data System of the State Compensation Board, which in turn is reported to the Central Criminal Records Exchange (CCRE) of the Virginia State Police. The law also requires CCRE to record such illegal alien's immigration status as part of his criminal history record.

Through the hard work of many and with broad bipartisan support, laws were passed in 2008 to ensure that consumers are protected. One such measure expands the scope of laws protecting trademarks and service marks. This law also prohibits causing a consumer confusion, mistake, or deception regarding the source or origin of goods. Another law protects consumers from pyramid promotional schemes by providing a clear definition and enhancing the penalties for contriving, preparing, setting up, operating, advertising, or promoting such a scheme. The laws governing such practice practices were added to the Virginia Consumer Protection Act.

This Office also assisted in enacting important legislation to protect Virginia's environment, particularly waterways, from known pollutants. Since phosphorus is one of the primary sources of water pollution and environmental damage, the new law bans use of phosphorus in detergents for household dishwashing machines.

Protecting Virginia's most vulnerable citizens was again a significant part of the Office's legislative agenda. Legislative efforts for a safer Virginia addressed quicker entry of protective orders into the Virginia Criminal Information Network (VCIN), amendments to the Violence Against Women Act, health care provider liability protections, and foster care custody issues.

Legislation requiring the court to enter protective orders into VCIN on the same day they are issued will help establish the precise time when such orders were entered. This will ensure that victims can be protected and when the orders expire, they may be cleared from VCIN. The bill also requires clerks to make electronic reports of certain proceedings or adjudications to CCRE.

Another successful legislative effort was aimed at protecting victims of violent crime. Amendments to the Violence Against Women Act allow victims of sexual assault who are involved in the criminal process to request, and the court to order, that a defendant submit to tests for human immunodeficiency virus and hepatitis B or C viruses. In the case of a juvenile, tests may be requested at any point following indictment, arrest by warrant, or service of a petition.

The Office worked closely with legislators and others to address another issue that received significant public attention in 2008: animal fighting. Legislation to end animal fighting for sport in Virginia included increased penalties for animal fighting, fewer restrictions on law enforcement investigating animal fighting, and new penalties for attending animal fights, allowing a minor to attend an animal fight, and promoting animal fighting.

Finally, Virginia's ability to effectively respond in the event of a natural or man-made disaster was improved through health care provider liability protections. New legislation provides that, in the absence of gross negligence or willful misconduct, health care providers who respond to a disaster shall not be liable for any injury or wrongful death arising from the delivery or withholding of health care. The bill also allows persons who hold licenses or certificates evidencing their professional or mechanical skills who render aid involving that skill during any disaster to receive reimbursement for their actual and necessary expenses. The belief is these changes will encourage medical providers to provide such critical services in a timely fashion during a state of emergency in the Commonwealth.

### STATE SOLICITOR GENERAL

The State Solicitor General is responsible for the Commonwealth's litigation in the Supreme Court of the United States, except capital cases, and all lower court appeals involving constitutional challenges to statutes or other high profile matters. In addition, the State Solicitor assists all Divisions of the Office with constitutional issues.

In 2008, the State Solicitor briefed and argued *Virginia v. Moore*, which examined whether the Constitution of the United States requires suppression of evidence when the arrest complies with the Constitution but violates state law. In April, the Court issued a unanimous decision adopting the position of this Office and reversing the decision of the Supreme Court of Virginia. A significant part of the Solicitor's Supreme Court practice is persuading the Court that review of the Commonwealth's victories in the lower appellate courts is not necessary. In 2008, the Solicitor successfully opposed every petition for certiorari in such cases.

The Solicitor also was involved in numerous lower court appeals and certain trial proceedings. Most significantly, the Solicitor: (1) briefed and argued the constitutionality of the Partial Birth Infanticide Act in the United States Fourth Circuit Court of Appeals after remand from the United States Supreme Court, including

persuading the Court to grant en banc review following an adverse decision by a panel; (2) briefed and argued the constitutional challenge to the Anti-Spam Act in the Virginia Supreme Court; (3) worked with private counsel on the successful defense of the deal to extend Metrorail to Dulles Airport; and (4) successfully defended against a Confrontation Clause challenge of Virginia's statute permitting the admission of certificates of analysis in criminal cases.

### **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 regarding 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, the Virginia State Bar, and the Office of Consumer Affairs.

#### **Trial Section**

During 2008, the Trial Section handled 839 new matters in addition to cases continued from the previous year. This was an increase of 301 new cases since 2007. The Section provided legal advice to state courts and judges, the Virginia State Bar, Board of Bar Examiners, State Board of Elections, 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 civilly 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.

The Trial Section managed and negotiated the settlement of 46 of the 48 potential tort claims arising out of the April 16, 2007 tragedy at Virginia Tech. The global settlement sought to meet the needs and concerns of the victims, including family members, through both monetary and non-monetary provisions, in exchange for a release of liability for the Commonwealth, Virginia Tech, and localities surrounding Virginia Tech. The Trial Section prepared individual settlement agreements and coordinated and managed the process of obtaining court approval for the 28 wrongful death settlements.

In *NAACP v. Kaine*, the Section successfully defended the State Board of Elections on the eve of the presidential election against allegations that Virginia was not adequately prepared and had allocated resources in a discriminatory manner. The Section

also was successful in pursuing two appeals from circuit courts under the Grievance Procedure for State Employees, *Thompson v. State Police* and *Brailey v. Department of Taxation*, thereby reaffirming the limited role of the judiciary in these appeals.

Attorneys in the Trial Section also provided training to human resource personnel from state agencies on workers' compensation law and on recent case decisions in employment law. Attorneys also provided training on new standards for retaliation and on sexual harassment under Title VII, on the Virginia Human Rights Act, and a variety of other topics. They also presented a mock civil jury trial for newly installed judges in their orientation program. The Section hosted the first sponsored CLE on the Virginia Fraud Against Taxpayers Act, or *qui tam* litigation, which was attended by 75 local attorneys.

### **Construction Litigation Section**

The Construction Litigation Section is responsible for all construction litigation involving the Commonwealth, including all roads, bridges, and buildings. The Section also provides ongoing advice to avoid claims and litigation to the Department of Transportation and other state agencies, colleges and universities during the administration of more than \$1 billion of building, road, and bridge contracts each year. These efforts support effective partnerships between the Commonwealth, general contractors, and road builders to enable timely and efficient completion of building, road, and bridge projects.

In 2008, the Section opened 15 new claim and litigation files. Together, the claimants in these matters requested damages from the Commonwealth in excess of \$56 million. In addition, 28 claim or litigation matters were resolved in 2008. The approximate total claim amount sought from the Commonwealth in these matters was \$73 million. The matters were resolved for a total payment of approximately \$14 million. Under appropriate circumstances, the Section makes claims or files lawsuits against construction and design professionals or surety companies as requested by state agencies. In 2008, the Commonwealth received payments in excess of \$1 million as a result of such efforts.

The Section also provided advice regarding construction projects to various public colleges and universities during the year, including Virginia Military Institute, the College of William and Mary, Norfolk State University, Virginia State University, the Virginia Community College System, Virginia Tech, Christopher Newport, Longwood College and others and has also provided such advice to the Department of Transportation, the Department of General Services, the Department of Conservation and Recreation, the Department of Military Affairs, and the Department of Game and Inland Fisheries. This advice facilitated the effective construction of roads, bridges, dormitories, dining areas, classrooms, campgrounds, office buildings, fish hatcheries, dams, and other infrastructures in the advancement of the missions of those agencies and the Commonwealth.

### **Antitrust and Consumer Litigation Section**

The Antitrust and Consumer Litigation Section enforces state and federal statutes that protect consumers from deception and misrepresentation, 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 2008, the Section joined the Federal Trade Commission (FTC) to prevent the proposed merger of Inova Health System Foundation and Prince William Health System. If approved, the merger would have consolidated Inova's already dominant position in the Northern Virginia hospital market. Additionally, Virginia and 45 other states and territories entered into a settlement with Bristol-Myers Squibb Co. (BMS) concerning BMS' alleged violations of consent decrees entered in two antitrust cases between the states and BMS in 2003. Both 2003 cases concerned alleged antitrust violations resulting from BMS' attempt to keep generic versions of two of its brand name drugs off the market. The states negotiated a civil settlement with BMS for violating the two consent decrees requiring payment of \$1.1 million, with Virginia's share being more than \$19,500.

In the consumer protection area, the Section negotiated settlements with two automobile title lenders of alleged violations of the Consumer Finance Act (CFA). The aggregate settlements required the companies to make refunds totaling more than \$25,000 to 147 consumers and to forebear collection of nearly \$48,500 in deficiency judgment amounts owed by 90 borrowers whose cars were repossessed, nearly \$160,000 in interest payments owed by 114 borrowers who took out loans and later defaulted but whose cars were not repossessed, and more than \$290,000 in interest payments owed by 237 borrowers who took out loans and were current at the time of the settlements.

In the final phase of restitution under settlement of a suit filed by the Attorneys General of Virginia, North Carolina, and Wisconsin, with the FTC, approximately \$772,000 in restitution was provided to 7,130 consumers who paid funds to American Savings Discount Club (ASDC), a Portsmouth telemarketing business. ASDC was alleged to have violated state and federal telemarketing laws and misled consumers to believe they had been pre-approved for loans.

Finally, the Section entered into three multi-state settlements that will provide significant monetary benefits to Virginians. Two settlements involved claims against pharmacy benefit managers that allegedly failed to share rebates with purchasers and made misrepresentations to medical plan providers and consumers about the cost savings they could achieve through drug interchanges. The two settlements

combined provided Virginia with more than \$1 million to be used to benefit low income, disabled or elderly consumers of prescription medications, to educate consumers concerning cost differences among medications, or other drug-related purposes. In response to proposals solicited for distribution of the funds, \$1 million will go to the Virginia Health Care Foundation for purposes of a challenge grant to raise an additional \$1 million, with all amounts raised to fund grants to Virginia's safety net providers to establish or expand the availability of prescription medications, basic mental health services, and primary medical care for people with mental illnesses. The third was a settlement of civil claims against Purdue Pharma related to the marketing of OxyContin. The more than \$956,000 recovered for Virginia in that settlement will be directed to projects focused on prescription drug abuse in Southwest Virginia.

### **Insurance and Utilities Regulatory Section**

The Insurance and Utilities Regulatory Section serves as Consumer Counsel and in that capacity represents the interests of Virginia's citizens as consumers of the services and products of insurance companies and regulated utilities such as electric, natural gas, water, and telecommunications companies. The Section participates in proceedings before the State Corporation Commission (SCC) and federal regulatory agencies, such as the Federal Energy Regulatory Commission (FERC) and Federal Communications Commission (FCC), as well as state and federal courts. Additionally, the Section occasionally participates in the legislative process as it may implicate consumer interests in the regulation of public utilities and insurance companies.

The rapid increases in worldwide energy prices experienced throughout most of 2008 presented many challenges to electric and natural gas utilities and their customers. The Section sought to mitigate the impacts of those costs on retail rates. To lessen the increase in Dominion's "fuel factor" rate the Section negotiated a settlement that deferred \$231 million in fuel costs, without interest, resulting in a reduced rate increase to customers. The Section also contested a \$208 million base rate increase requested by Appalachian Power. The increase finally approved by the SCC was \$40 million less than what was requested. In a separate matter, the Section negotiated a settlement reducing Appalachian's requested rate increase to recover environmental compliance and transmission and distribution system reliability expenditures. At FERC, the Section successfully challenged aspects of Dominion and American Electric Power (an affiliate of Appalachian) proposals to establish a formula for adjusting transmission rates that would limit participation by interested parties in determinations of whether the utilities' rates are just and reasonable.

Before the Virginia Supreme Court, the Section successfully defended two SCC decisions that collectively saved Allegheny Power's customers \$131 million. Following these appeals, the Section negotiated a settlement with Allegheny and other interested parties, which includes rate protections through June 2011 and seeks to limit

future rate increases. It includes a requirement that Allegheny consider alternative long-term energy resources in its future system planning. Allegheny is the only Virginia investor-owned electric utility that does not own generation facilities.

Before the SCC, Consumer Counsel successfully advocated that the costs for a new coal plant proposed by Appalachian Power were not reasonable or prudent, and that the company's projected load growth and existing fleet of coal-fired generation failed to reflect sufficient near-term need to justify such costs. Dominion Virginia Power's application for a new plant included verifiable cost support, and the Section negotiated a settlement that lowered the Company's return on its investment and will reduce the rate impact of the project on customers.

The Section also participated in the first case filed under the 2008 Natural Gas Conservation and Ratemaking Efficiency Act, which authorized rate "decoupling" for gas utilities offering energy conservation programs for their customers. Virginia Natural Gas agreed to modify its proposed conservation programs to make them available to more customers and to increase their cost-effectiveness.

In addition to a variety of other rate and regulation cases of lesser scope and potential impact, the Section participated in a number of SCC rulemaking proceedings to ensure that the Commission's regulations continue to protect the interests of consumers. Such proceedings included: (1) rules for local exchange telephone companies governing service quality standards; (2) rules governing late payment and bad check charges; (3) rules for applications to construct electric generation facilities; and (4) rules governing utility rate applications. The proceedings revised existing regulations to respond to current market conditions and recent changes in the law.

### **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 those agencies charged with providing essential services for those least able to help themselves. The Division also protects the rights of tax-paying Virginians by ensuring the proper use of state and federal funds in health and social services programs, provides advice on a daily basis 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 ensures quality education for students from kindergarten through college. For K-12, this guidance often directly impacts local schools in implementing 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. Virginia's fourteen colleges and twenty-three community colleges are self-contained communities with the full range of legal needs: campus safety and security, admission and educational quality issues, personnel issues, the proper relationship between colleges and the Commonwealth, contracts, procurement, and financing.

The work by Education Section attorneys stemming from the shootings at Virginia Tech continued in 2008, including issues relating to the Family Education Rights Privacy Act, mental health reform, and disaster planning. This Office provided guidance as each college developed threat assessment teams and updated disaster plans. Through a unique, multi-faced negotiation process joined by the Governor's office and counsel from this Office, a global settlement was reached in which the vast majority of the potential claimants participated.

### **Health Services Section**

Attorneys in the Health Services Section continued to devote significant time and counsel to the Virginia Mental Health Law Reform Commission, assisting with the drafting of legislation, working with the Implementation Task Force, and providing training to public and private mental health providers, special justices, and statewide bar associations. Attorneys in this Section served on task forces developing proposals on alternative transportation for persons subject to commitment proceedings, the use of advance directives for mental health services and treatment, public access to commitment hearings, additional privacy concerns related to the commitment process, and access to mental health services.

This Section provided ongoing representation to the Department of Mental Health, Mental Retardation and Substance Abuse Services in the United States Department of Justice's investigation under the Civil Rights of Institutionalized Persons Act of Central Virginia Training Center, a residential facility for the care and training of persons with intellectual disabilities.

Health Services attorneys represented the State Health Commissioner in high profile certificate of public need cases, continued to advise the health regulatory boards that protect public safety by disciplining health professionals with substance abuse and mental illness, and represented the Department of Health Professions staff and the Board of Medicine in both state and federal court in cases involving a physician's egregiously unsafe methods of practice, including the deaths of two patients.

### **Social Services Section**

Attorneys in the Social Services Section undertake the complex responsibility of providing guidance regarding the myriad of issues connected with Medicaid reimbursement and the protection of children through the Department of Social Services. During the past year, this Section successfully defended a number of founded

dispositions of child abuse, including several sex abuse cases, resulting in the names of the abusers being placed on the Department of Social Services' Central Registry, a statewide listing of persons who are found to have abused or neglected a child.

Social Services attorneys also defended a number of licensure revocation cases, many of which involved children's day care. These revocation cases were resolved by removing the problematic licensee from the facility through a change of ownership, placing requirements upon the facility to ensure future regulatory compliance, or closing the facility or program.

Attorneys for Department of Medical Assistance Services (DMAS) and the Department of Social Services continued to provide advice and defense on a number of medical and financial matters, including Medicaid, FAMIS (Family Access to Medical Insurance Security), TANF (Temporary Assistance for Needy Families), Child Care Assistance, Food Stamps, and Energy Assistance. These programs are complex regulatory schemes that involve both federal and state laws, and often state plans approved by a federal agency. Attorneys for DMAS provided advice on the challenging issues surrounding Medicaid Management Information Systems, the computer system upon which the Commonwealth's Medicaid system is administered, and to the Medicaid Fraud Control Unit to protect the integrity and fiscal soundness 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. Attorneys in this Section handled 122,791 child support hearings, resulting in collections of \$10,452,349 and 718,961 days in jail. This Section was successful in obtaining dismissals of 18 claims made or appeals taken against the Commonwealth, including two cases in the Supreme Court of Virginia, eight cases in the Court of Appeals of Virginia, six circuit court cases, one federal bankruptcy claim, and one out-of-state case in the District of Columbia.

Attorneys in this Section crafted legislation required as a result of a recent court challenge to the Department of Social Service's long standing authority to have non-attorneys sign pleadings for the Division of Child Support and Enforcement. Other legislation introduced in 2008 included attaching group life insurance from Virginia Retirement System, providing for concurrent jurisdiction in juvenile and circuit court for paternity determinations, alternatives to incarceration for civil contemnors, and requirements under the Deficit Reduction Act. Additionally, laws impacting appeal bonds, interest, withdrawal of civil appeals, parents on military duty and reduced child support obligations for incarcerated persons were enacted.

Craig Burshem, Chief of this Section, along with Nick Young, Division Director, received the Commissioner's Award for Innovative Partnerships from the

Federal Office of Child Support Enforcement. The award recognized their work in developing the Virginia Court Model Improvement Program and the DCSE Intensive Case Monitoring Program.

### **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. 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 cost effective professional debt collection services on behalf of state agencies. The Division also represents the Commonwealth in the civil commitment of sexually violent predators.

#### **Virginia Birth-Related Neurological Injury Compensation Representation**

The Division handled 8 new eligibility petitions and concluded 2 cases previously filed for benefits under the Virginia Birth-Related Neurological Injury Compensation Act. Of the eligibility cases, the Birth Injury Program accepted 5 petitions for benefits without a hearing. In one case, the Program recommended admission, but the healthcare providers appealed the Commission's jurisdiction determination to the Court of Appeals. One eligibility petition was dismissed by the Commission. Two petitions were remanded, in part, to the appropriate circuit courts for lack of jurisdiction in the Commission over specific claims. One petition was remanded, *in toto*, to the circuit court by the Commission, as recommended by the Program; but the healthcare providers appealed that decision to the Court of Appeals. The 2 cases appealed to the Court of Appeals were still pending at the end of year. Two new eligibility petitions were still pending at the end of the year.

Two benefits appeals pending before deputy commissioners were concluded by agreed order. One benefits appeal was still pending before the full Commission at the end of the year. One benefit appeal was pending before a deputy commissioner at the end of the year, and one benefit appeal was dismissed without prejudice due to its being unripe for review by the Commission. All concluded fee petitions ultimately were resolved by agreement. One fee petition was still pending at the end of the year.

The Division provided general counsel assistance to the Program, including research on real estate and FOIA issues.

### **Tobacco**

In 2008 the Tobacco Section continued to administer and enforce the Master Settlement Agreement (MSA), entered into in 1998 between the States and the leading cigarette manufacturers. Pursuant to the Settlement, in April 2008 the Commonwealth received more than \$132 million, raising total payments received by the Commonwealth under the Settlement to more than \$1.2 Billion. MSA settlement funds have been and continue to be used to fund medical treatment for low income Virginians, stimulate economic development in former tobacco growing areas and establish programs to deter youth smoking.

During the year, the Tobacco Section enforced MSA's implementing legislation through review, analysis, and investigation of manufacturer applications to sell cigarettes in the Commonwealth, investigation of alleged violations of law and representation of the Commonwealth in actions under the Virginia Tobacco Escrow Statute. In 2008, the Tobacco Section investigated 55 companies, certified 46 cigarette manufacturers as compliant with Virginia law, denied 1 application and delisted 6 companies as noncompliant with state law. The Section's investigations and enforcement actions have been nationally recognized for quality and effectiveness.

In addition to actions under the Virginia Tobacco Escrow Statute, the Section represented the Commonwealth in a multi-million dollar MSA payment dispute and participated in successfully opposing litigation that claimed MSA was unconstitutional and violated Federal antitrust laws.

Finally, the Section continued to monitor administration of the National Tobacco Grower Settlement Trust (Phase II Agreement)—including Federal legislation that ended the tobacco quota program and established a ten-year transitional payment program funded through assessments of approximately \$10 billion on domestic manufacturers of tobacco products and importers of foreign tobacco—and provided legal advice and representation to the Virginia Tobacco Indemnification and Community Revitalization Commission.

In 2008, this Office recommended and the General Assembly enacted landmark amendments to the Virginia Tobacco Statutes, including unique and effective enforcement tools that no other MSA state has adopted.

### **Sexually Violent Predator Civil Commitment Section**

Since the Sexually Violent Predators Act became effective on April 3, 2003, a total of 451 cases have been referred by the Commitment Review Committee or the courts. Since 2003, the Section has filed 286 petitions for civil commitment or conditional release. During this past year, the Section filed 108 petitions and did not file petitions in 56 cases which did not meet statutory criteria. In 2008, the Section made 316 court appearances and traveled throughout the Commonwealth. Currently, there are approximately 130 persons committed at the Virginia Center for Behavioral

Rehabilitation (VCBR) with 13 removed due to parole revocations and/or the commission of new crimes.

The Section filed notices of appeal in 2 cases from the Circuit Court of Accomack County on the grounds that conditional releases were ordered by the Court when not all of the statutory requirements for conditional release were met. In addition, Section Attorneys moved to revoke 2 persons, who had been placed on conditional release, who had violated the terms of their release. Both the Circuit Court of the Cities of Charlottesville and Martinsville revoked the conditional release orders and ordered both persons committed to VCBR.

### **Division of Debt Collection Section**

The mission of the Division of Debt Collection Section is to protect the taxpayers of Virginia by ensuring fiscal accountability for the Commonwealth's receivables. Section attorneys also provide advice on collection and bankruptcy issues and serve as general counsel to the Unclaimed Property Division of the Department of Treasury.

The Section is self-funded by contingency fees earned from its recoveries. During the 12 months from July 1, 2007 through June 30, 2008, gross recoveries for 40 state agencies totaled in excess of \$9 million. During fiscal year 2008, the Section recovered fees of almost \$2 million, which represents nearly \$200, 000 in excess of Section expenditures. These excess fees ultimately are returned to the General Fund minus funds needed for improvements to the Division. By the end of the fiscal year, the Section will maximize services to its client agencies through expanded partnerships with leading collection industry technology vendors.

The Division implemented the new laws and has provided consultation to other states interested in modeling Virginia's laws and MSA enforcement. In addition, this Division supported and helped to advance tough new laws to prevent animal fighting in the Commonwealth.

### **PUBLIC SAFETY AND ENFORCEMENT DIVISION**

The Public Safety and Enforcement Division is comprised of the Correctional Litigation, Criminal Litigation, Health Professions and Professional Integrity, and Special Prosecutions & Organized Crime Sections. This Division handles criminal appeals, prisoner cases, Medicaid fraud cases, health professions hearings, Alcoholic Beverage Control (ABC) enforcement hearings, as well as prosecutions relating to gangs, money laundering, fraud, patient abuse and public corruption. Additionally, the Division provides counsel for all of the state agencies within the Public Safety Secretariat and for the Office of Commonwealth Preparedness. Finally, the Division is responsible for the Attorney General's anti-crime initiatives, including the Gang Reduction & Intervention Program, and the work of the statewide facilitator for victims of domestic violence.

### **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 detainer matters, and Correctional Enterprises. During 2008, the Section was responsible for handling 90 Section 1983 cases, 20 employee grievances, 189 habeas corpus cases, 698 mandamus petitions, 40 inmate tort claims, 7 warrants in debts, and 303 advice matters.

In 2008, the Section handled several significant matters in the federal district courts, the Fourth Circuit Court of Appeals, and the circuit courts of the Commonwealth, including 7 trials, 41 hearings, and 6 oral arguments.

In *Huff v. Mahon*, the ACLU claimed a violation of Huff's First Amendment rights when he was disciplined for writing a letter to the Department of Corrections Director in which he referred to the Warden as cold, callous, and uncaring. The Commonwealth prevailed in the United States District Court, and argument was heard in the Fourth Circuit Court of Appeals in December 2008.

In *Lanteigne v. Johnson*, a local sheriff sued the DOC Director, arguing that the Director had a statutory mandate to remove prisoners with DOC time from his jail within 60 days of when the clerk of court transmitted the sentencing order. The Virginia Beach Circuit Court agreed with this Office, however, that Appropriation Act language vested the Director with discretion as to when the prisoners were removed, and dismissed the lawsuit.

In *Giarratano v. Johnson*, the ACLU challenged Virginia's FOIA prisoner exemption as an equal protection challenge. The Correctional Litigation Section handled the case at the district court level, and the Solicitor's Office handled the Fourth Circuit appeal.

The Correctional Litigation Section also successfully advocated to the General Assembly for an amendment to the *Code of Virginia* (§ 53.1-32.2) to direct the Department of Corrections to develop and implement a comprehensive reentry plan for its offenders. The plan is to take into account all available public and private resources in the area to facilitate an inmate's successful return to society.

### **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 death 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' Services Council.

In 2008, this Section defended against 1,012 petitions for writs of habeas corpus and represented the Commonwealth in 458 appeals in state and federal courts. In addition, the Section received 21 petitions for writs of actual innocence.

Among the Section's many significant cases were appeals decided by the Virginia Supreme Court. They included *Magruder v. Commonwealth*, which held that the defendant waived a Confrontation Clause objection because he did not ask to have the technician testify, and *Sadler v. Commonwealth*, holding that the coach of a teenage softball team could be guilty of taking indecent liberties with a child in his custody even when he was not actually coaching. In *Adams v. Commonwealth*, the Virginia Supreme Court, affirming the defendant's conviction for second degree murder, upheld a seizure of evidence because the police acted in good faith in executing a search warrant at the defendant's residence, even though the search warrant affidavit lacked probable cause.

In *George v. Commonwealth* the Virginia Supreme Court affirmed the embezzlement convictions of a physician who failed to remit funds withheld from employees to the Virginia Department of Taxation, rejecting the defendant's contention that technically he did not hold those funds in trust for the Commonwealth. In *Milazzo v. Commonwealth*, the Supreme Court sustained felony "hit and run" and related convictions and rejected the defendant's argument that, because he intentionally struck two police cars, he had not been involved in an "accident." In *Ortiz v. Commonwealth* the Virginia Supreme Court, in affirming the defendant's conviction for rape, upheld the exclusion of certain impeachment evidence under the rape shield statute.

The Criminal Litigation Section also received numerous important decisions from the Virginia Court of Appeals. For example, in *Huffman v. Commonwealth* the Court of Appeals upheld a conviction for brandishing a firearm on the ground that brandishing the weapon in the victim's presence caused her to be "reasonably apprehensive" that someone could be hurt. In *Bowden v. Commonwealth*, the Court of Appeals held that aggravated sexual battery, in violation of § 18.2-67.3, is not a lesser included offense of forcible sodomy. In *Roach v. Commonwealth*, the Court of Appeals held that there is no constitutional or statutory bar to trying someone during a single prosecution for two separate charges of obstructing a police officer, even though both acts took place just minutes apart during a single, ongoing incident.

The Court of Appeals in *Cobbins v. Commonwealth* upheld the defendant's robbery and related convictions and rejected his argument that he should have been permitted to withdraw his guilty pleas, based upon his acknowledgment that he had pled guilty in an attempt to "buy time" to obtain new counsel and continue the case again. In *Podracky v. Commonwealth*, the Court of Appeals upheld § 18.2-374.3(B) against the defendant's argument that it was facially overbroad and affirmed his conviction for using a communication system to solicit a person he knew, or had reason to believe, was a minor, for certain sexual offenses. In *Abney v. Commonwealth*, the Court of

Appeals of Virginia affirmed the defendant's conviction for the first degree murder of his wife committed almost 30 years earlier and rejected his various Confrontation Clause and hearsay objections.

The Criminal Litigation Section's Capital Unit defended on appeal and collateral attack the convictions of persons sentenced to death under Virginia law. Four death-row inmates were executed and three new death sentences were imposed in cases in 2008.

Two capital cases were particularly significant. In *Emmett v. Johnson*, we persuaded the United States Supreme Court to vacate the stay of execution it had granted to allow Emmett to litigate his lethal injection claim. Emmett's death sentence was carried out two months later. In *Bell v. Kelly*, we persuaded the United States Supreme Court, after briefing and oral argument, to dismiss the case as improvidently granted.

### **Health Care Fraud and Professional Integrity Section**

The Health Care Fraud & Professional Integrity Section is comprised of two units: the Medicaid Fraud Control Unit and the Health Professions Unit. These units handle the criminal investigation and prosecution of fraud against the Commonwealth by Medicaid providers, civil investigations and litigation under the Virginia Fraud Against Taxpayers Act involving Medicaid funds, violations of Virginia's fair housing laws, and the administrative prosecution of professional licenses for the Department of Health Professions.

#### **Medicaid Fraud Control Unit**

The Medicaid Fraud Control Unit (MFCU) had a successful year. Its criminal and civil investigations recovered over \$32.5 million through court ordered fines, penalties, and restitution. The MFCU delivered over \$12.6 million in restitution checks to the Department of Medical Assistant Services to be deposited into the Commonwealth's General Fund Health Care Account. The Virginia MFCU, during federal fiscal year 2007, achieved the highest amount of recoveries in the history of all state MFCUs. Specifically, the MFCU led a joint state and federal investigation of the Purdue Frederick Company involving allegations of fraudulent misbranding of the drug OxyContin. The investigation spanned more than four years and involved several state and federal law enforcement agencies. As a result, the Purdue Frederick Company and three of its corporate officers pled guilty, resulting in court-ordered fines, penalties, and restitution of \$634 million. For this achievement, MFCU was awarded the Department of Health and Human Services, Office of the Inspector General's State Fraud Award, given annually to the nation's top MFCU.

*United States v. Roy Silas Shelburne*: Shelburne was tried and convicted of a RICO violation, as well as mail fraud, wire fraud and healthcare fraud in the United States District Court for the Western District of Virginia. The underlying frauds involved billing for: services not provided; incomplete or medically unnecessary

services; services performed in a grossly deficient manner; services not supported by documentation in the patient files; “emergency” treatment; and double billing DMAS and private health insurance companies. The case was jointly investigated by MFCU, the FBI, and the IRS.

*Commonwealth v. Hawa Heller-Pace; United States v. Hawa A. Weller-Pace:* Weller-Pace pled guilty to one count of felony forgery in the Alexandria Circuit Court. Weller-Pace ran a home nursing business and billed Medicaid for services never provided, and forged a registered nurse’s signatures on aide records. In a related federal proceeding, Weller-Pace pled guilty to one count of health care fraud in the United States District Court for the Eastern District of Virginia. The cases were jointly investigated by MFCU and the FBI, and prosecuted by the Alexandria Commonwealth’s Attorney’s Office and the Office of the United States Attorney for the Eastern District of Virginia.

*Commonwealth v. Andrea Nester:* Nester and Harmon, nursing home business office employees, and their husbands pled guilty to embezzlement of approximately \$200,000 from patient trust funds in Grayson County Circuit Court. The investigation established that accounting entries for checks written for burial funds were actually being written to Nester and Harmon’s husbands. This case was investigated and prosecuted by the MFCU.

The MFCU settled two civil cases with Merck, Inc., involving claims Merck violated the Medicaid Drug Rebate Act by not reporting accurate best price data for its drugs Vioxx and Zocor (Merck I), and Pepcid (Merck II). Merck failed to report the discounts it had given to hospitals as part of its obligation under the Medicaid Drug Rebate Act. As a result, the state Medicaid programs received less than it was entitled to receive based on Virginia Medicaid’s utilization of the drugs. Under the settlement agreement for Vioxx and Zocor, Virginia more than \$8 million in federal and state funds. Under the settlement agreement for Pepcid, Virginia received more than \$5 million in federal and state funds.

#### Health Professions Unit/Fair Housing Unit

The Health Professions Unit (HPU) primarily prosecutes cases before the various health regulatory boards under the Department of Health Professions, including the Boards of Medicine, Nursing, Pharmacy, and Dentistry. HPU provides a focused and effective administrative prosecution of cases involving violations of health care-related licensing laws and regulations. Another part of the Unit represents the Virginia Fair Housing Office before the Virginia Real Estate Board and Fair Housing Board. In this capacity, the Unit reviews investigative files and prepares consultation opinions to the boards, and where a board determines that housing discrimination has occurred, the Unit litigates the matter in the courts of the Commonwealth.

HPU successfully prosecuted numerous formal administrative hearings, including one against a Scott County funeral service licensee who accepted funds from thirteen clients for pre-need funeral service contracts but failed to place those funds

in valid funeral trust accounts. The Unit negotiated the payment of \$39,883.27 from the licensee. In addition, under the terms of a consent order, the licensee agreed to an indefinite suspension of his license and to pay two other clients an additional \$9,846.53 plus 6% interest from the date of their contracts prior to seeking reinstatement of his license in June 2010.

The Unit prosecuted a surgeon based on a pattern of poor care for seven different patients. The care displayed a lack of competency and showed serious negligence and deviation from basic standards. In several cases, patients were harmed by the poor care they received. The doctor's license was suspended for a period of time, and he was required to complete a mentorship in which he must show clinical competency. The Unit prosecuted a psychiatrist who on at least two occasions during office visits within three months prescribed OxyContin, a Schedule II controlled substance, to a patient in exchange for sexual contact with the patient. The Virginia Board of Medicine ordered the indefinite suspension of the psychiatrist's license to practice.

The Unit also prosecuted a male licensed practical nurse who sexually assaulted a 43-year-old comatose female patient in his care while he was employed at a rehabilitation center. The Virginia Board of Nursing summarily suspended the nurse's license to practice and scheduled a formal hearing for January 2009. The Unit prosecuted a registered nurse who stole blank prescription pads from an oral and maxillofacial surgery center in Fairfax, forged fraudulent prescriptions for Percocet, a Schedule II controlled substance, and presented those prescriptions at several pharmacies in the area. The Virginia Board of Nursing ordered an indefinite suspension of the nurse's license to practice.

A Board-certified internist from southwest Virginia was prosecuted because her treatment of 18 patients fell below the standard of care for chronic pain management. Further, the physician violated protocols that were specifically adopted by the practice including a failure to require pain management contracts and a failure to monitor through urine drug screenings. The physician also post-dated prescriptions for Schedule II controlled substances in violation of the Controlled Substance Act requirement. Further, the physician authorized weight loss pharmaceuticals without recording required information related to patient progress. The physician's license was indefinitely suspended for a period time based on a consent order agreed to following the presentation of the Commonwealth's case.

The Unit convinced the Virginia Board of Medicine to summarily suspend a midwife's license and negotiated the surrender of the license in the first case regarding a licensed ("lay") midwife. The issues in this matter related to patient selection, monitoring throughout the pregnancy and delivery process for two patients attempting to deliver "footling" breach births that resulted in fetal demise. The midwife assumed care of these patients despite limited training in breach births and incorrectly identified the position of the fetus prior to commencement of labor and delivery.

In another case, the Virginia Board of Medicine summarily suspended the medical license of a Petersburg ophthalmologist who provided substandard care when performing cataract surgery which resulted in permanent visual impairments to his patients. The case was settled by Consent Order with a suspension of the physician's license.

The Unit has been working with the Board of Nursing regarding deficiencies found in nurse training programs. In one case involving a school for practical nurse education, a number of deficiencies were discovered, following a survey visit, and the school cited for violations. The case was settled by Consent Order, which allowed the school more time to comply with requirements.

In the fair housing arena, the Unit recovered over \$250,000 for persons who were subject to housing discrimination while ensuring that respondents/defendants revised discriminatory policies and obtained fair housing education. Administratively, the Unit provided 21 official consultation opinions as well as several informal opinions to the Fair Housing and Real Estate Boards. The Unit filed nine circuit court complaints, two of which have been settled. Most notably, the Unit obtained a landmark achievement this year – a \$190,000 jury verdict in a trial brought on behalf of a tenant whose landlord demanded sexual favors in exchange for not evicting the tenant and her family when she was unable to pay rent. In addition, the Unit recovered \$15,000 for a disabled man who was denied a transfer to a ground-floor apartment in order to accommodate his mobility impairment. Another \$15,000 recovery was made for a disabled woman who was denied a reserved parking space to accommodate her disability. The Unit also obtained a \$16,500 settlement for two Hispanic men who were discriminated against based on their national origin/race by a real estate agent. The agent's real estate license also was reduced from a broker's license to a salesperson's license for three years and the agent was suspended from practicing under his salesperson's license for a period of time.

Finally, the Unit assisted the Boards in beginning their periodic review of the Commonwealth's fair housing regulations, including making recommendations to include more guidance regarding reasonable accommodations and modifications.

#### Special Prosecutions & Organized Crime Section

The Special Prosecutions/Organized Crime Section (SPOCS) is the primary prosecutorial section of the Public Safety and Enforcement Division. The Section holds the responsibility of prosecuting various crimes – either pursuant to the Office's jurisdiction under the Virginia Code or by request of local Commonwealth's Attorneys – throughout the Commonwealth, representing criminal justice and public safety agencies in various courts throughout the Commonwealth, and implementing public safety initiatives set forth by this Office.

In 2008, the Section set out to accomplish several goals, including enhancing the efforts in prevention, intervention, and suppression of criminal street gang activity;

continuing the prosecution of identity theft offenses; working to crack down on counterfeit consumer goods; keeping Virginia's children safe from sex offenders; and assisting state and local partners with finding solutions for various criminal issues.

*The Wrong Family*

After years of relying on videos produced by other states, in 2008, the Section produced a Virginia gang video made up of interviews and footage shot entirely in Virginia. The hope is that law enforcement agencies around the Commonwealth will use this video to engage communities in a discussion on criminal street gang pre-vention. The video – created with federal grant funds and funds seized, by the Section, from criminals around the Commonwealth – is the first of its kind for Virginia. The goal: to keep children in Virginia from joining gangs, and to educate parents and law-enforcement on ways to monitor and recognize gang involvement. The Section, determined to take a fresh look at anti-gang initiatives, collaborated with police and probation officers, emergency room doctors, teachers, community service providers, and former and current gang members from across the Commonwealth. After several months of filming and editing, the video premiered on November 18, 2008. With overwhelmingly positive feedback, the Section is currently taking orders for copies of the video and plans to disseminate the video early in 2009, as well as produce a Spanish-language version.

*Staunton Community Day*

Responding to the increase in gang activity in the Shenandoah Valley, the Office initiated a Community Day in the City of Staunton. On September 27, 2008, after months of planning, the event came to fruition. Local residents, businesses, volunteer groups, and members of government joined to celebrate their community and raise awareness of the coordinated community effort to combat gangs and gang activity in the Staunton area. The event gave residents and businesses an opportunity to beautify their neighborhood through service, while offering free health check-ups to families and honoring community activism. The event also included a drawing contest in the area schools with awards given to the students who best depicted the negative influence of gangs in the community.

*Counterfeit Goods*

In 2008, the Section also focused on assisting the Virginia General Assembly in strengthening the laws relating to those selling counterfeit goods. Previously, counterfeiters only faced a Class 2 misdemeanor, no matter how much they were selling, and only a second arrest could result in a felony. With overwhelming support from law enforcement and businesses, the new legislation passed unanimously in both houses of the General Assembly.

The new law increases the punishment to a Class 1 misdemeanor and adds two Class 6 felonies based on quantity or frequency of occurrence. Counterfeit items may now be seized by law enforcement and forfeited to the Commonwealth. Since the new laws expand the definition of a “mark” to include marks registered with the

United States Patent and Trademark Office, it further protects Virginia consumers from substantial products that are often harmful to their health and safety. Along with the positive feedback from residents of Virginia, law enforcement has also benefited from the new laws. Since July 2008, there have been at least 13 cases across the Commonwealth resulting in more than \$4 million in seized goods. To increase awareness regarding the new laws, the Section provided three training sessions to law enforcement in counties throughout the Commonwealth. Although the passage of the new laws ensured harsher penalties for offenders, this Section still holds the issue of counterfeiting as a top priority and hopes to continue education and enforcement in the coming years.

#### *Operation “Coldplay”*

In an effort to combat sex offenders and illegal aliens, 2008 saw the rollout of Operation “Coldplay,” a joint effort between this Office, the Virginia Department of State Police, and Immigration and Customs Enforcement (ICE). The goal of the operation was to initiate deportation proceedings against convicted sex offenders who were either present in the United States illegally or whose sex offense conviction rendered them deportable. Initiated in 2007 at the request of this Office, Virginia State Police provided ICE with a list of 527 foreign-born offenders who were on the Virginia Sex Offender and Crimes Against Minors Registry. After investigations, in February 2008, ICE reported that of those on the list determined to be criminal aliens: (a) 84 offenders had left the country or had been deported; (b) 135 offenders currently were incarcerated in state or local facilities to be processed for deportation at the conclusion of their sentences; and (c) 36 remained at large in the Commonwealth.

As a result of these findings, ICE and the Virginia State Police carried out a proactive enforcement operation in an attempt to locate and arrest those remaining offenders who were at-large in Virginia and subject to removal proceedings. On February 20, Attorney General McDonnell, along with representatives from the Virginia State Police and ICE, announced the results of these efforts, including the arrest and initiation of deportation proceedings against the 36 convicted criminal alien sex offenders.

#### *Non-Compliant Sex Offenders*

In 2007, the Section, working with the Virginia Department of State Police, initiated a project to target non-compliant sex offenders residing in Virginia. In July 2008, the project was completed and resulted in the identification of several offenders in violation of the law. By locating and taking the appropriate actions necessary against these sex offenders, the Section assisted the Virginia State Police with an important public safety initiative.

#### *State Prosecutions*

Assisting Virginia’s Commonwealth’s attorneys is a significant part of the Section’s mission. In 2008, the Section assisted Commonwealth’s Attorneys in numerous cases from all over Virginia, which resulted in a number of criminal con-

victions. One case that stands out is *Commonwealth v. Tucker*, a murder case that was originally prosecuted in 2004. The Richmond Commonwealth's Attorney's office withdrew the charges in 2004 as witnesses refused to testify. However, between 2004 and 2008, the Richmond Police Department and the Alcohol, Tobacco, and Firearms Bureau continued to investigate Tucker and two witnesses to the murder, on other charges. As a result, Tucker and the witnesses were arrested and convicted in federal court on separate charges. Shortly thereafter, these witnesses began to cooperate in the old murder investigation and Tucker was re-indicted, in state court, for the 2004 murder of Garrison Llano. In August, Tucker pled guilty to second-degree murder and received an active term of 19 years incarceration.

#### *Identity Theft Task Force*

Several members of the Section participate in the Metro Richmond Identity Theft Task Force. In 2008, the Section prosecuted approximately twenty identity theft cases, which resulted in over 544 months' imprisonment. One notable conviction was of Givesspepe Hudson, a member of the self-titled "Felony Lane Gang" – a group of seven males who defrauded women all over the southeast by stealing their identification, credit cards, and checkbooks and would then negotiate the stolen items at bank drive-through lanes. Hudson and the other members were all sentenced to jail time and ordered to pay over \$900,000 in restitution. Another noteworthy conviction came in November 2008, when Thomas Mastin pled guilty to bank fraud. Mastin worked for Capital One and transferred payments from customers to accounts held by his wife and another associate. Mastin transferred over \$156,000 in customer payments and will be sentenced in early 2009.

The task force works closely with other government agencies, such as the United States Postal Service, local police departments, and the United States Secret Service, among others, in an effort to bring criminals to justice and to ensure convictions. The Section remains highly involved in this organization and plans to continue its contribution in the years to come.

#### *Petersburg*

With violent crime and drug activity on the rise, the City of Petersburg sought help in combating the problems that have plagued their city. One initiative is "Operation Impact," a multi-agency operation designed to attack drug trafficking, firearms violations, and other violent crime offenses throughout the city. Federal, state, and local law enforcement agencies pooled their resources to identify, arrest, and prosecute persons selling or buying illicit narcotics in the city. In 2008, the Section assisted in approximately twelve federal cases that resulted in prison sentences for all defendants, including one sentence of 120 months incarceration.

#### *Commonwealth Preparedness*

The Section is assigned legal responsibilities relating to emergency management and Commonwealth preparedness across Virginia. Emergency Preparedness

remained a priority in 2008. With the impending hurricane and tornado season, May 2008 brought about a table top exercise, sponsored by FEMA and the Virginia Department of Emergency Management, to determine the process which the State needs to undertake before requesting a federal disaster designation. Later in the summer, the Department of Emergency Management requested assistance in increasing operational readiness in the wake of Hurricanes Gustav, Hanna, and Ike. Although the hurricanes caused minimal damage in Virginia, the plans remain beneficial in anticipation of future hurricane seasons.

The Section also addressed concerns over campus security. As required by 2008 legislation, the Department of Emergency Management developed a crisis management template for public institutions of higher education. The template, released in September 2008, borrowed valuable ideas from the Second Annual Governor's Campus Preparedness Conference. The conference focused on all-hazards preparedness initiatives at public institutions of higher education. A member of the Section participated in the conference, at which issues such as higher education legislation, response and recovery during campus emergencies, PanFlu campus planning, campus coordination with local government, emergency operations planning, and mental health on campus were discussed. Drawing from the conference, the Department of Emergency Management released its template and conducted two training sessions. A Section member and university council from Virginia Tech presented the new laws governing the crisis management plans, including the creation of violence prevention committees and threat assessment teams, and early warning and notification systems on campus.

Along with preparing campuses for emergencies, members of the Section organized and participated in the Third Annual Office of the Attorney General Table Top "Legal Preparedness" Exercise in October. Participants included the Attorney General, Governor's Chief of Staff, Lieutenant Governor's Chief of Staff, representatives from the Governor's Cabinet, private observers, multiple state agencies, and agency counsel from this Office. The exercise explored issues of executive authority in the absence of the Governor and election laws.

In addition to the discussion of election laws at the Table Top Exercise, the Section worked to coordinate legal resources for law-enforcement personnel to use in case of emergencies. After consulting with Virginia Department of State Police, Virginia Fusion Center, Virginia National Guard, and other agencies, the Section created summaries of election laws and procedures and briefed the Virginia State Police and other government agencies on Virginia law as it relates to potential issues on Election Day. Fortunately, the Commonwealth did not experience any major public safety issues on Election Day. Through this collaborative effort, the Section helped to ensure that the Commonwealth was prepared.

*Elected Officials*

Another key responsibility of the Section is the authorization of Elected Official investigations. In 2008, the Section received, reviewed, and made recommendations regarding these requests. The Section works closely with the Virginia Department of State Police on these investigations and judiciously handles these very important cases with the attention they merit.

*Agency Representation*

In addition to representing other public safety agencies of the Commonwealth, the Section's representation of the ABC Enforcement Division involves administrative proceedings in which the Department seeks to sanction or revoke a license. The Section represented ABC in twenty-three hearings in 2008. In addition to representation, the Section provided two days of training to over 100 ABC agents regarding: how to conduct financial investigations; investigations involving computers and other technology; and how to recognize and identify gang-related activity and utilize the new gang statutes introduced in 2008. Finally, the Section endorsed and advocated for a law that allows the ABC Board to revoke a license if it is shown that an establishment has become a rendezvous or meeting place for gang members.

*Federal Cooperation*

The working relationship that exists between this Office and the United States Attorney's Office for the Eastern and Western Districts of Virginia is a valuable collaboration that grew even stronger in 2008. That relationship helped to foster an orderly transfer of criminal cases between federal, state, and local authorities in the Commonwealth. Funded through federal grants, two Assistant Attorneys General from the Section are currently detailed to the Office of the United States Attorney for the Eastern District of Virginia. One attorney is assigned to the Richmond Division, and the other is assigned to the Alexandria Division. The member of the Section who works in the Alexandria Division represents the United States in immigration cases and in the fight against the growing MS -13 presence in Virginia. Many of the immigration cases begin because it becomes apparent that an individual who has been apprehended on state charges is an illegal alien who has been previously deported. These "illegal re-entry after removal" cases provide a crucial mechanism by which criminals are removed from our local streets, convicted on felony charges, and removed from the Country in a very expeditious manner. This same attorney also handles many MS-13 gang cases. MS-13 is an extremely violent Hispanic criminal street gang. Investigation and prosecution of these individuals requires cooperation among federal agencies such as the FBI, ICE, and the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF), as well as state and local law enforcement. Criminal, illegal alien, and gang activities continue to be an important public safety concern in Virginia and will, therefore, be ongoing priorities in 2009.

Working in the Richmond Division of the United States Attorney for the Eastern District of Virginia, a member of the Section represents the United States in numerous

drug cases throughout the region. One case in particular involves the indictments of the “*Fulton Hill Hustlers*.” An investigation of the “hustlers” led to the indictment of nine targeted individuals believed to deal crack cocaine and heroin in the Fulton Hill area of the City of Richmond and Eastern Henrico County. With cooperation from the Henrico Police Department, the Richmond Police Department, DEA, and ATF, several of these defendants have been arrested and await trial in early spring 2009. Another significant drug case involved high-level drug dealers in Prince Edward County. A member of the Section represented the United States in the prosecution of these dealers. Cooperation among the United States Attorney’s Office, this Office, DEA, and the Farmville Police Department led to twelve convictions in 2008, with the anticipation of many more in 2009.

#### *Gang Awareness Coordinator*

In 2008, the Section acquired a Gang Awareness Coordinator to educate citizens and law enforcement throughout the Commonwealth on the particulars relating to criminal street gangs and Virginia’s efforts to combat gangs. Since May, the Coordinator, whose position is funded by a federal grant, has already spread the message of awareness through seventeen training sessions across the Commonwealth. These training sessions provided community members, parents, prosecutors, law enforcement, and public officials with up-to-date information regarding gang violence, anti-gang initiatives, and effective techniques for prevention and intervention. The Coordinator also represents the Section at Virginia Gang Investigators Association (VGIA) meetings and SAW 2010 meetings (a community group in the Staunton, Augusta, and Waynesboro area that creates programs to intervene and prevent gang activity). Attendance at these meetings allows members to share intelligence and discuss intervention and prevention strategies. In the coming year, the Coordinator plans to continue and broaden gang awareness training, as well as seek more partnerships in communities in an effort to aid in the fight against gangs in Virginia.

### **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 as well as other communications agencies and boards that provide information technology resources, oversight, and guidance necessary for government operations and programs. This Section also provides advice to the Commonwealth’s central procurement agencies. The Computer Crime Section is a specially-trained and equipped group of prosecutors and investigators skilled in computer, communications, and Internet technologies. The Computer Crime Section vigorously investigates and prosecutes illegal activities, such as Spam and identity theft,

with an emphasis on the protection of children who may be targeted by predators on the Internet. The Transportation Section represents the Departments of Transportation, Rail and Public Transportation, Aviation, and Motor Vehicles, as well as the Virginia Port Authority and Motor Vehicle Dealer Board. This Section provides advice to these agencies on all matters relating to transportation within the Commonwealth. The agencies represented by the Section directly affect the economic health and quality of life of the Commonwealth's citizens by promoting the mobility of people and goods on the roads, in the water, and in the air. The Environmental Section represents the agencies of the Secretary of Natural Resources in addition to some agencies outside that Secretariat. The Section provides legal advice to those agencies and their respective boards. Such services include litigation, regulation and legislative review, transactional work, personnel issues, and related matters. The Real Estate and Land Use Section (RELUS) is responsible for the majority of the transactional real estate for the Commonwealth, including sales of surplus property, purchases, easements, including all forms of conservation easements, leases, and licenses, other than for the Department of Transportation. In addition, the Section is responsible for construction claims and litigation for both buildings and highways. The Real Estate and Land Use Section continues to provide construction procurement and contract administration advice for non-higher education vertical construction projects of the Commonwealth and for projects undertaken pursuant to the Public-Private Education Facilities and Infrastructure Act of 2002 (PPEA).

### **Technology and Procurement Section**

The Technology and Procurement Section provided legal support and representation needed by numerous agencies and institutions to implement their technology requirements, fill their procurement needs, and address legal claims and compliance issues. This included extensive advice to assist: VITA with implementation of the Infrastructure Agreement with Northrop Grumman; the Virginia Enterprise Applications Project Office and the Commonwealth Chief Applications Officer in their efforts to achieve enterprise-wide efficiencies; and the Department of General Services and other agencies with implementation of Executive Order No. 33 relating to small, women-owned and minority-owned businesses. This Section assisted agencies with contract performance problems, technology acquisitions, licensing of Commonwealth data and software to other parties, intellectual property claims and agreements, electronic contracting, settlement of claims, structuring of procurements, responses to protests, and representation in procurement appeals and other litigation. Additionally, the Section provided training sessions on government procurement and contracting and e-discovery obligations to officials at various events, including at the Department of General Services' annual Public Procurement Forum.

### Computer Crime Section

Ten years ago, the General Assembly authorized and funded the creation of a Computer Crime Section within this Office. The long-term vision for this Section was to spearhead Virginia's computer-related criminal law enforcement in the twenty-first Century. In accordance with § 2.2-511, this Office has concurrent and original jurisdiction to investigate and prosecute such crimes committed by means of computer and dealing with the exploitation of children and identity theft. During 2008, the Computer Crime Section continued to work throughout the Commonwealth investigating and prosecuting computer crime cases. Some jurisdictions in which the Section has investigated and/or prosecuted computer crime or child exploitation cases this year include the counties of Chesterfield, Halifax, James City, Lunenburg, Madison, Mecklenburg, New Kent, Patrick, Washington, and Wise, and the cities of Colonial Heights, Martinsville, Newport News, Richmond, and Staunton. The Section's attorneys are cross-designated as Special Assistant United States Attorneys and prosecute cases in federal as well as state courts.

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

This year the Computer Crime Section became a founding member of the Peninsula Innocent Images Task Force based at the Newport News United States Attorney's Office. The task force is comprised of federal, state, and local law enforcement from the Richmond and Tidewater areas tasked to investigate and prosecute Internet crimes against children. The Computer Crime Section has provided one part-time investigator and its three prosecutors, on an "as needed" basis, to pursue the Task Force's cases in federal and state courts.

Earlier in the year, the Section's team of prosecutors and investigators also compiled a comprehensive manual on investigating computer crimes for use by law enforcement officials in Virginia. Since completion of the manual, the investigators and prosecutors have given several day-long training sessions on the topic of computer crime investigation and the Office's Internet safety programs at law enforcement academies statewide including academies in Abingdon, Fairfax, Shenandoah, Rappahannock, Virginia Beach, Chesterfield, and New River.

In addition to investigating and prosecuting computer crimes throughout the Commonwealth, the Section is a clearinghouse for information concerning criminal

and civil misuses of computers and the Internet. As such, the members of the Section are often called upon to give presentations or to make appearances on television and radio in an effort to inform the public about issues such as the increasing scourge of identity theft and the ever mounting use of computers and the Internet by sexual predators to make contact with children.

During 2008, members of the Computer Crime Section traveled extensively throughout Virginia to speak to students and deliver the Office's *Faux Paw's* and "Safety Net" presentations. *Faux Paw's Adventures in the Internet*, a book written by the Internet safety organization iKeepSafe for elementary school students, contains a special message from the Attorney General and teaches valuable lessons on how to be safe on the Internet. "Safety Net" is an interactive program which utilizes a real-life story to demonstrate how easy it is for a predator using very little personal information to track down a child victim over the Internet. Although the Section has utilized and continually updated this presentation over the past several years, the presentation continues to be in high demand amongst middle schools, high schools, and parent groups across the Commonwealth. This past year, members of the Section presented these programs to schools in Cape Charles, Fauquier, Richmond, Lawrenceville, Tappahannock, Chantilly, Loudoun, Alexandria, Chesterfield, Chesapeake, Danville, Tazewell, Suffolk, Newport News, Lunenburg, and many other locations throughout the Commonwealth.

In the spring of this year the Attorney General's Youth Internet Safety Advisory Committee selected the finalists of the Virginia Youth Internet Safety Contest. This was a statewide contest for students in grades 6-12 to create and film a 30-second public service announcement on some aspect of Internet safety. Students worked in teams of up to three and submitted their entries to this Office. The Office received hundreds of entries from all corners of Virginia which were narrowed down by the Advisory Committee and posted on a webpage specially designed for the contest where the public voted for the winner. Thousands of votes were cast and the winning ad, produced by three students from Robert E. Lee High School in Staunton, was aired on television stations throughout Virginia and the District of Columbia. The top three finalists received prizes from Microsoft and FOX Broadcasting Company. The contest was a great success that helped to raise Virginia students' awareness of the many issues surrounding Internet safety.

### **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. Section attorneys also serve as counsel to the Commission for the Virginia Alcohol Safety Action Program. The Virginia Department of Transportation (VDOT) presented a host of legal issues ranging from those arising from its day-to-day operations to complex highway construction programs and agreements. Section attorneys addressed legal issues relating to numerous highway construction projects, including projects conducted under the Public Private Transportation Act of 1995 (PPTA) as well as other laws addressing procurement of highway construction projects. Projects or matters addressed by Section attorneys included the 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, a new Route 460, and Midtown Tunnel improvements.

During the last quarter of 2008, attorneys in the Transportation Section worked with VDOT to facilitate the financial closing relating to transfer of operation and maintenance of the Dulles Toll Road to the Metropolitan Washington Airports Authority (MWAA). Under the operating permit granted to MWAA, the Authority will operate and maintain the Dulles Toll Road in the Northern Virginia area for a 50-year term. Toll revenues collected by MWAA and other funding sources will be used to construct an extension of Metrorail to Dulles Airport and beyond. In furtherance of that endeavor, the Department of Rail and Public Transportation, in 2007, assigned to MWAA the Comprehensive Agreement it executed with Dulles Transit Partners to construct the Metrorail extension. On behalf of both VDOT and the Department of Rail and Public Transportation, Section attorneys developed and reviewed various agreements and other documents associated with closing for the Dulles Toll Road transactions, which occurred on October 31, 2008. Litigation challenging transfer of Dulles Toll Road operation and maintenance to MWAA that had been dismissed by the Richmond Circuit Court on the basis of sovereign immunity was appealed to the Virginia Supreme Court, which, in mid 2008, overturned the Circuit Court's ruling and remanded the case for a trial on the merits. The Commonwealth prevailed in the trial on the merits and now the matter is again the subject of appeal in the Virginia Supreme Court. During the year, plaintiffs that filed a lawsuit in federal court, challenging the construction of the Metrorail in the Tyson's Corner area, withdrew their lawsuit.

The Section worked closely with VDOT staff in drafting and negotiating a Memorandum of Agreement (MOA) between VDOT, 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. Negotiations successfully concluded in early 2008 and the MOA was executed by the federal and state parties.

The Section was involved in issuance of transportation revenue bonds. A bond validation suit initiated in 2007, relating to the authority of regional transportation authorities to issue bonds, was appealed to the Virginia Supreme Court. The Supreme Court found that statutes authorizing regional authorities to impose certain fees

impermissibly authorized the regional authorities to impose taxes and because those fees were the revenue sources for servicing debt on the bonds, the bonds should not have been validated. A second case, filed in the Circuit Court for the City of Richmond in 2007, posed a constitutional challenge to the legislation authorizing the Commonwealth Transportation Board (CTB) to issue capital projects revenue bonds. That case, which was converted to a bond validation suit, was heard this year in Richmond Circuit Court. The Commonwealth prevailed in Circuit Court and because plaintiffs elected not to appeal the Circuit Court's decision, the CTB is now free to issue these capital projects revenue bonds.

This year, litigation was filed in Richmond Circuit Court challenging the constitutionality of the statute authorizing the Rail Enhancement Fund (REF). Plaintiff, Montgomery County, challenges the constitutionality of the REF statute on its face as well as the REF agreement that DRPT has entered into with Norfolk Southern for an intermodal facility to be located in Montgomery County. This litigation is still pending in circuit court.

During this past year, Section attorneys have also handled matters or issues, which often included litigation, involving: Department of Motor Vehicles licensing, registration and titling, driving schools, automobile manufacturer and dealer disputes, motor fuel and vehicle sales taxes, and hearings administration; VDOT design-build contracts for major projects, homeland security issues, disadvantaged business enterprise hearings, inverse condemnation matters, agreements and negotiations under the PPTA, outdoor advertising and logos, right of way, and eminent domain matters; Rail and Public Transportation Department 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; Department of Aviation grants and funding distribution; Motor Vehicle Dealer Board licensure and discipline of automobile dealers and salespersons; 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; and Virginia Port Authority real estate transactions, business transactions, and personnel matters. Additionally, the Section advised client agencies in general matters relating to FOIA, procurement, contracts, conflicts of interest, ethics in public contracting, personnel and employment matters, 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.

Extensive litigation over the State Air Pollution Control Board's permitting of the Mirant power plant in Alexandria continued in 2008. Following the Board's mid-year grant of a permit to merge its stacks, Mirant withdrew an appeal to the Virginia Court of Appeals of a circuit court opinion upholding the Board's issuance of a June 2007 State Operating Permit, and its circuit court appeal of a Board decision that the proposed stack merge required a permit. Mirant appealed a Board regulation capping emissions of air pollutants in nonattainment areas to the amount of allowances allocated under EPA's Clean Air Interstate Rule. The circuit court upheld the regulation and Mirant has appealed that ruling to the Virginia Court of Appeals. The Section also intervened in the Fourth Circuit Court of Appeals in support of EPA's approval of Virginia's State Implementation Plan implementing EPA's Clean Air Interstate Rule in a challenge brought by Mirant.

The Section is currently defending the State Air Control Board's issuance of permits to Dominion Virginia Power for its new coal fired plant in Wise County. The Section was authorized to join Virginia in a forthcoming EPA and multi-state action in federal court in Ohio with respect to the expected settlement of alleged violations of air pollution regulations at facilities owned by Aleris International, Inc., in eleven States, including Virginia. Settlement negotiations are ongoing.

During 2008, the Section also handled a considerable docket of litigation for the Department of Environmental Quality (DEQ) and the Virginia Marine Resources Commission (VMRC). For DEQ, that included a continuation of the defense of the State Water Control Board in its extension of the King William Reservoir permit, in its re-issuance of a permit for Dominion Virginia Power's North Anna Nuclear Station, and in a number of other permit actions. On behalf of VMRC, the Section obtained a reversal in the Virginia Court of Appeals of a lower court decision that the agency erred in issuing a permit for a structure on a public fishing pier and it is currently defending a VMRC regulation closing the season for catching crabs with a dredge.

The *Highland New Wind* turbine generating proceeding in which the Section represented the Department of Game and Inland Fisheries before the State Corporation Commission was successfully concluded when the Commission included in the permit for this project conditions to protect wildlife.

The workload for the Department of Mines, Minerals and Energy (DMME) continued to increase. The Gas and Oil Board held hearings on approximately 450 applications associated with wells in 2008. These have generated a considerable amount of litigation in the form of appeals. Drilling activity has increased placing pressure on the Board and its staff. Currently the Board is considering prohibiting the deduction of post-production costs from the royalty shares of owners who are subject to compulsory pooling orders. This is a matter of considerable public interest and probable legislative action in 2009.

The Board of Coal Mining Examiners has also greatly increased its workload. Substance abuse issues have resulted in the docketing of over 200 cases since the law on this subject was changed in 2007. DMME litigation involving the Consolidated Coal Levisa River discharge permit continues, as does long-standing litigation challenging the agency's decision not to perform a requested reclamation project in Grundy.

#### **Real Estate and Land Use Section**

The Real Estate and Land Use Section (RELUS) provides primary or support services for transactional real estate matters for all agencies of the Commonwealth and provides construction procurement and contract administration advice for vertical construction projects of the Commonwealth and for projects undertaken pursuant to PPEA. Of note in this regard was the announcement that the National Council for Public-Private Partnerships selected two PPEA projects for the Department of Corrections for its Infrastructure Award at its annual conference this year. Factors cited by DOC as contributing to the success of these projects included the early involvement of Section attorneys and their approach to handling the negotiations.

The Section handled a high volume of transactional matters during 2008, starting the year with 322 open files. The Section opened 127 new matters during the year with an estimated value in excess of \$185 million. One hundred and ninety-nine matters, valued at \$243,031,454, were closed during 2008. The case load at the beginning of 2009 is 250 cases with a stated value in excess of \$1 billion. The Section continues to see a significant caseload from the Department of Conservation and Recreation (DCR) and the various universities and other institutions of higher education, including the complex acquisition of 7.3 miles of conservation and/or recreational rails-to-trails projects for Virginia Military Institute (Chessie Trail), and DCR's Open Space Easement on the Roanoke River Rails-to-Trails project running through Halifax, Prince Edward, Lunenburg, Brunswick and Greensville counties. The Section also serves as agency counsel to the Virginia Outdoors Foundation, the Department of Historic Resources and the Fort Monroe Federal Area Development Authority, and is counsel to the Divisions of Real Estate Services and Engineering and Buildings of the Department of General Services.

### **FINANCIAL LAW AND GOVERNMENT SERVICES DIVISION**

The Financial Law and Government Support Division is comprised of two practice groups: Financial Law and Government Support.

#### **Financial Law**

The attorneys in the Financial Law Group provide advice to agencies and boards reporting to the Secretary of Finance and the Secretary of Public Safety. These agencies include the Virginia Department of Taxation, the Department of Treasury, the Department of Accounts, the Department of Planning and Budget, and the Department

of Veterans Services, and the Virginia Retirement System. Group attorneys successfully worked with the Department of Taxation on complex litigation regarding conservation easement tax credits. The Internal Revenue Service has initiated a similar investigation into the same easement transaction and has shared information with the Department. Attorneys for this Group participated in litigation involving a special commissioner in numerous consolidated insurance subrogation cases in which an insurance guarantor sought to recover its fees and expenses incurred in covering claims of Virginia policy holders against defunct insurers that issued policies in the Commonwealth. The Treasurer for the Commonwealth held certain security deposits previously posted by the insurers, and the guarantor is subrogated to the rights of the insured. Attorneys in this Group successfully represented the interests of the Treasurer in responding to the claims of the insurance guarantor and protecting the interests of the Treasurer in preserving the security deposits. This Group also provided the legal assistance required for drafting numerous regulations and legislation.

### **Government Support**

The attorneys in the Government Support Group provide advice to agencies and boards reporting to the Secretary of Administration, the Secretary of Commerce and the Secretary of Agriculture and Forestry. These agencies include the Virginia Economic Development Partnership, Virginia Employment Commission, Department of Veterans Services, Department of Agriculture and Consumer Services, Department of Professional and Occupational Regulation, and State Board of Elections. This Group also represents numerous other state agencies and boards charged with administrative and regulatory responsibility for the Commonwealth's economic policies and professional licensure. By providing counsel to these numerous agencies, the Group attorneys ensure that the agencies receive consistent and timely professional legal guidance. This Group also works closely with constitutional officers and local government attorneys to provide assistance with the interpretation and application of the laws of the Commonwealth at the local level of government.

Attorneys in the Group are required to represent the assigned agencies before both the federal and state courts in the Commonwealth. Their duties vary widely and include providing client advice. This Group provided counsel to the Department of Agriculture and Consumer Services in regard to federal mandates that required the phasing in of new ethanol blended gasoline into Virginia markets. The applicable state regulations requiring certain testing and for gasoline to meet certain standards pursuant to such testing would result in the new ethanol-blended gasoline failing the applicable tests. Group attorneys successfully proposed a solution for the promulgation of the regulatory amendments under an improvised publication/informational proceeding/public comment process that permitted relatively swift and efficient promulgation of the necessary amendments to the state regulation to meet the federal requirements. This

Group provided counsel to the State Board of Elections that resulted in the successful conduct of the historic 2008 Election, which involved the largest number of voter registrations and actual qualified voters casting ballots, both in person and by absentee ballot, in the history of the Commonwealth. The Group also successfully guided the State Board of Elections through numerous lawsuits arising from preparations for the 2008 election and the actual conduct of the election. The pre-election lawsuits included challenges to the physical conduct of the election involving the number of voters, voting machines, and the election officers assigned to a number of precincts throughout the Commonwealth.

### **OPINIONS DEPARTMENT**

The Senior Counsel to the Attorney General oversees the Opinions Department which manages 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 Department also manages the informal opinions issued by Deputy Attorneys General and Senior Counsel to the Attorney General. Attorneys throughout all Divisions in this Office are responsible for the research and drafting of opinions. In 2008, the Department processed 160 requests for opinions and this Office issued 94 official, informal, and conflict opinions.

This Department publishes the Annual Report of the Attorney General, which is presented annually to the Governor of Virginia on May 1<sup>st</sup> 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.

In addition to the Annual Report, official opinions are published on the website of the Attorney General ([www.vaag.com](http://www.vaag.com)) and available to the public within 24-48 hours of issuance. The Department 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.

In 2008, the Opinions Department, in cooperation with this Office's IT Department, the Department of Human Resource Management, and Department of Transportation personnel, launched the orientation course via the Internet on the "Office of the Attorney General Knowledge Center" (visit [www.vaag.com](http://www.vaag.com) and follow the links to "Legal & Legislative Reference" and "Conflict of Interest Training").

The Internet course is offered as five separate modules that may be taken at one time or broken into multiple sessions to accommodate the trainee. The course is suitable for the visually impaired as well as the hearing impaired as the course is presented with an audio script that may be viewed as text and with visual slides. The Internet training also features a printable course outline for later reference.

CONCLUSION

It has indeed been my honor and pleasure to serve the citizens of this Commonwealth as Attorney General. I am proud of the accomplishments of the attorneys and staff of this Office, which are many. 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 during the past year 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,

A handwritten signature in black ink, appearing to read "W. C. Mims". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

William C. Mims  
Attorney General



PERSONNEL OF THE OFFICE<sup>1</sup>

NAME	TITLE
Robert F. McDonnell .....	Attorney General
William C. Mims.....	Chief Deputy Attorney General
Martin L. Kent .....	Chief Counsel to the Attorney General
Stephanie L. Hamlett .....	Senior Counsel to the Attorney General
J. Jasen Eige .....	Chief of Staff and Counsel
Marla G. Decker.....	Deputy Attorney General
Francis S. Ferguson.....	Deputy Attorney General
Lisa M. Hicks-Thomas.....	Deputy Attorney General
David E. Johnson .....	Deputy Attorney General
Maureen R. Matsen.....	Deputy Attorney General
Stephen R. McCullough.....	State Solicitor General
William E. Thro .....	State Solicitor General
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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
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David B. Irvin .....	Sr. Assistant Attorney General/Chief
Alan Katz .....	Sr. Assistant Attorney General/Chief
JoAnne P. Maxwell .....	Sr. Assistant Attorney General/Chief
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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
John S. Westrick.....	Sr. Assistant Attorney General/Chief

<sup>1</sup>This list includes all persons employed and compensated by the Office of the Attorney General during calendar year 2008, 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
Steven T. Buck .....	Chief Counsel for MFCU/Section Chief
Robert H. Anderson III .....	Senior Assistant Attorney General
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Leah A. Darron.....	Senior Assistant Attorney General
Mark R. Davis.....	Senior Assistant Attorney General
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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
Kenneth C. Grigg.....	Senior Assistant Attorney General
Catherina F. Hutchins.....	Senior Assistant Attorney General
James V. Ingold .....	Senior Assistant Attorney General
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Carl Josephson .....	Senior Assistant Attorney General
Frederick R. Kozak .....	Senior Assistant Attorney General
Donald A. Lahy .....	Senior Assistant Attorney General
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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
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Ann R. Purdue.....	Senior Assistant Attorney General
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Matthew A. Conrad.....	Assistant Attorney General
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Mary Hendricks Hawkins	Assistant Attorney General
Flora Townes Hezel	Assistant Attorney General
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Mikie F. Melis	Assistant Attorney General
Christy W. Monolo	Assistant Attorney General
Ishneila G. Moore	Assistant Attorney General
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Valerie L. Myers	Assistant Attorney General
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Kara C. Smith .....	Assistant Attorney General
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Julie M. Whitlock .....	Assistant Attorney General
Jennifer C. Williamson .....	Assistant Attorney General
Randall H. Wintory .....	Assistant Attorney General
Corie Tillman Wolf .....	Assistant Attorney General
Daniel S. Wolf .....	Assistant Attorney General
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Dale G. Mullen .....	Chief Prosecutor
David W. Tooker .....	Chief Prosecutor
Catherine Crooks Hill .....	Assistant Attorney General/Acting Section Chief
Michael T. Judge .....	Deputy Director, Prosecutions & Litigation
Erica J. Bailey .....	Chief of Civil Investigations
Courtney M. Malveaux .....	Special Counsel Manager/Asst. Att’y Gen.
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Phillip O. Figura .....	Assistant Attorney General/Gang Prosecutor
Michele B. Brooks .....	Assistant Attorney General/Prosecutor

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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 Coordinator, GRIP
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
Carolyn R. Blaylock .....	Legal Secretary Senior
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Michele J. Bruno .....	Senior Criminal Investigator
Betsy R. Busch .....	Travel Coordinator
Charles R. Calton .....	Claims Representative

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Mary Rae Carter	Regional Coordinator/Class Action Program
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Heather A. Clouse	Office Services Floater
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Charles E. Crute Jr.	Senior Criminal Investigator
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Beverly B. Darby	Criminal Analyst
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Robert A. DeGroot	Criminal Investigator
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Harrell E. Erwin	Senior Criminal Investigator
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Cheryl D. Fleming	Legal Secretary
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Julia L. Fuller-Wilson	Program Assist. Sr., Victim Notification Program

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Montrue H. Goldfarb	Paralegal Senior
Mary P. Goodman	Legal Secretary Senior
David C. Graham	Crime Analyst
Karl E. Grotos	Financial Specialist
Carolyn Halbert	MFCU Computer Programmer
Lynda S. Hamm	Nurse Investigator
Lyn J. Hammack	Administrative Legal Secretary Senior
Mary Anne Harper	Claims Representative
Sandra W. Hott	Legal Secretary Senior
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Jewel J. Jefferson	Human Resources Assistant
Laura T. Jennings	Legal Secretary Senior
Terri C. Jernigan	Legal Secretary
Judith G. Jesse	Paralegal Senior Expert
Douglas A. Johnson	Chief Investigator
Genea C.P. Johnson	Paralegal
Jeri M. Johnson	Paralegal Senior
Kevin M. Johnson	Senior Criminal Investigator
Tierra G. Johnson	Legal Secretary Senior
Tyrone Johnson Jr.	Legal Secretary
Jon M. Johnston	Document Analyst
Scott D. Jones	Senior Criminal Investigator
Tammy P. Kagey	Paralegal Senior Expert
Hyo J. Kang	Senior Database Administrator/Developer
Debra M. Kilpatrick	Claims Representative
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Jacqueline A. Kotvas	Special Assistant, Community Relations
Amy Wight Kube	Special Projects Coordinator
Mary Anne Lange	Paralegal
Leslie E. Lauziere	Criminal Investigator
Laureen S. Lester	Supervising Investigator
Kendall R. Lewis	Office Services Specialist

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Patricia M. Lewis .....	Unit Program Coordinator
Robert T. Lewis .....	Deputy Director of Finance
David S. Little .....	Criminal Investigator
Lesley C. Lovett .....	Paralegal
Tara L. Maddox .....	Legal Secretary
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J. Tucker Martin .....	Director of Communications
Jason A. Martin .....	IT Support Specialist I
Sara I. Martin .....	Human Resources Analyst I
Tomisha R. Martin .....	Claims Specialist
Aaron M. Mathes .....	Chief Information Officer
Melinda R. Matzell .....	Forensic Auditor
Judy O. McGuire .....	Claims Representative
George T. McLaughlin .....	Investigator/Forensic Examiner
Racquel D. McRae .....	Legal Secretary
Angela P. Millender .....	GRIP Project Assistant
Cheryl F. Miller .....	Nurse Investigator
Lynice D. Mitchell .....	Office Services Specialist Senior
Eda M. Montgomery .....	Forensic Accountant
Howard M. Mulholland .....	FCIC Financial Investigator
Rebecca L. Muncy .....	Legal Secretary Senior Expert
Janice M. Myer .....	Administrative Legal Secretary Senior
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
John W. Peirce .....	Senior Criminal Investigator
Jane A. Perkins .....	Paralegal Senior Expert
Barbara B. Peschke .....	Criminal Investigator
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  
N. Jean Redford..... Legal Secretary Senior Expert  
Luvenia C. Richards..... Legal Secretary  
Melissa A. Roberson..... Program Coordinator/Domestic Violence  
Linda M. Roberts..... Senior Receptionist  
April D. Rogers-Crawford..... Gang Awareness Coordinator  
Bernadine H. Rowlett...Executive Assistant to State Solicitor General  
Hamilton J. Roye..... Facilities and Operations Manager  
Joseph M. Rusek..... MFCU Investigative Supervisor  
Patrice J. Sandridge..... Criminal Investigator  
Lisa W. Seaborn..... Publications Coordinator  
Pamela A. Sekulich..... Financial Services Specialist II  
Bernard J. Shamblin..... Senior Criminal Investigator  
Terry L. Sivert..... Criminal Investigator  
Debra L. Smith..... Administrative Legal Secretary Senior  
Faye H. Smith..... Human Resource Manager I  
Jameen C. Smith..... Claims Specialist Senior  
Jessica C. Smith..... Administrative Coordinator  
Cheryl L. Snyder..... Legal Secretary  
Michele A. Stanley..... Paralegal  
Kimberly F. Steinhoff..... Executive Assistant to the Chief Deputy  
Victoria G. Stewart..... Legal Secretary  
Mary Sullivan..... Criminal Investigator  
Gregory G. Taylor..... Claims Representative  
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

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Nanora W. Westbrook .....	Receptionist
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

ATTORNEYS GENERAL OF VIRGINIA FROM 1776 TO 2009

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

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

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

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

<sup>4</sup>The Honorable J. Lindsay Almond Jr. was elected Attorney General by the General Assembly on February 11, 1948, to fill the unexpired term of the Honorable Harvey B. Apperson, and resigned September 16, 1957.

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

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A.S. Harrison Jr. ....	1958–1961
Frederick T. Gray <sup>6</sup> .....	1961–1962
Robert Y. Button .....	1962–1970
Andrew P. Miller .....	1970–1977
Anthony F. Troy <sup>7</sup> .....	1977–1978
John Marshall Coleman .....	1978–1982
Gerald L. Baliles .....	1982–1985
William G. Broaddus <sup>8</sup> .....	1985–1986
Mary Sue Terry .....	1986–1993
Stephen D. Rosenthal <sup>9</sup> .....	1993–1994
James S. Gilmore III .....	1994–1997
Richard Cullen <sup>10</sup> .....	1997–1998
Mark L. Earley .....	1998–2001
Randolph A. Beales <sup>11</sup> .....	2001–2002
Jerry W. Kilgore .....	2002–2005
Judith Williams Jagdmann <sup>12</sup> .....	2005–2006
Robert F. McDonnell .....	2006–2009
William C. Mims <sup>13</sup> .....	2009–

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

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

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

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

<sup>10</sup>The Honorable Richard Cullen was appointed Attorney General to fill the unexpired term of the Honorable James S. Gilmore III upon his resignation on June 11, 1997, at noon, and served until noon, January 17, 1998.

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

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

<sup>13</sup>The Honorable William C. Mims was elected Attorney General by the General Assembly on February 26, 2009, and was sworn into office on February 27, 2009, to fill the unexpired term of the Honorable Robert F. McDonnell upon his resignation on February 20, 2009.





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

*Abofreka v. Va. Bd. of Med.* Denying petition for appeal from Court of Appeals ruling upholding suspension of appellant's medical license for performing illegal abortion and providing inadequate prenatal care and diagnostic testing to two patients.

*Adams v. Commonwealth.* Affirming Court of Appeals decision and holding that police acted with good faith in executing search warrant at defendant's residence.

*Baker v. Comptroller.* Affirming trial court decision that sheriff's deputy receive statutory presumption that death from heart disease was employment-related (despite preemployment diagnosis of hypertension); reversing trial court decision relating to line-of-duty death payments and holding that death by heart disease was not direct or proximate result of defendant's employment.

*Bishop v. Commonwealth.* Reversing Court of Appeals decision and finding evidence adduced at trial was insufficient to establish defendant had notice of his habitual offender status. Commonwealth was required to confess error regarding defendant's conviction for felony obstruction of justice under § 18.2-460(C).

*Bolden v. Commonwealth.* Affirming Court of Appeals decision and finding that evidence was sufficient to prove possession of firearm by convicted felon.

*Booker v. Commonwealth.* Reversing Court of Appeals decision and holding that trial court erred in telling jury that court could reduce, but not increase, sentence set by jury.

*Brailey v. Dep't of Taxation.* Denying grievance procedure appeal of termination for improperly accessing taxpayer's records for personal reasons.

*Brickhouse v. Commonwealth.* Reversing Court of Appeals decision and finding no evidence that defendant procured, encouraged, countenanced, or approved distribution and sale of cocaine.

*Briscoe v. Commonwealth.* Affirming Court of Appeals ruling that Confrontation Clause violation was waived because defendant did not request that technician testify.

*Britt v. Commonwealth.* Reversing Court of Appeals decision affirming conviction for grand larceny and holding that evidence was insufficient to prove value of goods taken was \$200 or more.

*Buhrman v. Commonwealth.* Reversing Court of Appeals holding that arrest was permissible under Fourth Amendment.

*Commonwealth v. Robertson.* Affirming Court of Appeals decision reversing trial court's denial of motion to suppress firearm discovered inside defendant's house. Court held that exigent circumstances' exception to warrant requirement did not apply and rendered entry into defendant's house illegal when defendant was arrested outside.

*Cost v. Commonwealth.* Reversing Court of Appeals decision and holding pat down was unreasonable search.

*Cypress v. Commonwealth.* Affirming Court of Appeals decision and holding that failure to use statutorily-prescribed mechanism to secure presence of preparer of certificates of analysis in drug possession cases waived Confrontation Clause challenge.

*Dodge v. Randolph-Macon Woman's Coll.* Affirming Court of Appeals decision (Commonwealth filed amicus curiae brief) regarding challenge to College's decision to sell certain donated property and College's decision to educate men as well as women.

*Doe v. Va. Bd. of Dentistry.* Denying petition for appeal from Court of Appeals *en banc* ruling that appellant procedurally defaulted in accordance with Rule 5A:18 for failure to preserve objections directly to Board during administrative hearing.

*Elliott v. Warden, Sussex I State Prison.* Dismissing habeas corpus case challenging conviction for capital murder and sentence of death from Prince William County Circuit Court.

*Garnett v. Commonwealth.* Affirming Court of Appeals holding that Commonwealth satisfied *Brady* obligation by providing defense with accurate summaries of tape-recorded interview.

*George v. Commonwealth.* Affirming Court of Appeals decision affirming medical doctor's four embezzlement convictions where defendant withheld funds from employees' paychecks for state withholding taxes, but failed to remit money to state.

*Gibson v. Commonwealth.* Affirming Court of Appeals decision and holding that defendant had defaulted claims that defendant was not properly convicted of withholding tax violations and that trial court had power to defer adjudication of guilt.

*Gilman v. Commonwealth.* Affirming Court of Appeals decision and holding that Confrontation Clause did not apply to appeal of summary contempt conviction.

*Glenn v. Commonwealth.* Affirming Court of Appeals *en banc* holding that search by police of defendant's unmarked, unlocked backpack, located in room he used in his grandfather's house, did not violate Fourth Amendment when officer relied on consent from grandfather to search home. Officer reasonably concluded, based on available facts, that consent extended to backpack.

*Gray v. Va. Sect'y of Transp.* Reversing trial court and holding that sovereign immunity did not bar constitutional challenge based on self-executing provisions of Virginia Constitution; remanded to circuit court, which affirmed constitutionality of Dulles Toll Road agreement.

*Green v. Va. State Bar.* Denying appeal of order denying petition for writ of mandamus and prohibition against the Bar.

*Green v. Va. State Bar.* Denying motion to dismiss summary order and correct record or issue stay of sanction pending appeal in attorney disciplinary matter.

*Green v. Va. State Bar.* Denying writ of prohibition and mandamus requesting stay of disciplinary proceedings and prohibiting Bar and Disciplinary Board from prosecuting any further allegations of misconduct.

*Harris v. Commonwealth.* Reversing Court of Appeals decision and holding that stop of defendant based on anonymous tip was not supported by reasonable suspicion.

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*Hughes v. Director.* Affirming circuit court decision rejecting defendant's multiple claims of ineffective assistance of counsel.

*In re American Academy Holdings, LLC.* Denying petition for writ of mandamus to direct judge to order breach of contract action referred to arbitration.

*In re BNP Paribas, S.A.* Denying petition for writ of prohibition to prevent circuit court judge from ordering petitioner, as garnishee, to answer garnishment summons.

*In re Christian.* Denying petition for writ of mandamus to direct circuit court to hold hearing on Freedom of Information Act claim.

*In re Emmett.* Denying petition for writ of prohibition regarding conviction of capital murder and sentence of death from Danville Circuit Court.

*In re Emmitt.* Denying petition for writ of prohibition seeking to prevent court from holding hearing to set execution date.

*In re Frison.* Denying petition for writ of mandamus to direct circuit court to void general district court judgment.

*In re Fromal.* Denying petition for writ of prohibition contending circuit court improperly awarded injunctive relief against petitioners for willful termination of tenant's electric services.

*In re Hill.* Denying petition for writ of mandamus to direct public defender to allow petitioner to review his entire criminal file.

*In re Johnson.* Dismissing, as moot, petition for writ of prohibition to prevent circuit court judge's entry of order barring individual from serving in elected office until resolution of election challenge.

*In re King.* Denying petition for writ of mandamus and prohibition to circumvent juvenile court's initial custody determination under Uniform Child Custody Jurisdiction and Enforcement Act.

*In re Martha Jefferson Hosp.* Denying petition for writ of prohibition to prevent court from exercising jurisdiction over petitioner.

*In re Morris.* Denying petition for writ of mandamus to direct judge to overturn decision to deny motion to nonsuit.

*In re O'Connor.* Denying petition for writ of mandamus, prohibition, or error to direct circuit court judge's decision in estate administration matter.

*In re Russell.* Denying petition for writ of mandamus to direct circuit court judge to rule on certain matters in custody case.

*In re Scott.* Denying petition for writ of prohibition and writ of mandamus to prevent exercise of jurisdiction by circuit court entering prefiling injunction and holding show cause proceedings as result of violation of that injunction.

*In re Switzer.* Denying petition for writ of mandamus or prohibition in custody matter.

*Jay v. Commonwealth.* Reversing Court of Appeals decision dismissing one of defendant's appellate issues for failure to cite authority in support of argument.

*Jaynes v. Commonwealth.* Reversing Court of Appeals decision holding that ground that anti-spam statute is unconstitutionally overbroad.

*Johnson v. Tice.* Appealing grant of habeas relief to Tice, one of "Norfolk Four"; unanimously reversed.

*Jones v. Commonwealth.* Reversing Court of Appeals decision and reversing conviction for maintaining or operating fortified drug house in violation of § 18.2-258.02 and holding that evidence was not sufficient to sustain conviction because statutory phrase, "substantially altered from its original status," was not satisfied by proof of stove and 2 x 4 used to barricade door from police.

*Lennon v. Va. Bd. of Dentistry.* Denying petition for appeal from Court of Appeals ruling upholding revocation of appellant's dental license based upon findings of substandard care and violations of prior Board orders were supported by substantial evidence.

*Logan v. Commonwealth.* Reversing and remanding Court of Appeals decision finding that exclusionary rule does not apply in probation revocation proceeding and reaffirming earlier case law stating that rule does not apply absent bad faith on part of police.

*Magruder v. Commonwealth.* Upholding Court of Appeals decision and holding that statute authorizing certificate of analysis of drugs to be offered into evidence without presence of forensic analyst who conducted testing was constitutional under Confrontation Clause.

*Malbrough v. Commonwealth.* Affirming Court of Appeals decision finding that police had not violated defendant's Fourth Amendment rights during traffic stop when defendant gave consent for search.

*Marshall v. N. Va. Transp. Auth.* Reversing trial court judgment and holding that that taxes and fees imposed by unelected regional transportation authorities violate Virginia Constitution.

*Maxwell v. Commonwealth.* Reversing Court of Appeals decision and holding that no rational fact finder could have found defendant guilty of possession with intent to distribute upon evidence adduced at trial.

*McCain v. Commonwealth.* Reversing Court of Appeals decision and holding pat down was unconstitutional because circumstances did not create suspicion of criminal activity or that defendant was armed and dangerous.

*Milazzo v. Commonwealth.* Affirming Court of Appeals ruling that term "accident," as used in § 46.2-894 (hit and run statute), is not limited to unintentional collisions; thus, evidence was sufficient to support conviction.

*Miller-Jenkins v. Miller-Jenkins.* Dismissing birth mother's appeal of child custody determination predicated on same sex Vermont civil union (Commonwealth filed amicus curiae brief in support of birth mother).

*Moore v. Commonwealth.* Reversing Court of Appeals *en banc* decision and finding that peeling, valid inspection sticker, without more, did not create reasonable, articulable suspicion.

*Ortiz v. Commonwealth.* Affirming Court of Appeals decision and holding that rape shield statute barred impeachment evidence against seven-year-old victim.

*Phelps v. Commonwealth.* Affirming Court of Appeals decision and holding that defendant is “person” within intent of felony eluding statute.

*Porter v. Commonwealth.* Affirming conviction for capital murder and sentence of death from Norfolk Circuit Court.

*Potomac Edison Co. v. State Corp. Comm’n.* Affirming decision of Commission that 2004 amendments to Restructuring Act did not terminate 2000 rate agreement voluntarily entered into by Company.

*Potomac Edison Co. v. State Corp. Comm’n.* Upholding Commission’s interpretation of Company’s 2000 rate agreement.

*Pryor v. Commonwealth.* Reversing Court of Appeals decision and holding that trial court erred in allowing certain evidence submitted to jury after court granted defendant’s motion to strike charge related to such evidence.

*Robertson v. Va. State Bar.* Denying appeal from suspension from practicing law in Virginia imposed because Robertson was suspended from practicing law in Maryland.

*Sadler v. Commonwealth.* Affirming Court of Appeals decision and holding evidence sufficient to convict defendant of taking indecent liberties with child in his custody.

*Shaikh v. Johnson.* Affirming trial court ruling that defendant was not entitled to evidentiary hearing and was not entitled to habeas relief on claims that counsel was ineffective for failure to ensure that refused jury instruction was made part of record on appeal and to call codefendant to testify.

*Stone v. Va. State Bar.* Dismissing appeal of revocation of license to practice law.

*Thompson v. Va. State Police.* Denying appeal from Court of Appeals decision reversing trial court decision to void disciplinary action taken against state trooper.

*Turman v. Commonwealth.* Reversing Court of Appeals decision and holding that instruction to jury regarding flight was improperly given and prejudiced defendant.

*Velasquez v. Commonwealth.* Affirming Court of Appeals decision and holding that error in instructing on inference of intent to rape from unlawful presence on premises was harmless.

*Vincent v. Commonwealth.* Reversing Court of Appeals decision and holding that in prosecution for burglary with intent to commit larceny, specific intent with which unlawful entry is made “may be inferred from the surrounding facts and circumstances,” not from absence of other evidence alone.

*White v. Commonwealth.* Reversing Court of Appeals decision that affirmed trial court decision revoking defendant’s “first offender” status as drug offender and finding that defendant’s period of supervised probation had ended; trial court erred in revoking probation based on subsequent actions.

*Young v. Commonwealth.* Reversing Court of Appeals decision affirming defendant's conviction for possession of controlled substance because evidence did not prove defendant was aware of "nature and character" of drugs she possessed.

### CASES PENDING IN THE SUPREME COURT OF VIRGINIA

*Barrett v. Va. State Bar.* Appealing revocation of license to practice law in Virginia.

*Chesapeake Bay Found., Inc. v. Commonwealth ex. rel. State Water Control Bd.* Appealing Court of Appeals decision reversing trial court ruling that dismissed appeal of permit extension on standing grounds.

*Cooper v. Commonwealth.* Appealing Court of Appeals ruling that defendant was not entitled to jury instruction regarding alibi in his trial for possession of cocaine with intent to distribute.

*Finney v. Commonwealth.* Appealing Court of Appeals judgment which held that evidence was sufficient to sustain defendant's convictions for burglary and grand larceny.

*Frederick County Business Park v. Va. Dep't of Env'tl. Quality.* Appealing Court of Appeals decision affirming trial court ruling upholding determination of agency that applicant required permit.

*Gray v. Warden, Sussex I State Prison.* Habeas corpus case challenging conviction for capital murder and sentence of death from Richmond City Circuit Court.

*Green v. Va. State Bar.* Appealing suspension of license to practice law in Virginia.

*Greene v. Commonwealth.* Appealing Court of Appeals decision holding that failure to comply with Virginia Department of Charitable Gaming subpoena is criminal violation.

*Hasan v. Commonwealth.* Appealing Court of Appeals decision holding that trial court properly denied defendant's motion to suppress statement made to police officers.

*In re Worthington.* Petitioning for writ of prohibition and/or mandamus to prevent enforcement of order requiring clerk to add name to list of those authorized to perform marriages in jurisdiction.

*Juniper v. Warden, Sussex I State Prison.* Habeas corpus case challenging conviction for capital murder and sentence of death from Norfolk Circuit Court.

*Payne v. Commonwealth.* Appealing Court of Appeals ruling that evidence was sufficient to sustain defendant's convictions for felony homicide, aggravated vehicular involuntary manslaughter, and hit and run; Commonwealth was not required to elect between two homicide offenses; conviction for both homicide offenses did not violate double jeopardy; defendant was not entitled to mistrial based on claim of suppression of exculpatory evidence; and testimony of expert witness was properly admitted.

*Riley v. Commonwealth.* Appealing Court of Appeals ruling that defendant's sleepwalking defense to charge of maiming while driving under influence was not supported by evidence.

*Seis v. Commonwealth.* Appealing Court of Appeals decision finding no error in prosecution's introduction during its case-in-chief of defendant's notice of alibi.

*Teleguz v. Warden, Sussex I State Prison.* Habeas corpus petition challenging conviction for capital murder and sentence of death from Rockingham County Circuit Court.

*Va. Dep't of Health v. NRV Real Estate, LLC.* Appealing Court of Appeals decision that Department acted arbitrarily and capriciously in rejecting defendant's certificate of public need application.

*Wells v. Harris.* Appealing dismissal of defamation action and raising issues of sovereign immunity and statute of limitations.

### CASES REFUSED BY THE SUPREME COURT OF VIRGINIA

*Captain's Cove Utility Co. v. State Water Control Bd.* Refusing to hear appeal of Court of Appeals reversal of circuit court ruling setting aside permit issued by Water Control Board.

*Harrison v. Boone.* Refusing to hear appeal of Court of Appeals reversal of circuit court ruling setting aside permit issued by Virginia Marine Resources Commission.

*Laurels of Bon Air, LLC v. Med. Facilities of Am. LIV Ltd. P'ship.* Refusing to hear petition for appeal challenging constitutionality and Health Department's interpretation.

*Loudoun Hosp. Ctr. v. State Health Comm'r.* Refusing to hear petition for appeal and petition for rehearing *en banc* filed by plaintiff challenging Court of Appeals decision that affirmed State Health Commissioner decision, which awarded certificate of public need to Northern Virginia Community Hospital, LLC.

*Nathaniel Greene Dev. Corp v. Commonwealth.* Refusing to hear motion seeking review of denial of motion to reinstate after dismissal pursuant to § 8.01-335(B).

### CASES IN THE SUPREME COURT OF THE UNITED STATES

*Alabama v. Pope.* Filing amicus curiae brief in support of Alabama in seeking review of award of attorneys' fees against state from aligned party, denied.

*Albert v. Johnson.* Petition for certiorari, attacking requirement of certificate of appeal in certain habeas cases, denied.

*Anderson v. Virginia.* Petition for certiorari, challenging statute allowing sample of DNA to be taken following arrest for certain offenses, denied.

*Bell v. Warden, Sussex I State Prison.* Petition for certiorari, seeking review of decision denying habeas corpus petition that challenged conviction for capital murder and sentence of death, granted, then dismissed.

*Bethea v. Virginia.* Petition for certiorari, seeking review of decision upholding convictions for bank robbery, denied.

*Blount v. Director.* Petition for certiorari, seeking review of denial of habeas corpus relief, denied.

*Bolden v. Virginia.* Petition for certiorari, seeking review of decision affirming conviction for possession of a firearm, denied.

*Brailey v. Dep't of Taxation.* Petition for certiorari seeking review of decision upholding termination for misconduct litigated to finality in state courts, denied.

*Briscoe v. Virginia.* Petition for certiorari, regarding admissibility of certificate of analysis of drugs under *Crawford v. Washington*, pending.

*Colosi v. Director.* Petition for certiorari, appealing denial of habeas corpus relief and claiming split in federal circuits on issue of “aggregate prejudice” from trial counsel’s deficiencies, denied.

*Ellis v. Virginia.* Petition for certiorari, seeking review of decision upholding convictions for distribution and possession of cocaine, denied.

*Emmett v. Warden, Sussex I State Prison.* Motion to vacate stay of execution regarding conviction of capital murder and sentence of death, granted.

*Equity in Athletics, Inc. v. Dep't of Educ.* Petition for certiorari, regarding validity of action to cut certain sports teams by James Madison University under Title IX, pending.

*Evans v. Virginia.* Petition for certiorari, challenging conviction on basis that juror received allegedly prejudicial communication from third party about case, denied.

*Garnett v. Virginia.* Petition for certiorari, seeking review of denial of *Brady* claim, denied.

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

*Green v. Director.* Petition for certiorari, seeking review of decision denying habeas corpus petition that challenged conviction for capital murder and application for stay from sentence of death, denied.

*Hamlett v. Director.* Petition for certiorari, seeking review of decision denying federal habeas relief, denied.

*In re Farshidi.* Petition for writ of mandamus directed to Governor of Virginia to pay for damages for unsuccessful claim of discrimination filed in Court of Appeals of Virginia, denied.

*Jackson v. Warden, Sussex I State Prison.* Petition for certiorari, seeking review of decision denying habeas corpus petition that challenged conviction for capital murder and application for stay from sentence of death, denied.

*Jaynes v. Virginia.* Petition for certiorari, seeking reversal of facial invalidation of Virginia’s anti-spam statute, pending.

*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.

*Locke v. Karass.* Filing amicus curiae brief urging Court to clarify its jurisprudence with respect to what expenses labor union can charge to certain nonunion members, pending.

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*Lynch v. Director.* Petition for certiorari, seeking review of decision denying federal habeas relief, denied.

*Lyon v. Virginia.* Petition for certiorari, appealing state court's holding that evidence was sufficient to sustain conviction, denied.

*Medellin v. Texas.* Filing amicus curiae brief in support of Texas and urging Court to uphold sovereign authority of states to refuse to reopen concluded proceeding based on order from President of the United States.

*Muhammad v. Warden, Sussex I State Prison.* Petition for certiorari, seeking review of decision denying habeas corpus petition that challenged conviction for capital murder and sentence of death, denied.

*Pacific Bell v. Linkline.* Filing amicus curiae brief on merits in support of petitioner seeking review of antitrust laws, pending.

*Patrick v. Virginia.* Petition for certiorari, seeking review of jury instruction on recent possession of stolen property, denied.

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

*Rodriguez v. Hassell.* Petition for certiorari, seeking review of Supreme Court of Virginia decision that demurred on issues of conspiracy and temporary restraining orders against Justices of Virginia Supreme Court, denied.

*Rodriguez v. Legal Times.* Petition for certiorari, seeking reversal of dismissal of petitioner's suit arising out of petitioner's 2006 disbarment proceedings, denied.

*Savage v. Director.* Petition for certiorari, seeking review of dismissal of state habeas petition as procedurally barred, denied.

*Smith v. Virginia.* Petition for certiorari, appealing claim that someone altered general district court order of *nolle prosequi* when defendant appealed to circuit court, denied.

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

*Virginia v. Moore.* Reversing judgment of Virginia Supreme Court upon grant of certiorari on issue of whether U.S. Constitution requires suppression of evidence for violation of state law.

*Yarbrough v. Warden, Sussex I State Prison.* Petition for certiorari, seeking review of decision denying habeas corpus petition that challenged conviction for capital murder and application for stay from sentence of death, denied.



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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: 2008 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](http://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. 07-084

**ADMINISTRATION OF GOVERNMENT: DEPARTMENT OF LAW – GENERAL PROVISIONS (OFFICIAL OPINIONS OF ATTORNEY GENERAL).**

**CRIMES: CRIMES INVOLVING MORALS AND DECENCY – GAMBLING.**

**Initial question requires factual determination regarding whether particular activity constitutes gambling; factual determination is not proper function of Attorney General.**

THE HONORABLE FRANKLIN D. EDMONDSON  
COMMISSIONER OF THE REVENUE FOR THE CITY OF PORTSMOUTH  
JANUARY 22, 2008

**ISSUES PRESENTED**

You ask whether certain poker tournament activities constitute gambling. You further inquire whether your office should issue business licenses authorizing such activities and whether admissions and other taxes should be assessed and collected in connection therewith.

**RESPONSE**

Your initial question requires a factual determination regarding whether a particular activity constitutes gambling. A factual determination is not a proper function of this Office.<sup>1</sup> Your second question is dependent upon the response to the first question and also requires a factual determination.

**BACKGROUND**

You relate that certain poker tournament and related business activities occur in the City of Portsmouth. You state that these activities are open to the public and publicly advertised. Participants must pay a fee to play some variety of poker in public locations, including restaurants and meeting halls. You note that the fees are sometimes described as “admission fees,” “voluntary contributions,” “charitable contributions,” or “cover charges.” In return for payment of the fees, you relate that participants are given poker chips to use for play. At the end of the event, participants who lose all their chips receive nothing. Participants who end the tournament with chips receive either cash prizes or items of material financial value proportionate to the number of chips. In some cases, participants may purchase additional chips during the tournament. Finally, you relate situations where the house keeps a portion of the total funds from the “entry” fees, and the winning participant receives the balance.

**APPLICABLE LAW AND DISCUSSION**

Section 18.2-325(1) defines “illegal gambling” as

the making, placing or receipt, of any bet or wager in this Commonwealth of money or other thing of value, made in exchange for a chance to win a prize, stake or other consideration or thing of value, dependent upon the result of any game, contest or any other event the outcome of which is uncertain or a matter of chance, whether such game, contest or event, occurs or is to occur inside or outside the limits of this Commonwealth.

Section 18.2-326 provides that “[e]xcept as otherwise provided in [Article 1, Chapter 8 of Title 18.2], any person who illegally gambles ... shall be guilty of a Class 3 misdemeanor.” Section 18.2-328 provides, in part, that:

The operator of an illegal gambling enterprise, activity or operation shall be guilty of a Class 6 felony. However, any such operator who engages in an illegal gambling operation which (i) has been or remains in substantially continuous operation for a period in excess of thirty days or (ii) has gross revenue of \$2,000 or more in any single day shall be fined not more than \$20,000 and imprisoned not less than one year nor more than ten years.

It is well settled in Virginia that an activity constitutes illegal gambling when the elements of “prize,” “chance,” and “consideration” are present together.<sup>2</sup> In the activities you describe, the elements of prize and chance clearly are present. The game of “poker” is not defined by statute. Absent a statutory definition, the plain and ordinary meaning of the term is controlling.<sup>3</sup> The term “poker” means

any of several card games in which a player bets that the value of his or her hand is greater than that of the hands held by others, in which each subsequent player must either equal or raise the bet or drop out, and in which the player holding the highest hand at the end of the betting wins the pot.<sup>4</sup>

You describe a situation where participants in a poker game play for a “prize,”<sup>5</sup> which goes to the person who by “chance” is holding the highest hand. Thus, whether “consideration” is present is the remaining factor regarding whether the activities you describe constitute illegal gambling.

A prior opinion of the Attorney General looks at the issue of “consideration.” That opinion concludes that the fact that individual participants were required to pay an admission fee to participate did not necessarily mean that subsequent use of play or pretend money was illegal gambling through the use of “money or other thing of value.”<sup>6</sup> When the amount of play money or poker chips won or lost does not depend upon the amount of actual money paid by the participants through their admission fees, such activity would not be a form of illegal gambling and is not prohibited by law.<sup>7</sup> However, after payment of the initial admission fees, when participants may purchase additional quantities of play money or poker chips, such activity would be prohibited under §§ 18.2-325 through 18.2-340.<sup>8</sup> The purchase of additional poker chips means that participants are gambling real “money or other thing of value” contrary to Virginia law.<sup>9</sup>

Regardless of whether participants may purchase additional poker chips, in the circumstances you describe the poker chips function as the equivalent of real money since they are redeemable for real money or “significant material financial value.” Therefore, when a participant places a bet or wager, he does so using money or other thing of value, and the element of “consideration” is present.

Prior opinions of the Attorney General have construed liberally what constitutes “consideration” for purposes of defining illegal gambling and have focused upon pecuniary benefit in order to determine the existence of consideration.<sup>10</sup> For example, where participation in a game was limited to persons who had purchased a room at the hotel conducting and hosting the game, the hotel derived pecuniary benefit from conducting the game.<sup>11</sup> Thus, the hotel received the consideration necessary to constitute illegal gambling even though no “entry fee” was required to participate in the game.<sup>12</sup> The Supreme Court of Virginia has held that where the object of the defendant in conducting a lottery unquestionably was to attract persons to the premises with the hope of deriving benefit from them, sufficient consideration existed for an illegal gambling conviction.<sup>13</sup>

You describe the “entry fees” as “admission fees,” “voluntary contributions,” “charitable contributions,” or “cover charges.” You also describe situations in which the “house” keeps a portion of the pot created by the entry fees. It is unclear, however, who conducts the tournaments and whether the restaurants and meeting halls derive pecuniary benefit from serving as the host sites. Indeed, it appears the party that conducts the tournaments and derives pecuniary benefit may vary from one event to another. You also do not indicate whether, in addition to the “entry” fees, participants must make additional purchases from the restaurants or meeting halls to be present on the premises. Such factors would be important to determine whether the element of consideration exists and whether such activities constitute illegal gambling.

Ultimately, the determination of whether consideration exists in the activities you describe is a question of fact, and the answer may vary from one tournament to the next. 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.<sup>14</sup> Furthermore, prior opinions of the Attorney General have concluded that the application of various elements of a criminal offense to a specific set of facts is a function properly reserved to the Commonwealth’s Attorney, the grand jury, and the trier of fact, and is not an appropriate issue on which to render an opinion.<sup>15</sup>

#### CONCLUSION

Accordingly, your initial question requires a factual determination regarding whether a particular activity constitutes gambling. A factual determination is not a proper function of this Office.<sup>16</sup> Your second question is dependent upon the response to the first question and also requires a factual determination.

<sup>1</sup>See, e.g., 1991 Op. Va. Att’y Gen. 122.

<sup>2</sup>See *Maughs v. Porter*, 157 Va. 415, 424, 161 S.E. 242, 245 (1931); 1996 Op. Va. Att’y Gen. 99, 100 and opinions cited therein.

<sup>3</sup>See *Sansom v. Bd. of Supvrs.*, 257 Va. 589, 594, 514 S.E.2d 345, 349 (1999); *Commonwealth v. Orange-Madison Coop.*, 220 Va. 655, 658, 261 S.E.2d 532, 533-34 (1980); 1999 Op. Va. Att’y Gen. 10, 11.

<sup>4</sup>MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 897 (10th ed. 2001).

<sup>5</sup>You state that this prize is "money" or "items of significant material financial value."

<sup>6</sup>See 1976-1977 Op. Va. Att'y Gen. 89, 89.

<sup>7</sup>*Id.*

<sup>8</sup>*Id.*

<sup>9</sup>*Id.*

<sup>10</sup>See, e.g., 1979-1980 Op. Va. Att'y Gen. 228, 229.

<sup>11</sup>*Id.*

<sup>12</sup>*Id.*

<sup>13</sup>*Maughs*, 157 Va. at 426, 161 S.E. at 245-46.

<sup>14</sup>See, e.g., 2007 Op. Va. Att'y Gen. 66, 69 n.14 and opinions cited therein.

<sup>15</sup>See 1996 Op. Va. Att'y Gen., *supra* note 2, at 100 and opinions cited therein.

<sup>16</sup>See *supra* note 1.

#### OP. NO. 08-060

#### ADMINISTRATION OF GOVERNMENT: GENERAL PROVISIONS – IMPLEMENTATION OF FEDERAL MANDATES ACT.

#### FEDERAL TRUTH IN LENDING ACT.

**No prohibition under state and federal law regarding pass through of merchant transaction fees imposed by credit card issuer by Virginia State Bar or private attorneys to attorney-licensees or clients. State law expressly authorizes Bar to impose surcharge on attorney-licensee's payment obligation, provided costs saved by acceptance of credit cards do not exceed amount of surcharges collected. Prior disclosure of transaction fees required under federal law when fees meet definition of 'finance charge.'**

MS. KAREN A. GOULD  
EXECUTIVE DIRECTOR AND CHIEF OPERATING OFFICER  
OCTOBER 20, 2008

#### ISSUES PRESENTED

You ask whether state and federal law permit the Virginia State Bar and attorneys in private practice ("private attorneys") to pass through to their attorney-licensees or clients, respectively, the merchant transaction fees imposed by credit card issuers. If state and federal law permit the pass through of merchant transaction fees in either or both cases, you ask whether there are any legal requirements governing this practice.

#### RESPONSE

It is my opinion that state and federal law do not prohibit the Virginia State Bar or private attorneys from passing through to their attorney-licensees or clients, respectively, the merchant transaction fees imposed by a credit card issuer.<sup>1</sup> It further is my opinion that state law expressly authorizes the Virginia State Bar to impose a surcharge on attorney-licensee's payment obligation, provided the costs saved by acceptance of credit cards do not exceed the amount of surcharges collected. Finally, under federal law, it is my opinion that when credit card merchant transaction fees are

passed through to attorney-licensees or clients, the transaction fees must be disclosed before such parties become obligated on the transaction when the transaction fees fall within the definition of a “finance charge.”

#### APPLICABLE LAW AND DISCUSSION

I find no applicable federal law prohibiting the practice of passing through credit card merchant transaction fees to persons who elect to pay with credit card instead of other forms of payment.<sup>2</sup> Likewise, I am not aware of any provision in the *Virginia Code* that prohibits such practice.<sup>3</sup>

In addition, § 2.2-614.1 provides that:

A. Subject to § 19.2-353.3, any public body that is responsible for revenue collection, including, but not limited to taxes, interest, penalties, fees, fines or other charges, may accept payment of any amount due by any commercially acceptable means, including, but not limited to, checks, credit cards, debit cards, and electronic funds transfers.

B. The public body may add to any amount due a sum, not to exceed the amount charged to that public body for acceptance of any payment by a means that incurs a charge to that public body or the amount negotiated and agreed to in a contract with that public body, whichever is less. Any state agency imposing such additional charges shall waive them when the use of these means of payment reduces processing costs and losses due to bad checks or other receivable costs by an amount equal to or greater than the amount of such additional charges.

While § 2.2-614.1 does not define the term “public body,” it is well-settled that “[t]he Code of Virginia constitutes a single body of law, and other sections can be looked to where the same phraseology is employed.”<sup>4</sup> Section 2.2-3701 of the Virginia Freedom of Information Act in Title 2.2 defines a “public body” as “any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth.” The Virginia State Bar is an administrative agency of the Supreme Court of Virginia;<sup>5</sup> therefore, it is a “public body” within the meaning of § 2.2-614.1. The Bar is responsible for revenue collection, *e.g.*, mandatory annual fees.<sup>6</sup> Thus, it is my opinion that § 2.2-614.1, subject to the limitations therein, expressly authorizes the Bar to pass through credit card merchant transaction fees to its attorney-licensees in the form of a surcharge.

When private attorneys or the Virginia State Bar passes through credit card merchant transaction fees to clients or attorney-licensees, federal law may impose disclosure requirements. Regulation Z<sup>7</sup> of the federal Truth in Lending Act<sup>8</sup> (“Regulation Z”) defines a “finance charge” as “the cost of consumer credit as a dollar amount,” including “any charge payable directly or indirectly by the consumer and imposed directly or indirectly by the creditor as an incident to or a condition of the extension of credit.”<sup>9</sup> Additionally, Regulation Z defines “creditor” to mean, in part, “a person that honors a credit card.”<sup>10</sup>

Regulation Z also provides that “[a]ny person, other than the card issuer, who imposes a finance charge at the time of honoring a consumer’s credit card, shall disclose the amount of that finance charge prior to its imposition.”<sup>11</sup> In expanding upon this requirement, the staff of the Federal Reserve Board has commented that:

A person imposing a finance charge at the time of honoring a consumer’s credit card must disclose the amount of the charge, or an explanation of how the charge will be determined, prior to its imposition. This must be disclosed before the consumer becomes obligated for property or services that may be paid for by use of a credit card. For example, disclosure must be given before the consumer has dinner at a restaurant, stays overnight at a hotel, or makes a deposit guaranteeing the purchase of property or services.<sup>[12]</sup>

Whether the disclosure requirement in Regulation Z<sup>13</sup> is imposed upon the Virginia State Bar or private attorneys necessarily depends on how the merchant transaction fees are passed through to the attorney-licensee or client. It is clear that transaction fees passed through in the form of a surcharge added to the attorney-licensee or client’s total payment obligation would qualify as a “finance charge” under Regulation Z,<sup>14</sup> which would trigger the disclosure requirements of Regulation Z.<sup>15</sup> When the merchant transaction fee is passed on by offering a discount from the regular price to individuals paying with cash, the fee also constitutes a “finance charge,”<sup>16</sup> unless the discount clearly and conspicuously is disclosed and offered to all attorney-licensees or clients.<sup>17</sup> Thus, in transactions where the fee falls within the definition of a “finance charge,” Regulation Z requires that the amount of the merchant transaction fee assessed, or an explanation of how it will be calculated, be disclosed before the party is obligated on the transaction.<sup>18</sup>

Additionally, I note that, under specific circumstances, state law places requirements on the passing through of merchant transaction fees to individuals paying with credit cards. Section 2.2-614.1(B) requires that any surcharges assessed or imposed by a “state agency” must be waived if the acceptance of payment by credit card reduces other costs (e.g., bad check processing costs) by an amount at least equal to the amount of surcharges collected. However, I find no other requirements under Virginia law that govern this practice.<sup>19</sup>

#### CONCLUSION

Accordingly, it is my opinion that state and federal law do not prohibit the Virginia State Bar or private attorneys from passing through to their attorney-licensees or clients, respectively, the merchant transaction fees imposed by a credit card issuer.<sup>20</sup> It further is my opinion that state law expressly authorizes the Virginia State Bar to impose a surcharge on attorney-licensee’s payment obligation, provided the costs saved by acceptance of credit cards do not exceed the amount of surcharges collected. Finally, under federal law, it is my opinion that when credit card merchant

transaction fees are passed through to attorney-licensees or clients, the transaction fees must be disclosed before such parties become obligated on the transaction when the transaction fees fall within the definition of a “finance charge.”

<sup>1</sup>While this opinion is not intended to address private agreements that may exist between a credit card issuer and the Virginia State Bar or private attorneys, I note that federal law prohibits credit card issuers from contractually barring sellers from offering cash discounts to consumers to encourage payment with cash instead of credit card. *See* 15 U.S.C.A. § 1666f(a) (West 1998).

<sup>2</sup>The practice of imposing a surcharge on individuals who paid with a credit card formerly was banned under federal law until February 27, 1984. *See* 15 U.S.C.A. § 1666f(a)(2) annot. (West 1998) (“Effective and Termination Notes”).

<sup>3</sup>The Truth in Lending Act only preempts state law to the extent that state law is inconsistent with federal law. *See* 15 U.S.C.A. § 1610(a)(1) (West 1998); 12 C.F.R. § 226.28(a)(1) (2008). Consequently, some states have passed laws that prohibit the imposition of a surcharge on a credit card holder who elects to use a credit card instead of other forms of payment. *See e.g.*, CAL. CIV. CODE § 1748.1(a) (Deering 2007).

<sup>4</sup>*King v. Commonwealth*, 2 Va. App. 708, 710, 347 S.E.2d 530, 531 (1986).

<sup>5</sup>*See* VA. CODE ANN. § 54.1-3910 (2005).

<sup>6</sup>*See* § 54.1-3912 (2005) (permitting Supreme Court to promulgate rules and regulations governing collection of fees paid by members of Virginia State Bar); *see also* VA. SUP. CT. R. pt. 6, § IV, para. 11 (requiring members of Virginia State Bar to pay annual dues to Bar’s treasurer).

<sup>7</sup>*See* 12 C.F.R. pt. 226 (Truth in Lending (Regulation Z)) (2008).

<sup>8</sup>*See* 15 U.S.C.A. § 1604(a) (West 1998) (directing Board of Governors of the Federal Reserve System to promulgate regulations governing Truth in Lending Act).

<sup>9</sup>12 C.F.R. § 226.4(a) (2008).

<sup>10</sup>*Id.* § 226.2(a)(17)(ii) (2008).

<sup>11</sup>*Id.* § 226.9(d)(1) (2008).

<sup>12</sup>*Id.* pt. 226, supp. I, § 226.9, annot. (2008) (comment 9(d)(1), “Official Staff Interpretations”).

<sup>13</sup>*Id.* § 226.9(d)(1).

<sup>14</sup>*See id.* § 226.4(a) (defining “finance charge”).

<sup>15</sup>*See id.* § 226.9(d)(1); *see also id.* § 226.4(b)(2) (2008) (including “transaction charges” as express example of “finance charge”).

<sup>16</sup>*See id.* § 226.4(b)(9) (2008) (naming “[d]iscounts for the purpose of inducing payment by a means other than the use of credit” as express example of “finance charge”).

<sup>17</sup>*See* 15 U.S.C.A. § 1666f(b) (West 1998); 12 C.F.R. § 226.4(c)(8) (2008). Accordingly, if the discount is “clearly and conspicuously” disclosed and made available to “all prospective buyers,” there is no “finance charge.” 15 U.S.C.A. § 1666f(b).

<sup>18</sup>Regulation Z does not require that this disclosure be made in writing; therefore, it may be provided orally. *See* 12 C.F.R. § 226.5 n.7 (2008). It also is worth noting that civil and criminal penalties for violations of the Truth in Lending Act may not be imposed on state agencies. 15 U.S.C.A. § 1612(b) (West 1998).

<sup>19</sup>I note that the Virginia Consumer Protection Act expressly does not apply to “[t]hose aspects of a consumer transaction which are regulated by the Federal Consumer Credit Protection Act, 15 U.S.C. § 1601 et seq.” Section 59.1-199(C) (2006). For background purposes, the Truth in Lending Act was enacted as Title I of the federal Consumer Credit Protection Act. *See* Pub. L. No. 90-321, § 101, 82 Stat. 147 (1968).

<sup>20</sup>*See supra* note 1.

OP. NO. 08-068

**AGRICULTURE, ANIMAL CARE, AND FOOD: COMPREHENSIVE ANIMAL CARE – SEARCH, SEIZURE, IMPOUNDING AND ENFORCEMENT – CRUELTY TO ANIMALS.**

**IMMUNITY.**

**Animal control officer may act to prevent act of cruelty upon any animal that occurs in his presence. Question of whether there is occurrence of act of cruelty is factual determination to be made by officer. Immunity for reasonable and good faith actions of animal control officer performed within scope of official duties.**

THE HONORABLE PATRICIA S. TICER  
MEMBER, SENATE OF VIRGINIA  
DECEMBER 11, 2008

#### ISSUE PRESENTED

You ask what circumstances would authorize an animal control officer to enter a vehicle to rescue a companion animal that has been left unattended. Further, you inquire concerning the potential civil liability of such an officer.

#### RESPONSE

It is my opinion that an animal control officer may act to prevent an act of cruelty upon any animal when that act occurs in his presence. It further is my opinion that the question of whether there is an occurrence of an act of cruelty is a factual determination to be made by the animal control officer. Finally, it is my opinion that an animal control officer is entitled to immunity for actions performed within the scope of his official duties, provided such actions were reasonable and in good faith.

#### APPLICABLE LAW AND DISCUSSION

Section 3.2-6566 provides that “[e]ach animal control officer ... shall interfere to prevent the perpetration of any act of cruelty upon any animal in his presence.” Section 3.2-6570(A) provides that:

Any person who: (i) overrides, overdrives, overloads, tortures, ill-treats, abandons, willfully inflicts inhumane injury or pain not connected with bona fide scientific or medical experimentation, ... [on] any animal, whether belonging to himself or another; [or] (v) carries or causes to be carried by any vehicle, vessel or otherwise any animal in a cruel, brutal or inhumane manner, so as to produce torture or unnecessary suffering; ... is guilty of a Class 1 misdemeanor.

“*Humane*’ means any action taken in consideration of and with the intent to provide for the animal’s health and well-being.”<sup>1</sup> Inhumane means “not humane.”<sup>2</sup> Therefore, I conclude that if the animal control officer reasonably determines that an animal may become overheated or may suffer from hypothermia or is suffering from a lack of food or water<sup>3</sup> due to being left in an automobile, he may rescue such animal to preserve its health and well-being.

An “animal control officer may *lawfully* seize and impound any animal that has been abandoned, has been cruelly treated, or is suffering from an *apparent* violation of [Chapter 65] that has rendered the animal in such a condition as to constitute a direct and immediate threat to its life, safety or health.”<sup>4</sup> The term “apparent” means “appearing as actual to the eye or mind.”<sup>5</sup> “Where a statute is unambiguous, the plain meaning is to be accepted without resort to the rules of statutory interpretation.”<sup>6</sup> “The manifest intention of the legislature, clearly disclosed by its language, must be applied.”<sup>7</sup> The General Assembly affirmatively has authorized an animal control officer to seize an animal in the event of apparent cruelty.<sup>8</sup> Therefore, when an animal control officer observes an animal left alone in a vehicle under conditions such as extreme temperature or the animal otherwise appears to be in distress, he lawfully may remove the animal.

Section 3.2-6569 further provides a remedy for the owner of the animal. A hearing is required within ten days of the seizure of an animal to determine whether it should be returned to the owner.<sup>9</sup> You ask whether the animal control officer would be subject to civil liability for his actions if the court determines that the animal was not the subject of inhumane or cruel treatment.<sup>10</sup> As previously noted, § 3.2-6569(A) foresees situations where an animal control officer may act where there is apparent, but not actual, inhumane treatment. However, the officer must act reasonably and with good faith.<sup>11</sup> Specifically, if the animal control officer has a good faith, reasonable belief that an animal is subject to inhumane treatment, he may act within his official capacity without being subject to civil liability.<sup>12</sup> The question of whether an animal control officer has acted reasonably in a particular circumstance is a factual determination for a trier of fact.<sup>13</sup>

#### CONCLUSION

Accordingly, it is my opinion that an animal control officer may act to prevent an act of cruelty upon any animal when that act occurs in his presence. It further is my opinion that the question of whether there is an occurrence of an act of cruelty is a factual determination to be made by the animal control officer. Finally, it is my opinion that an animal control officer is entitled to immunity for actions performed within the scope of his official duties, provided such actions were reasonable and in good faith.

<sup>1</sup>VA. CODE ANN. § 3.2-6500 (2008).

<sup>2</sup>MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 600 (10th ed 2001) [hereinafter “COLLEGIATE DICTIONARY”].

<sup>3</sup>Section 3.2-6503(A)(1)-(2) requires an owner to provide adequate feed and water for his companion animals. A violation of this statute is a Class 4 misdemeanor. *See* § 3.2-6503(B) (2008).

<sup>4</sup>Section 3.2-6569 (2008) (emphasis added); *see also* § 3.2-6565 (2008) (authorizing animal control officer to impound animal when he “finds that an apparent violation of [Chapter 65] has rendered an animal in such a condition as to constitute a direct and immediate threat to its life, safety or health”). I note that Chapter 65 includes both § 3.2-6565 and § 3.2-6569.

<sup>5</sup>COLLEGIATE DICTIONARY, *supra* note 2, at 55.

<sup>6</sup>*Last v. Va. State Bd. of Med.*, 14 Va. App. 906, 910, 421 S.E.2d 201, 205 (1992).

<sup>7</sup> *Barr v. Town & Country Props., Inc.*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990) (quoting *Anderson v. Commonwealth*, 182 Va. 560, 566, 29 S.E.2d 838, 841 (1944)).

<sup>8</sup> Section 3.2-6569(A).

<sup>9</sup> *Id.*

<sup>10</sup> *See* § 3.2-6569(D).

<sup>11</sup> *See DeChene v. Smallwood*, 226 Va. 475, 479, 311 S.E.2d 749, 751 (1984); *see also Lentz v. Morris*, 236 Va. 78, 82, 372 S.E.2d 608, 610 (1988) (noting that employee of county, which shares immunity of state, was entitled to sovereign immunity where his activities clearly involved exercise of judgment and discretion); *Messina v. Burden*, 228 Va. 301, 311, 321 S.E.2d 657, 662 (1984) (holding that government employee operating within scope of his employment and absent claim of gross negligence is entitled to sovereign immunity). *Cf. James v. Jane*, 221 Va. 43, 53, 282 S.E.2d 864, 869 (1980) (holding that state employee who acts wantonly, or in culpable or grossly negligent manner, is not protected; nor is employee who acts beyond scope of employment).

<sup>12</sup> *Dechene*, 226 Va. at 479, 311 S.E.2d at 751.

<sup>13</sup> *See, e.g.*, 2002 Op. Va. Att’y Gen. 144, 147.

#### **OP. NO. 08-043**

#### **CONSERVATION: GENERAL PROVISIONS – DEPARTMENT OF CONSERVATION AND RECREATION.**

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

**Department has only such authority to restrict open carrying of firearms which is expressly provided by law.**

THE HONORABLE KEN T. CUCCINELLI II  
MEMBER, SENATE OF VIRGINIA  
SEPTEMBER 26, 2008

#### **ISSUE PRESENTED**

You request guidance related to the authority of the Department of Conservation and Recreation to regulate the open carrying of firearms in state parks.<sup>1</sup>

#### **RESPONSE**

It is my opinion that the Department of Conservation and Recreation has only such authority to restrict the open carrying of firearms which is expressly provided by law.<sup>2</sup>

#### **APPLICABLE LAW AND DISCUSSION**

Article 1, Chapter 1 of Title 10.1, §§ 10.1-100 through 10.1-104.4 governs and establishes the Department of Conservation and Recreation (the “Department”). Section 10.1-104(A)(4) mandates that the Department “prescribe rules and regulations necessary or incidental to the performance of duties or execution of powers conferred by law.” In accordance with such authority, the Department has adopted the following regulation regarding firearms:

No person except employees, police officers, or officers of the department shall carry or possess firearms of any description, or airguns, within the park. This regulation shall not apply in areas designated for hunting by the Department of Conservation and Recreation. This

regulation also shall not apply to the carrying of concealed handguns within state parks by holders of a valid concealed handgun permit issued pursuant to § 18.2-308 of the Code of Virginia.<sup>3]</sup>

The Department is the state agency responsible for the management of all state parks.<sup>4</sup> State parks are open to the general public and are located in areas of the Commonwealth suitable to the development of outdoor recreational activities, including, but not limited to, camping, concerts, festivals, boating, hunting, fishing, horseback riding, and swimming.<sup>5</sup> The Department's general authority does not supersede statutory or case law, public policy, or explicit statements of the General Assembly regarding specific topics.<sup>6</sup>

A 2002 opinion of the Attorney General (the "2002 Opinion") concluded that the Department lacked authority to regulate or prohibit the general carrying of a concealed handgun by an individual with a valid permit.<sup>7</sup> Further, the common law right to openly carry a firearm long has been recognized.<sup>8</sup>

The 2002 Opinion regarding the authority of the Department to regulate concealed handguns, concluded that § 10.1-104(A) "empowers the Department to employ personnel to carry out the duties of the Department; enter into contracts; accept funds and grants and gifts of real and personal property; and assess civil penalties for state park admittance and parking violations."<sup>9</sup> In addition, the Director of the Department may request that the Governor commission designated conservation officers<sup>10</sup> "to uphold and enforce the laws of the Commonwealth."<sup>11</sup>

Section 10.1-200 sets out the duties of the Department related to parks and outdoor recreation and grants the Department the power to administer funds to accomplish the purposes of parks and recreation; study and develop a comprehensive plan for the Commonwealth's outdoor recreational needs and programs and establish standards for outdoor recreational facilities; apply for federal aid respecting outdoor recreation; act independently or jointly with another department to carry out the Department's powers and duties; and report annually to the Governor and General Assembly on the development of a standard by which the public may determine whether park and recreational needs are being met by the Commonwealth. In addition, the Department shall engage in state park master planning;<sup>12</sup> prescribe and impose penalties for littering;<sup>13</sup> prohibit admission to a state park for which a charge has been assessed and regulate vehicle parking in such parks;<sup>14</sup> acquire property by gift, purchase or eminent domain;<sup>15</sup> pay gifts and funds for state parks to the State Park Conservation Resources Fund;<sup>16</sup> establish a card authorizing persons receiving social security disability payments to enter state parks free of charge;<sup>17</sup> protect and maintain the Appalachian Trail and the statewide system of trails;<sup>18</sup> and manage False Cape State Park.<sup>19</sup>

Read as a whole, the duties imposed on the Department may be summarized into four categories: (1) acquisition of property; (2) development of recreational facilities; (3) handling of funds; and (4) cooperation with other agencies. Authority to govern the recreational activities of parks is implicit in these general duties. Specific authority to proscribe the conduct

of individual citizens is limited to littering, parking, and the payment of charges. Otherwise, an individual's conduct must conform with the general laws of the Commonwealth, which are enforced by Department officers charged with that responsibility.

The construction of statutes by agencies charged with the administration of such statutes is entitled to great weight.<sup>20</sup> A decision of an agency charged by the General Assembly with statewide administration carries great weight and is entitled to deference, unless it clearly is wrong.<sup>21</sup> The grant of regulatory authority extends only to duties or powers conferred by law.<sup>22</sup> As such, "regulations, promulgated . . . pursuant to definitive statutory authority, have the force and effect of law."<sup>23</sup> Regulations that "clearly and explicitly mirror" statutory authority are the most likely to be sustained.<sup>24</sup> Therefore, any regulation the Department adopts must be reasonably grounded in an identifiable and definitive statutory foundation.

Regulatory authority also may be reasonably implied from statutes.<sup>25</sup> The General Assembly, by grant of regulatory authority to the Department, recognizes that the legislature cannot effectively or efficiently dictate the all the details of operating parks. Even where regulations by implication conflict with other statutes, they will be upheld,<sup>26</sup> unless there is "a manifest intent on the part of the legislature to preempt the field."<sup>27</sup> There is no basis for an agency regulation where the legislature plainly, broadly, and comprehensively has addressed the same object.<sup>28</sup>

I find no specific statutory authority granting the Department the authority to prohibit the open carrying of firearms in state parks. A person's right to carry a firearm openly is considered universal within the Commonwealth, subject to definite and limited restrictions upon certain locations and classifications of individuals.<sup>29</sup> Section 18.2-287.4 is the only statute that specifically addresses carrying of firearms in public parks. In the context of parks and public spaces, the General Assembly merely limits certain classifications of firearms and not firearms generally.<sup>30</sup> Under accepted rules of statutory construction, the mention of one thing in a statute implies the exclusion of another.<sup>31</sup> Further, the Department's enabling legislation does not specifically authorize a prohibition against the open carry of firearms.<sup>32</sup>

In light of the General Assembly's explicit statements regarding limitations on carrying and possessing firearms, the Department may not infer such authority from its enabling legislation and prohibit the carrying of firearms not otherwise prohibited within state parks. It is within the sole discretion of the General Assembly to limit the carrying of firearms in parks beyond that restricted by § 18.2-287.4. Additionally, the General Assembly could grant explicit statutory authority to the Department to accomplish such purpose. I find no authority, express or implied, for the Department to prohibit the carrying and possession of firearms within state parks beyond that currently prohibited by law.

#### CONCLUSION

Accordingly, it is my opinion that the Department of Conservation and Recreation has only such authority to restrict the open carrying of firearms which is expressly provided by law.<sup>33</sup>

<sup>1</sup>You do not inquire concerning the Department's authority to regulate firearms in the context of hunting on state property. Consequently, that issue is not addressed.

<sup>2</sup>The right of open carrying of firearms may be limited in certain situations. *See infra* notes 29-30 and accompanying text. Such right to openly carry a firearm is further subject to statutory provisions that limit the manner in which that right may be executed. *See, e.g.*, VA. CODE ANN. § 18.2-282(A) (Supp. 2008) (restricting conduct regarding pointing, holding, or brandishing any firearm).

<sup>3</sup>4 VA. ADMIN. CODE § 5-30-200 (2005). The Department revised this regulation in 2003 to permit persons holding valid concealed handgun permits to possess a concealed handgun in state parks. *See* 2002 Op. Va. Att'y Gen. Va. 34 (concluding that Department may not issue regulation prohibiting permit holders from carrying concealed handguns in state parks); 19 Va. Reg. Regs. 1338 (Jan. 13, 2003) (amending 4 VAC 5-30-200 and noting in "Background" that reason for amendment was 2002 opinion of Attorney General).

<sup>4</sup>*See generally* VA. CODE ANN. § 10.1-200 (2006).

<sup>5</sup>*See id.*; *see also* Department of Conservation and Recreation, Virginia State Parks, [http://www.dcr.virginia.gov/state\\_parks/index.shtml](http://www.dcr.virginia.gov/state_parks/index.shtml) (noting state park activities) (last visited July 10, 2008).

<sup>6</sup>*See generally* *Stallings v. Wall*, 235 Va. 313, 367 S.E.2d 496 (1988) (holding that general delegations of authority may be broad enough to permit localities to restrict sales of firearms); *see also* VA. CODE ANN. § 15.2-915 (2008) (clarifying authority of localities regarding control of firearms raised by plaintiff in *Stallings* and providing specific guidance). The General Assembly reacted to the issues present in the *Stallings* matter by making it clear that local regulation of firearms is limited. The General Assembly may wish to clarify the limits of agency regulation as well.

<sup>7</sup>*See* 2002 Op. Va. Att'y Gen. Va., *supra* note 3, at 34.

<sup>8</sup>[I]t has always been widely understood that the Second Amendment ... codified a pre-existing right. The very text of the Second Amendment implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed.'" *Dist. of Columbia v. Heller*, 554 U.S. \_\_\_, 2008 U.S. LEXIS 5268, \*37 (June 26, 2008).

<sup>9</sup>*See* 2002 Op. Va. Att'y Gen., *supra* note 3, at 35 (footnotes omitted).

<sup>10</sup>*See* § 10.1-115(A) (2006).

<sup>11</sup>*See* § 10.1-117(A) (2006).

<sup>12</sup>*See* § 10.1-200.1(A) (2006).

<sup>13</sup>*See* § 10.1-104 (Supp. 2008); § 10.1-200.2 (2006).

<sup>14</sup>*See* § 10.1-200.3 (2006).

<sup>15</sup>*See* § 10.1-201 (2006).

<sup>16</sup>*See* § 10.1-202 (A) (Supp. 2008).

<sup>17</sup>*See* § 10.1-202.1 (2006).

<sup>18</sup>*See* §§ 10.1-203, 10.1-204 (2006).

<sup>19</sup>*See* § 10.1-205 (2006).

<sup>20</sup>*See* *Commonwealth v. Prog. Comty. Club*, 215 Va. 732, 739, 213 S.E.2d 759, 763 (1975); *Commonwealth v. Research Analysis Corp.*, 214 Va. 161, 163, 198 S.E.2d 622, 624 (1973); *see also* *Forst v. Rockingham Poultry Mktg. Coop.*, 222 Va. 270, 276, 279 S.E.2d 400, 403 (1981) (noting that Tax Commissioner's interpretation of tax statute is entitled to great weight).

<sup>21</sup>*See* *Specialty Auto Body v. Cook*, 14 Va. App. 327, 330, 416 S.E.2d 233, 235 (1992); *Va. Real Estate Bd. v. Clay*, 9 Va. App. 152, 160-61, 384 S.E.2d 622, 627 (1989); 1999 Op. Va. Att'y Gen. 159, 163.

<sup>22</sup>*See* 2002 Op. Va. Att'y Gen., *supra* note 3, at 36.

<sup>23</sup>*Carbaugh v. Solem*, 225 Va. 310, 314, 302 S.E.2d 33, 35 (1983).

<sup>24</sup>*See* 1999 Op. Va. Att'y Gen., *supra* note 21, at 163.

<sup>25</sup> See 2002 Op. Va. Att’y Gen., *supra* note 3, at 36.

<sup>26</sup> Va. Beach v. Va. Restaurant Assoc., 231 Va. 130, 132, 341 S.E.2d 198, 199 (1986).

<sup>27</sup> *Id.* at 133, 341 S.E.2d at 199 (1986); see also *Norfolk v. Tiny House, Inc.*, 222 Va. 414, 424, 281 S.E.2d 836, 842 (1981) (noting that courts are obligated to harmonize statute and ordinance where they can “stand together”); *Nat’l Maritime Union of Am. v. Norfolk*, 202 Va. 672, 674, 119 S.E.2d 307, 311 (1961) (noting that intention of Congress to exclude states from exerting power to legislate in particular areas must be manifest).

<sup>28</sup> *Cf.* 1981-1982 Op. Va. Att’y Gen. 112, 113 (concluding that counties have no authority to adopt ordinances regulating sale of handguns except as specifically permitted by statute).

<sup>29</sup> See generally § 18.2-283 (2004) (prohibiting carrying of weapons in places of religious worship); § 18.2-283.1 (Supp. 2008) (prohibiting carrying of weapons in courthouses); § 18.2-287.01 (Supp. 2008) (prohibiting carrying of weapons in air carrier airport terminals); § 18.2-308.1 (Supp. 2008) (prohibiting possession of weapons on school property); see also § 18.2-308.1:1 (Supp. 2008) (prohibiting possession of firearms by persons acquitted by reason of insanity); § 18.2-308.1:2 (2004) (restricting persons adjudicated incompetent from purchasing, possessing, and transporting firearms); § 18.2-308.1:3 (Supp. 2008) (prohibiting purchase, possession, and transportation of firearms by persons involuntarily committed); § 18.2-308.2 (Supp. 2008) (restricting convicted felons from purchasing, possessing, and transporting firearms).

<sup>30</sup> See § 18.2-287.4 (Supp. 2008) (restricting right to carry certain “loaded” high capacity center-fire weapons and shotguns in public parks and certain public areas).

<sup>31</sup> See *Grigg v. Commonwealth*, 224 Va. 356, 364, 297 S.E.2d 799, 803 (1982) (explaining maxim “[e]xpressio unius est exclusio alterius”); Op. Va. Att’y Gen.: 1997 at 35, 35; 1994 at 9, 11.

<sup>32</sup> This opinion is limited in scope and addresses only the open carrying of firearms in state parks. Other instrumentalities of the Commonwealth may have explicit or implicit authority to provide some measure of regulation regarding the open carrying of firearms.

<sup>33</sup> See *supra* note 2.

## OP. NO. 08-077

### CONSERVATION: VIRGINIA WATER QUALITY IMPROVEMENT ACT – VIRGINIA WATER QUALITY IMPROVEMENT FUND.

**No authority for Director of Department of Environmental Quality to issue technical assistance grants related to nutrient reduction without providing required notice, public review, and comment period.**

THE HONORABLE CHRISTOPHER K. PEACE  
MEMBER, HOUSE OF DELEGATES  
DECEMBER 11, 2008

#### ISSUE PRESENTED

You inquire concerning the proper interpretation of §§ 10.1-2130 and 10.1-2131(C) of the Virginia Water Quality Improvement Act of 1997<sup>1</sup> regarding the issuance of technical assistance grants from the Virginia Water Quality Improvement Fund.<sup>2</sup> Specifically, you ask whether § 10.1-2131 allows the Director of the Department of Environmental Quality to disregard § 10.1-2130, which requires notice and a public review and comment period prior to issuance of a technical assistance grant.

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**RESPONSE**

It is my opinion that § 10.1-2131(C) does not authorize the Director of the Department of Environmental Quality to issue a technical assistance grant related to nutrient reduction without the notice and the public review and comment period required by § 10.1-2130.

**APPLICABLE LAW AND DISCUSSION**

You inquire concerning provisions of the Virginia Water Quality Improvement Fund (the “Fund”), a portion of the Virginia Water Quality Improvement Act of 1997. You relate that your understanding is state agencies have interpreted § 10.1-2130, which requires a public notice period for all grants, not to apply to technical assistance grants pursuant to § 10.1-2131.

The General Assembly established the Fund to assist eligible wastewater treatment plant owners in complying with heightened requirements for reducing nutrient discharges into the Chesapeake Bay.<sup>3</sup> The stated purpose of the Fund is to provide grants “to local governments, soil and water conservation districts, state agencies, institutions of higher education and individuals.”<sup>4</sup> The Director of the Department of Environmental Quality is one of the persons authorized to request expenditures and disbursements from the Fund.<sup>5</sup> Furthermore, the Department of Environmental Quality oversees and disburses grant monies “for the sole purpose of designing and installing nutrient removal technologies for publicly owned treatment works designated as significant dischargers or eligible nonsignificant dischargers.”<sup>6</sup> Within these guidelines, technical assistance grants are contemplated and authorized under § 10.1-2131(C).

You inquire about § 10.1-2130,<sup>7</sup> which provides, in pertinent part, that:

Grant agreements shall be made available for public review and comment for a period of no less than thirty days but no more than sixty days prior to execution. The granting agency shall cause notice of a proposed grant agreement to be given to all applicants for Water Quality Improvement Grants whose applications are then pending and to any person requesting such notice.

The plain language of § 10.1-2130 applies the public review and comment period and the notice requirement to all grants issued pursuant to the Fund. Section 10.1-2131<sup>8</sup> provides further conditions for issuing grants directed at addressing and reducing point source pollutants. Specifically, § 10.1-2131(C) refers to technical assistance grants and provides that:

[T]he Director of the Department of Environmental Quality shall not authorize the distribution of grants from the Fund for purposes other than financing the cost of design and installation of nutrient removal technology at publicly owned treatment works until such

time as all tributary strategy plans are developed and implemented . . . . In addition to the provisions of § 10.1-2130, all grant agreements related to nutrients shall include . . . .

Subsequent to the implementation of the tributary strategy plans, the Director may authorize disbursements from the Fund for any water quality restoration, protection and improvements related to point source pollution that are clearly demonstrated as likely to achieve measurable and specific water quality improvements, including, but not limited to, cost effective technologies to reduce nutrient loads. *Notwithstanding the previous provisions of this subsection, the Director may, at any time, authorize grants, including grants to institutions of higher education, for technical assistance related to nutrient reduction.* [Emphasis added.]

The phrase “[n]otwithstanding the previous provisions of this subsection” unambiguously refers to § 10.1-2131(C). In this instance, the term “notwithstanding”<sup>9</sup> is used in the context of the phrase “of this subdivision.” Therefore, it is my opinion that the use of the phrase “[n]otwithstanding the previous provisions of this subsection” in § 10.1-2131(C) indicates a legislative intent to override the prohibition against “distribution of grants from the Fund for purposes other than financing the cost of design and installation of nutrient removal technology” for grants “for technical assistance related to nutrient reduction.”<sup>10</sup> Moreover, § 10.1-2130 clearly is not a part of subsection C of § 10.1-2131, nor is it mentioned in the “notwithstanding” phrase. The mention of § 10.1-2130 in § 10.1-2131(C) in this context adds requirements in addition to those imposed by § 10.1-2130.

Furthermore, it is well established that statutes should not be read in isolation.<sup>11</sup> Statutes relating to the same subject should be considered *in pari materia*.<sup>12</sup> Moreover, statutes dealing with the same subject matter should be construed together to achieve a harmonious result, resolving conflicts to give effect to legislative intent.<sup>13</sup> Therefore, it is my opinion that § 10.1-2130 provides a general requirement that all grants under the Fund, including technical assistance grants, must have a public review and comment period and notice must be given. This general requirement is not specifically excepted or overruled by § 10.1-2131(C).

#### CONCLUSION

Accordingly, it is my opinion that § 10.1-2131(C) does not authorize the Director of the Department of Environmental Quality to issue a technical assistance grant related to nutrient reduction without the notice and the public review and comment period required by § 10.1-2130.

<sup>1</sup> See VA. CODE ANN. §§ 10.1-2117 to 10.1-2134 (2004 & Supp. 2008).

<sup>2</sup> See §§ 10.1-2128 to 10.1-2134 (2004 & Supp. 2008).

<sup>3</sup> See Water Quality Improve Fund Guidelines, Section B, ch. I.I, \*10 (Nov. 2006), available at <http://www.deq.virginia.gov/export/sites/default/bay/documents/WQIFGuidelinesNov2006.pdf>.

<sup>4</sup>Section 10.1-2128(B) (Supp. 2008).

<sup>5</sup>See § 10.1-2128(A).

<sup>6</sup>Section 10.1-2129(A)(2) (Supp. 2008).

<sup>7</sup>I note that this section is titled “[g]eneral provisions related to grants from the Fund.”

<sup>8</sup>I note that this section is titled “[p]oint source pollution funding; conditions for approval.” “The headlines of the sections ... are intended as mere catchwords to indicate the contents of the sections and do not constitute part of the act of the General Assembly.” VA. CODE ANN. § 1-217 (2008).

<sup>9</sup>When a statute begins with the term “notwithstanding,” it is presumed that the General Assembly intended to override potential conflicts. See Op. Va. Att’y Gen.: 2001 at 153, 154; *id.* at 17, 18; 2000 at 112, 113; 1998 at 56, 57.

<sup>10</sup>See *id.*; accord 2004 Op. Va. Att’y Gen. 120, 121 (interpreting phrase “[n]otwithstanding any contrary provisions of this section” in § 15.2-410(F) to mean indication of legislative intent to override any potential conflicts with other subsections of § 15.2-410).

<sup>11</sup>2B NORMAN J. SINGER & J.D. SHAMBLE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 51:2 (West 7th ed. 2008); Op. Va. Att’y Gen.: 1999 at 22, 22; 1998 at 123, 124; *id.* at 19, 21; 1996 at 197, 198; 1995 at 146, 147; 1993 at 160, 162; *id.* at 135, 137; 1992 at 108, 112.

<sup>12</sup>See *Prillaman v. Commonwealth*, 199 Va. 401, 405-06, 100 S.E.2d 4, 7-8 (1957); 1996 Op. Va. Att’y Gen. 134, 135. “*In pari materia*” is the Latin phrase meaning “[o]n the same subject; relating to the same matter.” BLACK’S LAW DICTIONARY 807 (8th ed. 2004).

<sup>13</sup>See 2A SINGER & SINGER § 46:5 (West 7th ed. 2008); 2000 Op. Va. Att’y Gen. 182, 185.

## OP. NO. 08-033

### CONSTITUTION OF THE UNITED STATES: AMENDMENT 1.

**First Amendment would protect publication of advertisement containing allegedly defamatory statements which impute misconduct generally rather than against specific individual; unlikely that advertisement would be enjoined by court of law.**

THE HONORABLE PHILLIP P. PUCKETT  
MEMBER, SENATE OF VIRGINIA  
JUNE 16, 2008

### ISSUE PRESENTED

You inquire whether the Buchanan County School Board and the Buchanan County Education Association could initiate a cause of action to enjoin further publication of a certain anonymous advertisement<sup>1</sup> (the “Advertisement”) that runs every two weeks in the local newspaper.

### RESPONSE

It is my opinion that the First Amendment to the Constitution of the United States would protect publication of an advertisement containing allegedly defamatory statements which impute misconduct generally rather than against a specific individual. Therefore, it is my opinion that the Advertisement is unlikely to be enjoined by a court of law.

### BACKGROUND

You state that an advertisement currently runs every two weeks in a local newspaper, *The Voice*, which has circulation in the counties of Buchanan and Tazewell. You have provided a copy of the Advertisement, which states:

### \$5,000 reward offered

A \$5,000 reward is offered to a student who is attending or has attended any Buchanan County School, if the student has been a victim of sexual misconduct by a school employee.

The conditions and details for the reward are as follows:

The reward is being offered to the first student past or present, under the age of 20, who comes forward to report any sexual misconduct by a Buchanan County school employee, if the information leads to the arrest and conviction of the employee.

**\$1,000 will be awarded at the time of the indictments and the balance of \$4,000 if the person is convicted.** [Emphasis in original.]

You note that the Buchanan County School Board and the Buchanan County Education Association are concerned about the defamatory nature of the Advertisement as well as the implication that such conduct has occurred. Thus, you seek an opinion regarding an injunction to prohibit further publication of the Advertisement.

#### APPLICABLE LAW AND DISCUSSION

The law of defamation represents a complex amalgam of common law principles, constitutional doctrine (both state and federal), and statutes. Such law strikes a delicate balance between two core principles that enjoy a prominent place in the Constitution of Virginia, *i.e.*, the freedom that permits citizens to fully speak, write, and publish sentiments on all subjects and the corresponding requirement that citizens be held responsible for abuse of that right.<sup>2</sup> Attempts by courts to harmonize these dual principles have created a legal patchwork of rules and exceptions.

The law of defamation traditionally requires personal reputational injury to individuals, not to groups, organizations, and associations.<sup>3</sup> While Virginia courts have addressed the legal concept of group libel, that tort requires that the group allegedly defamed have so few members that the defamation necessarily casts aspersion on all of them.<sup>4</sup> Thus, in Virginia for instance, a statement that all lawyers are thieves does not create a cause of action for defamation for any individual lawyer.<sup>5</sup>

The Supreme Court of the United States has called into question the small group libel theory as applied to government officials.<sup>6</sup> “An allegedly defamatory statement which imputes misconduct generally to [a] governmental group” is not an implicit reference to an individual.<sup>7</sup>

While the Advertisement may be read to imply that sexual misconduct in the school system is occurring or has occurred, it does not point to a particular employee. Therefore, such advertisement cannot be deemed to work a personal, actionable, reputational injury.

Courts are willing to protect anonymity in political expression.<sup>8</sup> I share your concerns that an unscrupulous reader might concoct allegations simply to avail himself of the

reward. However, while the possibility of fraud warrants scrutiny by prosecutors, it does not justify prepublication suppression of the advertisement. In this regard, I note that the unidentified person placing the ad offers \$1,000.00 upon indictment and the balance (\$4,000.00) upon conviction.<sup>9</sup>

Since there is little probability that a court would conclude that the Advertisement is defamatory and because “loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury,”<sup>10</sup> a court is unlikely to enjoin further publication of the Advertisement.<sup>11</sup>

### CONCLUSION

Accordingly, it is my opinion that the First Amendment to the Constitution of the United States would protect publication of an advertisement containing allegedly defamatory statements which impute misconduct generally rather than against a specific individual. Therefore, it is my opinion that the Advertisement is unlikely to be enjoined by a court of law.

<sup>1</sup> See *infra* “Background.”

<sup>2</sup> VA. CONST. art. I, § 12; see also U.S. CONST. amend. I (providing that Congress may not enact laws “abridging the freedom of speech”).

<sup>3</sup> See *Ewell v. Boutwell*, 138 Va. 402, 409-10, 121 S.E. 912, 914 (1924); see also *Gazette, Inc. v. Harris*, 229 Va. 1, 37, 325 S.E.2d 713, 738 (1985) (noting that alleged defamation must be “of or concerning” person complaining of defamation).

<sup>4</sup> *Ewell*, 138 Va. at 410, 121 S.E. at 914; see also *Dean v. Dearing*, 263 Va. 485, 489, 561 S.E.2d 686, 689 (2002) (noting that reference to governmental group cannot be treated as implicit reference to specific individual even if that individual generally is understood to be responsible for acting on group’s behalf).

<sup>5</sup> See, e.g., *Shah v. Medical Econ. Co.*, 17 Va. Cir. 162, 162-63 (1989) (finding that foreign medical graduate could not complain about derogatory remarks concerning such graduates since 120,000 such graduates practice in United States).

<sup>6</sup> See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 291-92 (1964); see also *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) (“Criticism of those responsible for government operations must be free, lest criticism of government itself be penalized.”); *Dean v. Town of Elkton*, 54 Va. Cir. 518, 522 (2001) (noting that after *New York Times v. Sullivan*, small group libel theory has had “little use in Virginia”).

<sup>7</sup> *Dearing*, 263 Va. at 489, 561 S.E.2d at 689; see also *New York Times*, 376 U.S. at 292 (holding that criticism of government operations does not constitute libel against official responsible for such operations).

<sup>8</sup> *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334 (1995) (holding that prohibition of distribution of anonymous campaign literature abridges First Amendment.); *Talley v. California*, 362 U.S. 60 (1960) (holding that city ordinance barring distribution of anonymous handbills was facially unconstitutional under First Amendment).

<sup>9</sup> See VA. CODE ANN. § 18.2-209 (2004) (imposing criminal penalty upon person found guilty of knowingly making false statements “concerning any person or corporation” to newspapers, television stations, or other media). It is my opinion that § 18.2-209 is intended for specific accusations against an individual or a particular corporation and is not a general statute.

<sup>10</sup> *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

<sup>11</sup> See *Blackwelder Furniture Co. v. Seilig Mfg. Co.*, 550 F.2d 189 (4th Cir. 1977) (noting that injunctions require element of irreparable harm).

OP. NO. 08-007

**CONSTITUTION OF VIRGINIA: EDUCATION (STATE APPROPRIATIONS).**

**Financial assistance pursuant to Article VIII, § 10 of Virginia Constitution may be provided directly to students in form of loan or grant funds, appropriated to career college on behalf of student, or appropriated to State Council of Higher Education for Virginia. Legislation may name or create entity to distribute loans or grants directly to student or institution.**

THE HONORABLE ROBERT TATA  
MEMBER, HOUSE OF DELEGATES  
JUNE 18, 2008

**ISSUES PRESENTED**

You inquire about financial assistance provided pursuant to Article VIII, § 10 of the Constitution of Virginia to students who attend two- or four-year degree programs at private, for-profit, nonsectarian, postsecondary career colleges. Specifically, you ask whether such assistance may take the form of loan or grant funds: (1) made available directly to the students, (2) appropriated to a career college on behalf of a student, or (3) appropriated to the State Council of Higher Education for Virginia. Finally you ask whether an entity other than the State Council may be named in or created by legislation to distribute the loans or grants directly to the student or an institution or to both.

**RESPONSE**

It is my opinion that student financial assistance provided pursuant to Article VIII, § 10 of the Virginia Constitution may take the form of loan or grant funds made available directly to students, appropriated to a career college on behalf of a student, or appropriated to the State Council of Higher Education for Virginia. It further is my opinion that another entity may be named in or created by legislation to distribute the loans or grants directly to the student or an institution.

**BACKGROUND**

You refer to a 2007 opinion of the Attorney General<sup>1</sup> (the “2007 Opinion”) that addressed the question of whether students attending private, for-profit, nonsectarian, postsecondary career colleges are eligible to participate in state-funded financial assistance programs established under Article VIII, § 10. The 2007 Opinion concluded that the General Assembly may appropriate financial assistance directly to such schools for the benefit of students enrolled in such schools who are seeking degrees rather than certificates or diplomas.<sup>2</sup> You seek additional guidance concerning the form and the method of distribution of such funds.

**APPLICABLE LAW AND DISCUSSION**

Article VIII, § 10 of the Virginia Constitution 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 ... collegiate or graduate education of Virginia students in public and nonsectarian private schools and institutions of learning.” Prior opinions of the Attorney General have analyzed this constitutional provision and have concluded that students who

are enrolled in non-profit, private schools and those enrolled in for-profit private schools in a program leading to a degree are constitutionally eligible for state-funded financial assistance under § 10.<sup>3</sup>

While § 10 sets out eligibility criteria, it is silent on the form the contemplated aid may take. “[T]he accepted canon of construction applicable to the Constitution of [Virginia is] that it is a restraining instrument, and that the General Assembly of the State possesses all legislative power not prohibited by the Constitution.”<sup>4</sup> “The Legislature of the State has plenary legislative power except where it is restricted by the Constitution of the State, or of the United States.”<sup>5</sup>

The first clause of § 10 prohibits the appropriation of public funds to any school or institution that is not owned or controlled exclusively by the Commonwealth or one of its political subdivisions. The three exceptions following the first clause do not place restrictions on the type of funding or on the method of appropriation. However, § 10 does restrict the applicability to schools that are “public or nonsectarian private schools and institutions of learning.” Further, § 10 requires that the funds be appropriated “for educational purposes” at the “elementary, secondary, collegiate or graduate” levels. Nothing prohibits the General Assembly from appropriating funds in any particular manner. In my opinion, § 10 merely provides that the General Assembly appropriate such funds subject to the restrictions identified in the Constitution and those imposed by the General Assembly itself. Based on the language contained in § 10, it appears that all of the forms of aid about which you inquire are permissible.

Furthermore, the Supreme Court of Virginia has examined § 10 in reviewing the constitutionality of certain acts of the General Assembly.<sup>6</sup> “Section 10 of Article VIII permits financial aid, *without restriction as to form*, to students in public institutions” and “to students in nonsectarian private schools.”<sup>7</sup> Thus, the Supreme Court has confirmed that the limitations set out in § 10 govern the basic issue of eligibility for aid, but do not restrict the form which that aid may take.<sup>8</sup>

#### CONCLUSION

Accordingly, it is my opinion that student financial assistance provided pursuant to Article VIII, § 10 of the Virginia Constitution may take the form of loan or grant funds made available directly to students, appropriated to a career college on behalf of a student, or appropriated to the State Council of Higher Education for Virginia. It further is my opinion that another entity may be named in or created by legislation to distribute the loans or grants directly to the student or an institution.

<sup>1</sup> See 2007 Op. Va. Att’y Gen. 42.

<sup>2</sup> *Id.*

<sup>3</sup> See Op. Va. Att’y Gen.: 2007, *supra* note 1, at 42; 1998 at 24; 1982-1983 at 97, 97-98. Please note that the only financial assistance programs currently available for students attending nonstate colleges and universities are established under Article VIII, § 11 rather than under Article VIII, § 10. Under § 11, the assistance is available only for students of nonprofit institutions of higher learning. See VA. CODE ANN. § 23-38.10:9 (Supp. 2007) (Two-Year College Transfer Grant Program); § 23-38.12 (2006) (Tuition Assistance Grant Program).

<sup>4</sup>Whitlock v. Hawkins, 105 Va. 242, 248, 53 S.E. 401, 403 (1906).

<sup>5</sup>Prison Ass'n v. Ashby, 93 Va. 667, 670, 25 S.E. 893, 894 (1896).

<sup>6</sup>Miller v. Ayres, 214 Va. 171, 198 S.E.2d 634 (1973)

<sup>7</sup>*Id.* at 179, 198 S.E.2d at 640 (emphasis added).

<sup>8</sup>*See Whitlock*, 105 Va. at 248, 53 S.E. at 403; *Ashby*, 93 Va. at 670, 25 S.E. at 894; *see also* City of Richmond v. Va. Ry. & Power Co., 141 Va. 69, 91, 126 S.E. 353, 359 (1925) (noting that Virginia Constitution is retraining instrument and not grant of power).

**OP. NO. 08-092**

**CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT (COUNTY, CITY, AND TOWN GOVERNING BODIES).**

**ELECTIONS: FEDERAL, COMMONWEALTH, AND LOCAL OFFICERS – VACANCIES IN ELECTED CONSTITUTIONAL AND LOCAL OFFICES.**

**COUNTIES, CITIES AND TOWNS: SERVICE DISTRICTS; TAXES AND ASSESSMENTS FOR LOCAL IMPROVEMENTS.**

**Authority under Front Royal Town Charter for Town Council to appoint individual to serve unexpired term of council member elected as mayor; no authority for Town Council to appoint such individual when vacancy has existed for more than forty-five days. Town Council may petition circuit court to issue writ of election to fill such vacancy. Individual appointed to serve such unexpired term is not elected member of Town Council as that term is used in Title 15.2.**

THE HONORABLE CLIFFORD L. "CLAY" ATHEY JR.  
MEMBER, HOUSE OF DELEGATES  
DECEMBER 3, 2008

**ISSUES PRESENTED**

You ask whether the Town Council for the Town of Front Royal (the "Town") under the Charter of the Town of Front Royal (the "Charter"), may appoint an individual to serve the remaining two years of the unexpired term of a council member elected as mayor, or whether such individual must be elected pursuant to the requirements of Article VII, § 5 of the Constitution of Virginia. Further, you ask whether the Town Council may appoint such individual after a vacancy has existed for more than forty-five days. You also inquire regarding whether the Town Council may call a special election to fill the vacated council position. Finally, you ask whether the term "elected" members of the governing body as used in several provisions of Title 15.2 includes a member who is appointed by the Town Council to serve the remaining two years of the unexpired term of the council member elected as mayor in contrast with an individual elected by the qualified voters of the Town in a special election.

**RESPONSE**

It is my opinion that the Charter of the Town of Front Royal authorizes the Town Council of Front Royal to appoint an individual to serve the remaining two years of the unexpired term of a council member elected as mayor. Further, it is my opinion that the Town Council is not authorized to appoint such individual when the vacancy has existed for more than forty-five days. It also is my opinion that pursuant to

§ 24.2-226, the Town Council may petition the circuit court to issue a writ of election to fill the vacancy in an election that complies with the requirements of Article VII, § 5 of the Virginia Constitution. Finally, it is my opinion that an individual appointed to serve such unexpired term is not an elected member of the Town Council as that term is used in Title 15.2.<sup>1</sup>

#### BACKGROUND

You advise that the Town Council consists of six members and the mayor. The mayor does not have a vote except as a tiebreaker. In May 2008, a Town Council member was elected as mayor. On June 25, 2008, the mayor-elect resigned his Town Council position to qualify as mayor, with his term beginning on July 1, 2008. Effective July 1, 2008, you state there were only five members of Town Council and the mayor. You note that the Council intends to fill the vacancy on August 11, 2008, which is more than forty-five days after the mayor-elect resigned. You further advise that, historically, vacancies on the Town Council have not been filled by the usual special election process applicable to local government in Virginia under Article 6, Chapter 2 of Title 24.2, §§ 24.2-225 through 24.2-229, because § 6 of the Charter permits the Council to appoint a member to fill a vacancy for the balance of the unexpired term.

Further, you advise that the five-member Town Council currently seeks to impose an assessment against adjoining property owners for certain improvements the Town is constructing under Chapter 24 of Title 15.2, §§ 15.2-2400 through 15.2-2413. You note that § 15.2-2405 requires that without a petition from affected landowners, the assessment may only be imposed “by a two-thirds vote of all the members *elected* to the governing body.” (Emphasis added.) You note that there are a number of similar provisions contained in the *Code* limiting the actions of a governing body to votes by its “elected” members.<sup>2</sup> You relate that the Council has been advised that when it appoints an individual to serve an unexpired term, the vote of such appointed member cannot be counted for any votes that require the vote of an “elected” member of the governing body.

#### APPLICABLE LAW AND DISCUSSION

Section 6 of the Charter of the Town of Front Royal provides that “[t]he council *may* fill any vacancy that occurs in the membership of the council for the unexpired term.”<sup>3</sup> In addition, pursuant to § 24.2-228(A) “[w]hen a vacancy occurs in a local governing body . . . , the remaining members . . . , within forty-five days of the office becoming vacant, *shall* appoint a qualified voter of the election district in which the vacancy occurred to fill the vacancy.” If the governing body fails to make the appointment within forty-five days, the judges of the circuit court must make the appointment.<sup>4</sup> The Supreme Court of Virginia has noted that while the effect of the word “shall” primarily is mandatory, and “may” primarily is permissive, “courts, in endeavoring to arrive at the meaning of written language, whether used in a will, a contract, or a statute, will construe ‘may’ and ‘shall’ as permissive or mandatory in accordance with the subject matter and context.”<sup>5</sup> The word “may” in § 6 of the Charter clearly is permissive because both the Town Council and the circuit

court have appointive power to fill vacancies on the Council under § 24.2-228(A). Therefore, either the Town Council or the circuit court may appoint a replacement to the Council. Accordingly, the Charter authorizes, but does not require, the Town Council to fill such vacancy.

In 1996, an opinion of the Attorney General (the “1996 Opinion”) considered the provisions of § 6 of the Charter and concluded that § 6 does not divest the circuit court of authority under § 24.2-228(A) to appoint a replacement if the town council does not act.<sup>6</sup> The 1996 Opinion also concluded that the intent of § 6, when read in conjunction with Article 6 of Title 24.2, was “that vacancies in local offices be filled within a limited time period.”<sup>7</sup> Because the Town has a population greater than the threshold of 3,500 specified by the General Assembly in § 24.2-228(A), the appointment of a replacement allows the individual to hold office only until the qualified voters of the Town fill the vacancy by special election pursuant to § 24.2-226. The General Assembly has not substantially amended the statutes considered by the Attorney General in the 1996 Opinion, including § 6 of the Charter.<sup>8</sup> While an opinion of the Attorney General is not binding on the courts of the Commonwealth, it is “entitled to due consideration.”<sup>9</sup> This particularly is the case when the General Assembly has knowledge of such Attorney General’s opinion and has done nothing to amend the law. “The legislature is presumed to have had knowledge of the Attorney General’s interpretation of the statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General’s view.”<sup>10</sup>

Article VII, § 5 provides that “[t]he governing body of each ... town shall be elected by the qualified voters of such ... town in the manner provided by law.” Title 24.2 governs the administration of elections in the Commonwealth. Pursuant to the election laws of the Commonwealth, the General Assembly recognizes only three types of elections – general, primary, and special.<sup>11</sup> A general election is “an election held in the Commonwealth on the Tuesday after the first Monday in November or on the first Tuesday in May for the purpose of filling offices regularly scheduled by law to be filled at those times.”<sup>12</sup> A primary is “an election held for the purpose of selecting a candidate to be the nominee of a political party for election to office.”<sup>13</sup> Finally, a special election is “any election that is held pursuant to law to fill a vacancy in office or to hold a referendum.”<sup>14</sup> The facts that you provide clearly demonstrate that the matter about which you inquire would involve a special election. Sections 24.2-226(A) and 24.2-228(A) would require a special election to fill the position vacated by a Town Council member who resigns to assume the duties of mayor.

Title 15.2 governs local government in Virginia. Section 15.2-1424 generally provides that vacancies in a local governing body “shall<sup>[15]</sup> be filled as provided for in Title 24.2,” which, as previously noted, governs elections. The 1997 Session of the General Assembly recodified the Commonwealth’s laws regarding local government.<sup>16</sup> The drafting note following § 15.2-1424 in the 1997 Code Commission report on the recodification of Title 15.1 provides that:

No substantive change in the law; provides for continuity of government by appointed officials, as provided in (§ 24.2-225 et seq.), until appointed officials are replaced by elected ones.<sup>[17]</sup>

As previously noted, § 24.2-228(A) authorizes “the remaining members of the [local governing] body . . . , within forty-five days of the office becoming vacant, [to] appoint a qualified voter of the election district in which the vacancy occurred to fill the vacancy.” The 1993 Session of the General Assembly recodified the Commonwealth’s election laws within Title 24.2<sup>18</sup> (the “1993 Recodification”). Prior to the 1993 Recodification, § 24.1-76, the predecessor statute to § 24.2-228, provided that interim appointments to fill vacancies in any county, city, town, or district office were to be made by the appropriate circuit court judges when “no other provision is made for filling the same.”<sup>19</sup> Former § 24.1-76 was consistent with its predecessor statute, § 136.<sup>20</sup> The 1975 Session of the General Assembly first enacted § 24.1-76.1, establishing an exception for vacancies in county governing bodies and providing for interim appointments by the remaining members of the governing body.<sup>21</sup> Prior to the 1993 Recodification, city and town council members had the authority to fill such vacancies by appointment only when their respective charters provided for such appointment.<sup>22</sup> The 1975 Session of the General Assembly’s enactment of § 24.1-76.1 created a separate mechanism for a county to fill a vacancy occurring in the membership of its governing body.

The 1993 Recodification resulted in the amendment and recodification of §§ 24.1-76 and 24.1-76.1 at § 24.2-226, dealing only with special elections; and §§ 24.2-227 and 24.2-228, dealing with interim appointments.<sup>23</sup> Section 24.2-226(A), which applies to towns, provides that “[a] vacancy in any elected local office . . . shall be filled by special election [held at] . . . the next ensuing general election . . . in May.” The drafting note following § 24.2-226 in the Code Commission report on the recodification of Title 24.1 provides that:

The provisions of existing § 24.1-76 A. for interim appointments by circuit judges are moved to proposed § 24.2-227 so that it is clear that the basic principle of . . . [A]rticle [6, Chapter 2 of Title 24.2] is to fill vacancies by election.<sup>[24]</sup>

In addition, the drafting note following § 24.2-227 provides that:

Proposed § 24.2-227 is based on existing subdivision A of § 24.1-76. The only significant change in language occurs in the first sentence, where all local governing bodies are excluded from the court’s power to make interim appointments to fill vacancies. This already is the case for vacancies in county governing bodies which occur during a member’s term because existing § 24.1-76.1 authorizes the governing body to make the appointment.<sup>[25]</sup>

Section 24.1-76 clearly was the basis for drafting § 24.2-228, as the drafting note provides that:

Proposed § 24.2-228 is based on existing § 24.1-76 provisions for counties and makes no substantive change with regard to the governing body's authority to make an interim appointment when a vacancy occurs during a member's term in office. The proposed section would expand the governing body's interim appointment power to include vacancies arising when a member-elect did not qualify.<sup>[26]</sup>

Based on the drafting notes of the Code Commission and the 1996 opinion, it is clear that the Town Council is authorized, but not required, to appoint an individual to serve the remaining two years of the unexpired term of the council member elected as mayor. It equally is clear that an individual may be elected to fill the Town Council vacancy in a special election pursuant to § 24.2-226, which would comply with Article VII, § 5. Such special election is based upon the writ of election issued by the circuit court ordering such election. Finally, based upon the analysis of the applicable provisions of the *Code*, including the General Assembly's recodification of Titles 15.2 and 24.2, it is clear that an individual appointed to the Town Council to serve the remaining two years of the unexpired term of a council member elected as mayor is not an "elected" member of the Town Council as that term is used in various provisions of Title 15.2. Such an individual is an appointed member of the Town Council.<sup>27</sup>

I am aware of the decision of the Circuit Court of Rockingham County,<sup>28</sup> which is a part of the Twenty-Sixth Judicial Circuit of Virginia<sup>29</sup> that also includes the Town. In its published decision, the Circuit Court considered § 15.2-2636, a portion of the Public Finance Act,<sup>30</sup> that mandates "[a]ny ordinance or resolution authorizing the issuance of bonds by a municipality must be passed by the recorded affirmative vote of a majority of all the members elected to its governing body." The Circuit Court concluded that the term "elected" in § 15.2-2636 is not limited to popular elections, but includes elections by members of a governing body.<sup>31</sup> Prior opinions of this Office have concluded that the actions and decisions of a circuit court are not subject to the review of the Attorney General "and must be treated as the binding determination with regard to the case before the court."<sup>32</sup> Therefore, the conclusions set forth herein are not intended to call into question the validity of the Circuit Court of Rockingham County's determination in the case before it.<sup>33</sup>

#### CONCLUSION

Accordingly, it is my opinion that the Charter of the Town of Front Royal authorizes the Town Council of Front Royal to appoint an individual to serve the remaining two years of the unexpired term of a council member elected as mayor. Further, it is my opinion that the Town Council is not authorized to appoint such individual when the vacancy has existed for more than forty-five days. It also is my opinion that pursuant to § 24.2-226, the Town Council may petition the circuit court to issue a writ of election to fill the vacancy in an election that complies with the requirements of Article VII, § 5 of the Virginia Constitution. Finally, it is my opinion that an

individual appointed to serve such unexpired term is not an elected member of the Town Council as that term is used in Title 15.2.<sup>34</sup>

<sup>1</sup>But see *infra* note 33 and accompanying text.

<sup>2</sup>See, e.g., VA. CODE ANN. § 15.2-1428 (2008) (appropriation of money exceeding \$500); § 15.2-2100(A) (2008) (sale of Town property); § 15.2-2102 (2008) (award of franchise); § 15.2-2636 (2008) (issuance of bonds); § 15.2-3202 (2008) (petition for annexation); § 15.2-3203(B) (2008) (rejection of annexation petition).

<sup>3</sup>See 1993 Va. Acts ch. 479, at 572, 573 (emphasis added). The charter for the Town of Front Royal was enacted in 1937. See 1936-7 Va. Acts ch. 44, at 142. While § 6 of the Charter was amended in 1993, the provision in § 6 concerning the filling of a vacancy on the town council remains essentially the same as originally enacted in 1937. Compare 1993 Va. Acts, *supra* at 573 (amending portions of § 6) with 1936-7 Va. Acts, *supra*, at 144.

<sup>4</sup>See VA. CODE ANN. § 24.2-228(A) (2006).

<sup>5</sup>*Pettus v. Hendricks*, 113 Va. 326, 330, 74 S.E. 191, 193 (1912).

<sup>6</sup>1996 Op. Va. Att’y Gen. 127, 129-30 (interpreting prior version of § 24.2-228(A)). At the time of the 1996 Opinion, §24.2-288(A) provided that when a vacancy occurred in a local governing body, the remaining members had thirty days to appoint a successor, and the failure to do so authorized the circuit court to make such appointment. *Id.* at 128.

<sup>7</sup>*Id.* at 130.

<sup>8</sup>See, e.g., 1999 Va. Acts ch. 128, at 158, 158 (amending § 24.2-228(A) to provide period of forty-five days instead of previous period of thirty days).

<sup>9</sup>*Twietmeyer v. City of Hampton*, 255 Va. 387, 393, 497 S.E.2d 858, 861 (1998) (quoting *Va. Beach v. Va. Rest. Ass’n*, 231 Va. 130, 135, 341 S.E.2d 198, 201 (1986)).

<sup>10</sup>*Browning-Ferris, Inc. v. Commonwealth*, 225 Va. 157, 161, 300 S.E.2d 603, 605-06 (1983).

<sup>11</sup>See § 24.2-101 (Supp. 2008) (defining term “election”).

<sup>12</sup>*Id.*

<sup>13</sup>*Id.*

<sup>14</sup>*Id.*

<sup>15</sup>“[T]he use of ‘shall,’ in a statute requiring action by a public official, is directory and not mandatory unless the statute manifests a contrary intent.” *Jamborsky v. Baskins*, 247 Va. 506, 511, 442 S.E.2d 636, 638 (1994). “A statute directing the mode of proceeding by public officers is to be deemed directory, and a precise compliance is not to be deemed essential to the validity of the proceedings, unless so declared by statute.” *Nelms v. Vaughan*, 84 Va. 696, 699, 5 S.E. 704, 706 (1888), *quoted in Commonwealth v. Rafferty*, 241 Va. 319, 324, 402 S.E.2d 17, 20 (1991).

<sup>16</sup>See 1997 Va. Acts ch. 587, at 976, 1069.

<sup>17</sup>5 H. & S. Docs., *Report of the Virginia Code Commission on the Recodification of Title 15.1 of the Code of Virginia*, S. Doc. No. 5, at 351 (1997).

<sup>18</sup>See 1993 Va. Acts ch. 641, at 812 (revising and recodifying election laws of Virginia by repealing Title 24.1 and adding Title 24.2). The 1991 Session of the General Assembly requested that the Virginia Code Commission study and revise Title 24.1 and report its findings to the Governor and the 1993 Session of the General Assembly in the form of a recodified title. See 1991 Va. Acts S.J. Res. 242, at 2135, 2135. The Virginia Code Commission rendered its report, which resulted in the recodification of Title 24.1. See 5 H. & S. Docs., *Report of the Virginia Code Commission on the Recodification of Title 24.1 of the Code of Virginia*, S. Doc. No. 25 (1993) [hereinafter S. Doc. No. 25].

<sup>19</sup>The phrase “no other provision is made for filling the same” originally appeared in the first sentence of § 24.1-76. See 1970 Va. Acts ch. 462, at 826, 846. The 1984 Session of the General Assembly added subsection A to § 24.1-76, and the phrase continues in the first sentence of that subsection. See 1984 Va. Acts ch. 480, at 764, 769.

<sup>20</sup> See VA. CODE ANN. § 136 (1919), amended by 1920 Va. Acts ch. 296, at 410; 1928 Va. Acts ch. 24, at 22; 1930 Va. Acts ch. 68, at 79. Section 136 subsequently was codified at § 24-145. See 1 REP. OF THE COMM'N ON CODE RECODIFICATION AND PROPOSED CODE OF VIRGINIA (Michie 1947). The 1970 Session of the General Assembly repealed Title 24, including § 24-145, which was recodified at § 24.1-76 in Title 24.1. See 1970 Va. Acts, *supra* note 19, at 846.

<sup>21</sup> See 1975 Va. Acts ch. 515, at 1042, 1053 (adding § 24.1-76.1 (codified as amended at § 24.2-228)).

<sup>22</sup> See 1996 Op. Va. Att'y Gen. 127, 129.

<sup>23</sup> See 1993 Va. Acts, *supra* note 18, at 822-23.

<sup>24</sup> S. Doc. No. 25, *supra* note 18, at 30.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 31.

<sup>27</sup> A 1975 opinion of this Office concludes that a “tie breaker and the appointed member of the Prince William Board of Supervisors may vote on matters requiring an affirmative vote of all ‘elected’ members pursuant to Article VII, Section 7, of the Constitution of Virginia (1971).” 1974-1975 Op. Va. Att'y Gen. 35, 36. The 1975 opinion is expressly overruled.

<sup>28</sup> See *Hutton v. Town of Elkton*, 57 Va. Cir. 278 (2002).

<sup>29</sup> See VA. CODE ANN. § 17.1-506 (Supp. 2008).

<sup>30</sup> Sections 15.2-2600 to 15.2-2663 (2008).

<sup>31</sup> See *Hutton*, 57 Va. Cir. at 280.

<sup>32</sup> See Op. Va. Att'y Gen.: 1987-1988 at 140; *id.* at 352.

<sup>33</sup> The doctrine of *stare decisis* “plays a significant role in the orderly administration of justice by assuring consistent, predictable, and balanced application of legal principles. And when a court of last resort has established a precedent, after full deliberation upon the issue by the court, the precedent will not be treated lightly or ignored, in the absence of flagrant error or mistake.” *Selected Risks Ins. Co. v. Dean*, 233 Va. 260, 265, 355 S.E.2d 579, 581 (1987). The Virginia Supreme Court has concluded that:

“It is to the interest of the public that there should be stability in the laws by which they regulate their conduct. It may be that this [C]ourt, as at present constituted, would not, as an original proposition, have construed [the statute] as it was construed in the cases cited, but the construction of statutes ought not to vary with every change in the personnel of the appellate court. The construction was a fair and reasonable one, made after full deliberation by courts of very able judges, for whose opinion and judgment we entertain the highest respect. [T]his construction [has been] repeated three times by a unanimous court ... and cannot now be repudiated by this [C]ourt.”

*Kelly v. Trehly*, 133 Va. 160, 169, 112 S.E. 757, 760 (1922). Absent an appeal to the Court of Appeals of Virginia or the Virginia Supreme Court, the Circuit Court for Rockingham County is the court of last resort in the Twenty-Sixth Judicial Circuit. Therefore, the Court in *Hutton* has established a precedent, after full deliberation, upon the interpretation of the meaning of the term “elected” in the context of § 15.2-2636. Accordingly, that precedent will not be treated lightly or ignored by a similar court in such Circuit absent flagrant error or mistake.

<sup>34</sup> See *supra* note 33 and accompanying text.

#### OP. NO. 08-073

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

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

Article VII, § 9 of Virginia Constitution and § 15.2-2100 apply to request to reconfigure and relocate easement located within and owned by City of Lexington in perpetuity. Supermajority vote of City Council is necessary to approve transaction.

LAURENCE A. MANN  
ATTORNEY FOR THE CITY OF LEXINGTON  
DECEMBER 1, 2008

#### ISSUES PRESENTED

You ask whether Article VII, § 9 of the Constitution of Virginia and § 15.2-2100 apply to a request between Cornerstone Bank and the City of Lexington to exchange property, which would reconfigure and relocate an easement held in perpetuity by the City and located within the City. You further ask whether such exchange would require the affirmative vote of three-fourths of the members elected to the City Council (“supermajority vote”).

#### RESPONSE

It is my opinion that Article VII, § 9 of the Constitution of Virginia and § 15.2-2100 apply to an exchange of property, which would reconfigure and relocate an easement held in perpetuity by the City of Lexington on property located within the City. It further is my opinion that a supermajority vote of the City Council is necessary to approve the exchange.

#### BACKGROUND

You advise that Cornerstone Bank has requested that the City Council for the City of Lexington (the “City”) consider a relocation and reconfiguration of the easement that the City holds in perpetuity,<sup>1</sup> which is known as Lot One. Lot One includes a decorative stone wall, plantings, a recreation of the original plat of the City, and a commemorative plaque. You express the view that the easement is intended for public use and benefit. You also advise that the easement is a significant element of the central intersection of the City.

You advise that the general law concerning relocation of easements is well settled. If both parties agree and the party making the request picks up all relocation costs, you believe the easement may be moved. You state that the current easement is comprised of 569.75 square feet. Cornerstone Bank has offered to exchange property for Lot One that contains slightly more square footage than the current easement. The Bank has proposed to keep the plat and plaque on Main Street while moving a portion of the plantings to another area to screen the parking area, which currently is screened by the stone wall and plantings. You believe that Cornerstone presents a good argument that the reconfigured easement will continue to meet the public purpose test. You also note that the issue is one of a private benefit and requires a determination of whether the request to reconfigure and relocate the easement by an exchange of property amounts to a sale as contemplated by the Virginia Constitution and *Code*.<sup>2</sup>

#### APPLICABLE LAW AND DISCUSSION

Under the Dillon Rule of strict construction, municipal corporations possess and may exercise only those powers expressly granted by the General Assembly, powers necessarily or fairly implied from such express powers, and those powers that are essential and indispensable.<sup>3</sup> Article VII, § 9 of the Virginia Constitution and

§ 15.2-2100 impose two distinct restrictions on cities. First, a city may not *sell* a park or other public places without “a recorded affirmative vote of three fourths of all members elected to the governing body.”<sup>4</sup> This requirement applies to public places devoted to use by the public at large or by the municipality itself in carrying out its governmental functions.<sup>5</sup> Second, the grant of any franchise, lease, or right to use city parks “or any other public property or easement of any description in a manner not permitted to the general public”<sup>6</sup> is limited to forty years in duration.<sup>7</sup> Prior opinions of the Attorney General note that Article VII, § 9 seeks to prevent the permanent dedication of publicly owned property to private use.<sup>8</sup>

A 2000 opinion of the Attorney General (the “2000 Opinion”) notes that “[a] grant of an easement ‘in perpetuity’ is a grant of a prescribed use of certain real property for an endless duration” and effectively results in the permanent dedication of property.<sup>9</sup> The 2000 Opinion concludes that the “Article VII, § 9 requirement of an affirmative vote of three fourths of the members elected to a city governing body before a city or town may sell any rights ‘in and to its ... parks ... or other public places’ and the parallel provisions of § 15.2-2100(A) are” applicable to a grant of an easement in perpetuity because the granting of an easement in perpetuity is tantamount to a sale of property.<sup>10</sup>

The applicable rule of statutory construction requires that words be given their ordinary meaning, given the context in which they are used in a statute.<sup>11</sup> A sale is “[t]he transfer of property or title for a price.”<sup>12</sup> Furthermore, a sale of land is a “transfer of title to real estate from one person to another by a contract of sale. A transfer of real estate is often referred to as a conveyance rather than a sale.”<sup>13</sup> Finally, a conveyance is “[t]he voluntary transfer of a right or of property.”<sup>14</sup>

The situation you describe involves City-owned property, which is comprised of an easement in perpetuity. Cornerstone Bank seeks the release of such perpetual easement and a conveyance of the property, known as Lot One, to construct a bank building on the site for its private use. In consideration for release of the Lot One easement, Cornerstone Bank offers to grant an easement in perpetuity of property that it owns, which has a slightly greater square footage than Lot One. The Bank’s property is located in the same general area as Lot One. It is my opinion that such a transaction is a transfer of property or title for a price. The price paid by Cornerstone Bank is the property it owns, which it offers to Lexington as an easement in perpetuity to replace Lot One. You also advise that the portion of Lot One being exchanged for other land owned by Cornerstone Bank, which is intended to serve the same purpose as Lot One, will involve a transfer or conveyance of land by deed. I must conclude that the transaction you describe constitutes the sale of a park or other public place within the meaning and intent of Article VII, § 9 and § 15.2-2100. Thus, an affirmative vote of three fourths of the members elected to the City Council will be required to approve the transaction.

#### CONCLUSION

Accordingly, it is my opinion that Article VII, § 9 of the Constitution of Virginia and § 15.2-2100 apply to the request to reconfigure and relocate an easement held by the

City of Lexington in perpetuity on property located within the city limits. It further is my opinion that a supermajority vote of the City Council is necessary to approve the transaction.

<sup>1</sup>The term “perpetuity” means “[t]he state of continuing forever.” BLACK’S LAW DICTIONARY 1177 (8th ed. 2004).

<sup>2</sup>Section 2.2-505(B) requires that an opinion request from a city attorney “shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney’s legal conclusions.”

<sup>3</sup>Norton v. City of Danville, 268 Va. 402, 408 n.3, 602 S.E.2d 126, 129 n.3 (2004); Arlington County v. White, 259 Va. 708, 712, 528 S.E.2d 706, 708 (2000); Bd. of Supvrs. v. Countryside Inv. Co., 258 Va. 497, 503, 522 S.E.2d 610, 613 (1999); County of Fairfax v. S. Iron Works, Inc., 242 Va. 435, 448, 410 S.E.2d 674, 682 (1991).

<sup>4</sup>VA. CONST. art. VII, § 9; *see also* VA. CODE ANN. § 15.2-2100(A) (2008) (parallel statute) (providing that city may not sell park or other public places without “recorded affirmative vote of three-fourths of all the members elected to the council”).

<sup>5</sup>*See* 1983-1984 Op. Va. Att’y Gen. 31, 31 (interpreting Article VII, § 9 and § 15.1-307, predecessor to § 15.2-2100).

<sup>6</sup>VA. CONST. art. VII, § 9; § 15.2-2100(B) (parallel statute).

<sup>7</sup>*See id.*; *see also* Stendig Dev. Corp. v. City of Danville, 214 Va. 548, 551, 202 S.E.2d 871, 874 (1974) (holding that city may adopt ordinance imposing three-fourths vote limitation on resolution to sell any of its property, *i.e.*, all property owned by city and not just property set aside for public use); 1989 Op. Va. Att’y Gen. 125 (concluding that constitutional limits are applicable to city’s lease of property to state agency).

<sup>8</sup>*See* Op. Va. Att’y Gen.: 2004 at 38, 39; 2001 at 45, 47; 2000 at 62, 63; *see also* Op. Va. Att’y Gen.: 1999 at 63, 64 (stating intent of Article VII, § 9 and § 15.2-2100); 1989, *supra* note 7, at 126-27 (noting intent of § 15.1-307).

<sup>9</sup>*See* 2000 Op. Va. Att’y Gen. 44, 46 (footnotes omitted).

<sup>10</sup>*Id.* (alterations in original).

<sup>11</sup>Va. Beach v. Bd. of Supvrs., 246 Va. 233, 236, 435 S.E.2d 382, 384 (1993).

<sup>12</sup>BLACK’S LAW DICTIONARY, *supra* note 1, at 1364. “Price” means “[t]he amount of money or other consideration asked for or given in exchange for something else.” *Id.* at 1226.

<sup>13</sup>*Id.* at 1366.

<sup>14</sup>*Id.* at 357.

## OP. NO. 08-023

### CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE – LOTTERY PROCEEDS FUND.

**Constitution mandates that General Assembly establish Lottery Proceeds Fund into which net lottery proceeds are deposited and appropriate amounts in that fund directly to counties, cities, and towns and school divisions thereof.**

THE HONORABLE STEPHEN D. NEWMAN  
MEMBER, SENATE OF VIRGINIA

THE HONORABLE WALTER A. STOSCH  
MEMBER, SENATE OF VIRGINIA

THE HONORABLE WILLIAM C. WAMPLER JR.  
MEMBER, SENATE OF VIRGINIA  
MARCH 4, 2008

**ISSUE PRESENTED**

You ask whether Article X, § 7-A of the Constitution of Virginia requires the General Assembly to establish a Lottery Proceeds Fund into which net lottery proceeds are deposited and to appropriate the amounts in that fund directly to counties, cities, and towns and the school divisions thereof.

**RESPONSE**

It is my opinion that Article X, § 7-A of the Virginia Constitution mandates that the General Assembly establish a Lottery Proceeds Fund into which net lottery proceeds are deposited and appropriate the amounts in that fund directly to counties, cities, and towns and the school divisions thereof.

**APPLICABLE LAW AND DISCUSSION**

Article X, § 7-A of the Virginia Constitution provides that:

The General Assembly shall establish the Lottery Proceeds Fund. The Fund shall consist of the net revenues of any lottery conducted by the Commonwealth. Lottery proceeds shall be appropriated from the Fund to the Commonwealth's counties, cities and towns, and the school divisions thereof, to be expended for the purposes of public education.

Any county, city, or town which accepts a distribution from the Fund shall provide its portion of the cost of maintaining an educational program meeting the standards of quality prescribed pursuant to Section 2 of Article VIII of this Constitution without the use of distributions from the Fund.

The General Assembly shall enact such laws as may be necessary to implement the Fund and the provisions of this section.

The General Assembly may appropriate amounts from the Fund for other purposes only by a vote of four-fifths of the members voting in each house, the name of each member voting and how he voted to be recorded in the journal of the house.

“Questions of constitutional construction are in the main governed by the same general rules as those applied in statutory construction.”<sup>1</sup> It is well-settled that, “[i]f the language of a statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it.”<sup>2</sup> Furthermore, ““every word employed in the Constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it.””<sup>3</sup> “It is the duty of the court in construing the Constitution to give effect to an express provision, rather than to an implication.”<sup>4</sup>

Paragraph 1 of Article X, § 7-A clearly states that “[t]he General Assembly *shall* establish the Lottery Proceeds Fund” and that “[t]he Fund *shall* consist of net revenues

of [the] lottery” and “[l]ottery proceeds *shall* be appropriated from the Fund to the Commonwealth’s counties, cities and towns, and the school divisions thereof.”

Paragraph 1 consistently uses the term “shall” in establishing the procedures for the establishment of and appropriations from the Lottery Proceeds Fund. The use of the word “shall” in the statute generally indicates that the procedures are intended to be mandatory.<sup>5</sup> The language in Article X, § 7-A plainly and unambiguously mandates that the General Assembly establish a fund for net lottery proceeds<sup>6</sup> and distribute such funds directly to counties, cities, and towns and the school divisions thereof, for the purposes of public education. It further is my opinion that such direct appropriation necessarily means that placing such funds into another fund, such as the general fund of the state treasury, prior to distribution to the localities and school divisions is prohibited.

It also is important to consider the question before the voters when Article X, § 7-A was added to the Constitution as effective July 1, 2001. The ballot contained the question “[s]hall the Constitution of Virginia be amended to provide for a Lottery Proceeds Fund and the distribution of net lottery revenues to the localities to spend for public education purposes?”<sup>7</sup> It is clear that in approving this constitutional amendment, the voters believed that the net lottery proceeds would be distributed directly to localities for the purpose of funding education.

#### CONCLUSION

Accordingly, it is my opinion that Article X, § 7-A of the Virginia Constitution mandates that the General Assembly establish a Lottery Proceeds Fund into which net lottery proceeds are deposited and appropriate the amounts in that fund directly to counties, cities, and towns and the school divisions thereof.

<sup>1</sup>4C MICHIE’S JUR. *Constitutional Law* § 7, at 38 (2006).

<sup>2</sup>*Temple v. Petersburg*, 182 Va. 418, 423, 29 S.E.2d 357, 358 (1944), *quoted in* Op. Va. Att’y Gen.: 2003 at 166, 168; *id.* at 32, 33.

<sup>3</sup>*Lipscomb v. Nuckols*, 161 Va. 936, 945, 172 S.E. 886, 889 (1934) (quoting *Quesinberry v. Hull*, 159 Va. 270, 274-75, 165 S.E. 382, 383 (1932) (further citation omitted)).

<sup>4</sup>*Id.* at 945-46, 172 S.E. at 889.

<sup>5</sup>*See Andrews v. Shepherd*, 201 Va. 412, 414, 111 S.E.2d 279, 281-82 (1959); *see also* 1994 Op. Va. Att’y Gen. 64, 68. The only provision where the permissive term “may” is used permits the General Assembly to appropriate amounts from the fund for other purposes provided the required super majority approves such appropriation. Article X, § 7-A requires a four-fifths vote of the members voting in each house to appropriate funds for other purposes.

<sup>6</sup>The Lottery Proceeds Fund has been established pursuant to § 58.1-4022.1(A). I am mindful that § 58.1-4022.1(B) provides that: “For purposes of any appropriation act enacted by the General Assembly and for the purposes of the Comptroller’s preliminary and final annual reports required by § 2.2-813, all deposits to and appropriations from the Lottery Proceeds Fund shall be accounted for and considered to be a part of the general fund of the state treasury.” You do not inquire, and I provide no opinion regarding the constitutionality of that provision.

<sup>7</sup>2000 Va. Acts ch. 713, at 1410, 1410.

OP. NO. 08-024

**CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE – LOTTERY PROCEEDS FUND  
— LEGISLATURE – ENACTMENT OF LAWS.**

**Article X, § 7-A of Constitution mandates that General Assembly establish Lottery Proceeds Fund, deposit net lottery proceeds into Fund, and appropriate amounts from Fund directly to counties, cities, and towns and school divisions thereof to be expended for purposes of public education. Absent affirmative vote of four-fifths of members voting in each house, any budget/appropriation item diverting lottery funds would be unconstitutional.**

THE HONORABLE WILLIAM T. BOLLING  
LIEUTENANT GOVERNOR  
MARCH 7, 2008

**ISSUE PRESENTED**

You ask whether Article X, § 7-A of the Constitution of Virginia requires that amounts in the Lottery Proceeds Fund must be appropriated directly to counties, cities, and towns and the school divisions thereof for the purposes of public education absent a four-fifths vote of the members voting in each house.

**RESPONSE**

It is my opinion that Article X, § 7-A of the Constitution mandates that the General Assembly establish a Lottery Proceeds Fund, deposit net lottery proceeds into the Fund, and appropriate amounts from the Fund directly to counties, cities, and towns and the school divisions thereof to be expended for the purposes of public education. Absent an affirmative vote of four-fifths of the members voting in each house, any budget/appropriation item diverting lottery funds would be unconstitutional.

**APPLICABLE LAW AND DISCUSSION**

The Constitution establishes “super majority” votes for certain actions, including the distribution of net lottery proceeds. Article X, § 7-A of the Constitution provides that:

The General Assembly shall establish the Lottery Proceeds Fund. The Fund shall consist of the net revenues of any lottery conducted by the Commonwealth. Lottery proceeds shall be appropriated from the Fund to the Commonwealth’s counties, cities and towns, and the school divisions thereof, to be expended for the purposes of public education.

Any county, city, or town which accepts a distribution from the Fund shall provide its portion of the cost of maintaining an educational program meeting the standards of quality prescribed pursuant to Section 2 of Article VIII of this Constitution without the use of distributions from the Fund.

....

The General Assembly may appropriate amounts from the Fund for other purposes *only by a vote of four-fifths of the members voting in each house*, the name of each member voting and how he voted to be recorded in the journal of the house. [Emphasis added.]

By its plain and unambiguous language,<sup>1</sup> paragraphs 1 and 2 of § 7-A require the direct appropriation of funds from the Lottery Proceeds Fund to counties, cities, and towns and the school divisions thereof for the purposes of public education. However, paragraph 4 of § 7-A provides an alternate appropriation method only by an affirmative “vote of four-fifths of the members *voting* in each house.” Any appropriation which diverts net lottery proceeds in a manner inconsistent with Article X, § 7-A is unconstitutional.

#### CONCLUSION

Accordingly, it is my opinion that Article X, § 7-A of the Constitution mandates that the General Assembly establish a Lottery Proceeds Fund, deposit net lottery proceeds into the Fund, and appropriate amounts from the Fund directly to counties, cities, and towns and the school divisions thereof to be expended for the purposes of public education. Absent an affirmative vote of four-fifths of the members voting in each house, any budget/appropriation item diverting lottery funds would be unconstitutional.

<sup>1</sup>“[E]very word employed in the Constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it.” Lipscomb v. Nuckols, 161 Va. 936, 945, 172 S.E. 886, 889 (1934) (quoting Quesinberry v. Hull, 159 Va. 270, 274-75, 165 S.E. 382, 383 (1932) (further citation omitted)), *quoted in* 2003 Op. Va. Att’y Gen. 32, 33. “It is the duty of the court in construing the Constitution to give effect to an express provision rather than to an implication.” *Id.* at 945-46, 172 S.E. 889, *quoted in* 2003 Op. Va. Att’y Gen., *supra*, at 33.

#### OP. NO. 08-072

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

#### GENERAL PROVISIONS: COMMON LAW AND RULES OF CONSTRUCTION.

**Locality may not enact ordinance that preempts or nullifies state or federal law; such ordinance would be unconstitutional. Locality may not enact ordinance that diminishes, alters, or eliminates legal rights, particularly where state or federal government occupies field.**

THE HONORABLE RILEY E. INGRAM  
MEMBER, HOUSE OF DELEGATES  
NOVEMBER 14, 2008

#### ISSUE PRESENTED

You ask several questions regarding the authority of a Virginia locality to adopt and enforce a local ordinance affecting the rights of corporations within its boundaries. Specifically you inquire whether a locality may enact an ordinance<sup>1</sup> that preempts or nullifies state or federal law or that diminishes, alters, or eliminates legal rights.

#### RESPONSE

It is my opinion that a Virginia locality may not enact an ordinance that preempts or nullifies state or federal law and that such an ordinance would be unconstitutional. Further, it is my opinion that a Virginia locality may not enact an ordinance that

diminishes, alters, or eliminates legal rights, particularly where the state or federal government may be said to “occupy the field,” unless given specific authority to do so by the General Assembly or the Congress of the United States.

#### BACKGROUND

You provide an example of an ordinance promoted by a not-for-profit organization, which is headquartered outside of the Commonwealth. You note that the organization has developed a variety of ordinances (“model ordinances”) that it seeks to have adopted by local governments. You relate that the model ordinances include provisions that: (a) prohibit corporations from mining or owning certain mineral estates within a town; (b) create a new strict liability cause of action (“bodily trespass”); and (c) deprive corporations of standing and other rights. You inquire concerning the constitutionality of these model ordinances.

#### APPLICABLE LAW AND DISCUSSION

Virginia follows the Dillon rule of strict construction regarding powers of localities.<sup>2</sup> “Under the Dillon Rule, municipal corporations and counties possess and may exercise only those powers expressly granted ..., powers necessarily or fairly implied from from such express powers, and those powers that are essential and indispensable.”<sup>3</sup> The terms “locality” and “local government” include a “county, city, or town as the context may require.”<sup>4</sup> Virginia courts consistently have held that “a local government may not ‘forbid what the legislature has expressly licensed, authorized or required.’”<sup>5</sup>

Furthermore, § 1-248 expressly provides:

The Constitution and laws of the United States and of the Commonwealth shall be supreme. Any ordinance, resolution, bylaw, rule, regulation, or order of any governing body or any corporation, board, or number of persons shall not be inconsistent with the Constitution and laws of the United States or of the Commonwealth.

Consequently, a Virginia locality may not, by ordinance or otherwise, deny corporations rights specifically afforded to them by the Constitutions and laws of the United States and the Commonwealth of Virginia.

You specifically inquire about a model ordinance that regulates activities regarding certain mining activities. For example, the General Assembly has enacted and codified statutes governing the permitting process and the conduct of certain mining activities,<sup>6</sup> which would include exploratory mining of uranium deposits.<sup>7</sup> Specifically, Chapter 21 of Title 45.1<sup>8</sup> (“Exploration for Uranium Ore”) governs the mining of uranium in the Commonwealth. Section 45.1-274(A) prohibits “any person to commence any exploration activity ... without first obtaining a permit to do so from the Chief [of the Division of Mines of the Department of Mines, Minerals and Energy].”

In § 32.1-228.1(A), the General Assembly has designated the Department of Health as the state radiation control agency. Section 32.1-229, which governs the powers and duties of the State Board of Health (the “Health Board”), authorizes the Health Board, in part, to:

1. Establish a program of effective regulation of sources of radiation for the protection of the public health and safety, including a program of education and technical assistance relating to radon that is targeted to those areas of the Commonwealth known to have high radon levels.

2. Establish a program to promote the orderly regulation of radiation within the Commonwealth, among the states and between the federal government and the Commonwealth and to facilitate intergovernmental cooperation with respect to use and regulation of sources of radiation to the end that duplication of regulation may be minimized.

3. Establish a program to permit maximum utilization of sources of radiation consistent with the public health and safety.

4. Promulgate regulations providing for (i) general or specific licenses to use, manufacture, produce, transfer, receive, acquire, own or possess quantities of, or devices or equipment utilizing, by-product, source, special nuclear materials, or other radioactive material occurring naturally or produced artificially, (ii) registration of the possession of a source of radiation and of information with respect thereto, and (iii) regulation of by-product, source and special nuclear material.

Pursuant to § 32.1-227(7), “source material” means “uranium or thorium, or any combination thereof, in any physical or chemical form; or ores that contain by weight one-twentieth of one percent (0.05 percent) or more of uranium, thorium, or any combination thereof.”

Article VI of the Constitution of Virginia establishes the rights and powers of the judiciary. Specifically, Article VI, § 1 grants to the General Assembly the “power to determine the original and appellate jurisdiction of the courts of the Commonwealth.” Standing may be established either by statute or by the courts in interpreting and applying those statutes.<sup>9</sup>

You ask whether a Virginia locality may impose criminal liability on an entity operating in compliance with federal and state laws or limit the authority of the state or the federal government employees to issue permits. 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[.]

County and municipal ordinances must be consistent with the laws of the Commonwealth.<sup>10</sup> Such ordinances are inconsistent with state law when they cannot coexist with a statute.<sup>11</sup> “[A] local government may ‘not forbid what the legislature has expressly licensed, authorized, or required.’”<sup>12</sup> While a local legislative body, in the exercise of its police powers, may have the authority to forbid an act where state law is silent on the subject, it cannot limit or forbid activities that expressly are sanctioned by the General Assembly.<sup>13</sup> Thus, if an entity operates in compliance with state law, a Virginia locality cannot impose a criminal liability on that entity. Likewise, a locality may not prohibit or limit the authority of state or federal agencies to carry out their duties as prescribed by law.

Article 8, Chapter 6 of Title 32.1, §§ 32.1-227 through 32.1-238, governs radiation control and is administered by the Health Board.<sup>14</sup> Due to the comprehensive nature of Article 8 and Chapter 21 of Title 45.1, the power of a Virginia locality to pass ordinances relating to corporate mining and chemical and radioactive activities is limited as the state may be said to “occupy the entire field.”<sup>15</sup> Further, to survive a constitutional challenge, any ordinance regulating corporate mining must be reasonable in scope, clearly define prohibited conduct, and not unduly burden a corporation’s rights or violate the Commerce Clause of the United States Constitution.<sup>16</sup>

#### CONCLUSION

Accordingly, it is my opinion that a Virginia locality may not enact an ordinance that preempts or nullifies state or federal law and that such an ordinance would be unconstitutional. Further, it is my opinion that a Virginia locality may not enact an ordinance that diminishes, alters, or eliminates legal rights, particularly where the state or federal government may be said to “occupy the field,” unless given specific authority to do so by the General Assembly or the Congress of the United States.

<sup>1</sup>You provide a copy of an ordinance enacted by a locality in Virginia. Attorneys General consistently have declined to issue official opinions on local ordinances or matters purely of local concern. *See, e.g.,* Op. Va. Att’y Gen.: 2007 at 105, 107 n.2; *id.* at 84, 88 n.1; 2004 at 159, 160; 1976-1977 at 17, 17. However, I will provide guidance and address your questions in a general manner.

<sup>2</sup>*See* Commonwealth v. County Bd., 217 Va. 558, 573, 232 S.E.2d 30, 40 (1977)

<sup>3</sup>Logan v. City Council, 275 Va. 483, 494, 659 S.E.2d 296, 302 (2008).

<sup>4</sup>*See* VA. CODE ANN. § 15.2-102 (2008) (applying definition to Title 15.2).

<sup>5</sup>Blanton v. Amelia County, 261 Va. 55, 64, 540 S.E.2d 869, 874 (2001) (quotation not identified); *see also* Klingbeil Mgmt. Group Co. v. Vito, 233 Va. 445, 449, 357 S.E.2d 200, 202 (1987); King v. County of Arlington, 195 Va. 1084, 1090, 81 S.E.2d 587, 591 (1954) (noting fundamental rule that local ordinances must conform to and not be inconsistent with state’s public policy and statutes).

<sup>6</sup>*See* VA. CODE ANN. tit. 45.1, ch. 16, §§ 45.1-180 to 45.1-197.18 (2002 & Supp. 2008) (codified in scattered sections).

<sup>7</sup>*See* § 45.1-181 (Supp. 2008) (providing that “[i]t shall be unlawful for any operator to engage in any mining operation in Virginia, without having first obtained from the Department [of Mines, Minerals and

Energy] a permit to engage in such operation and paying a fee .... A permit shall be obtained prior to the start of any mining operation”).

<sup>8</sup> See § 45.1-272 (not set out), §§ 45.1-273 to 45.1-285, §§ 45.1-285.1 to 45.1-285.10 (not set out) (2002).

<sup>9</sup> See *Wilkins v. West*, 264 Va. 447, 458, 571 S.E.2d 100, 106 (2002) (“Merely advancing a public right or redressing a public injury cannot confer standing on a complainant.”); see also Va. Beach Beautification Comm’n v. Bd. of Zoning Appeals, 231 Va. 415, 419, 344 S.E.2d 899, 902 (1986) (holding that for party to be “aggrieved,” “it must affirmatively appear that such person had some direct interest in the subject matter of the proceeding that he seeks to attack”).

<sup>10</sup> See *Blanton*, 261 Va. at 63, 540 S.E.2d at 873-74; *Klingbeil*, 233 Va. at 449, 357 S.E.2d at 202; *King*, 195 Va. at 1090, 81 S.E.2d at 591.

<sup>11</sup> See *Blanton*, 261 Va. at 64, 540 S.E.2d at 874; *King*, 195 Va. at 1091, 81 S.E.2d at 591; *West Lewinsville Hgts. Citizens Ass’n v. Bd. of Supvrs.*, 270 Va. 259, 265-66, 618 S.E.2d 311, 314 (2005).

<sup>12</sup> *Blanton*, 261 Va. at 64, 540 S.E.2d at 874 (quotation not identified).

<sup>13</sup> See *Allen v. Norfolk*, 196 Va. 177, 180, 83 S.E.2d 397, 399-400 (1954).

<sup>14</sup> See VA. CODE ANN. § 32.1-229 (Supp. 2008) (listing powers and duties of Health Board, including establishment of program to regulate sources of radiation).

<sup>15</sup> See *Lynchburg v. Dominion Theatres, Inc.*, 175 Va. 35, 40, 7 S.E.2d 157, 159 (1940); Va. Op. Att’y Gen.: 2007 at 59, 60; 2001 at 141, 142; 1983-1984 at 86, 87; c.f. *King*, 195 Va. at 1087-88, 81 S.E.2d at 590 (noting that where state did not occupy entire field, 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).

<sup>16</sup> See *Nat’l Linen Serv. Corp. v. Norfolk*, 196 Va. 277, 280, 83 S.E.2d 401, 403 (1954).

**OP. NO. 08-049**

**COUNTIES, CITIES AND TOWNS: GOVERNING BODIES OF LOCALITIES – SALARIES.**

**Authority for board of supervisors to adopt resolution granting its members fringe benefit of family health insurance coverage that is same as provided to county’s administrator and attorney.**

MARK B. TAYLOR  
ACCOMACK COUNTY ATTORNEY  
AUGUST 5, 2008

**ISSUE PRESENTED**

When a board of supervisors has established compensation for its members pursuant to § 15.2-1414.3, you ask whether the board also may grant to such members, as a fringe benefit, family health insurance coverage that is the same as provided to the county’s administrator and attorney.

**RESPONSE**

It is my opinion that § 15.2-1414.3(4) authorizes the board of supervisors to adopt a resolution granting its members, as a fringe benefit, family health insurance coverage that is the same as provided to the county’s administrator and attorney.

**BACKGROUND**

You advise that the Accomack County Board of Supervisors has adopted the alternative method for establishing the salaries of the Board as authorized by § 15.2-1414.3.<sup>1</sup> Furthermore, you advise that the Board has adopted a resolution

granting its members a fringe benefit consisting of paid family health insurance coverage. You state that the County's administrator and attorney currently receive the same family health insurance coverage as a fringe benefit. You note that all other Accomack County employees receive fully paid health coverage for themselves, but not for family members. Finally, you state that all County health insurance coverage is provided under the same plan with the difference being the portion of the premium the County pays as a fringe benefit.<sup>2</sup>

#### APPLICABLE LAW AND DISCUSSION

Section 15.2-1414.3(4) provides that:

In addition to and without regard for the salary limits herein set out, any board of supervisors by resolution may grant to its members any or all of the fringe benefits in the manner and form as such benefits are provided for county employees or any of them.

The power of a local governing body, unlike that of the General Assembly, "must be exercised pursuant to an express grant"<sup>3</sup> because "the powers of boards of supervisors are fixed by statute and are limited to those conferred expressly or by necessary implication."<sup>4</sup> This rule is corollary to the Dillon Rule that municipal corporations are similarly limited in their powers.<sup>5</sup> "Where a statute is unambiguous, the plain meaning is to be accepted without resort to the rules of statutory interpretation."<sup>6</sup> "The manifest intention of the legislature, clearly disclosed by its language, must be applied."<sup>7</sup> "[T]ake the words as written" ... and give them their plain meaning."<sup>8</sup>

The operative language in § 15.2-1414.3(4) is the use of the word "or" in the phrase "as such benefits are provided for county employee or any of them." "Generally, phrases separated by a comma and the disjunctive 'or' are independent."<sup>9</sup> The use of the disjunctive results in alternatives that must be treated separately. Thus, the word "or" in § 15.2-1414.3(4) is evidence of the intent that what follows the "or" is meant to be separate and independent from what preceded the "or." Consequently, the General Assembly clearly and unambiguously has authorized a board of supervisors to adopt a resolution granting to its members the same fringe benefits provided to all county employees. Furthermore, a board of supervisors may adopt a resolution granting its members the same fringe benefits provided to a lesser number of county employees in instances where different fringe benefits are provided to the different groups of county employees.

#### CONCLUSION

Accordingly, it is my opinion that § 15.2-1414.3(4) authorizes the board of supervisors to adopt a resolution granting its members, as a fringe benefit, family health insurance coverage that is the same as provided to the county's administrator and attorney.

<sup>1</sup> See *infra* "Applicable Law and Discussion."

<sup>2</sup> Section 2.2-505(B) requires that an opinion request from a county attorney "shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions." I

note that correspondence raising other issues in connection with this opinion request was received by this Office. As indicated, § 2.2-505(B) requires a county attorney to provide a memorandum of law in connection with his opinion request. This opinion addresses the legal question set forth in your request letter and accompanying memorandum.

<sup>3</sup>Nat'l Realty Corp. v. Va. Beach, 209 Va. 172, 175, 163 S.E.2d 154, 156 (1968).

<sup>4</sup>Bd. of Supvrs. v. Horne, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975).

<sup>5</sup>*Id.*

<sup>6</sup>Last v. Va. State Bd. of Med., 14 Va. App. 906, 910, 421 S.E.2d 201, 205 (1992).

<sup>7</sup>Barr v. Town & Country Props., Inc., 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990) (quoting Anderson v. Commonwealth, 182 Va. 560, 566, 29 S.E.2d 838, 841 (1944)).

<sup>8</sup>Adkins v. Commonwealth, 27 Va. App. 166, 169, 497 S.E.2d 896, 897 (1998) (quoting Birdsong Peanut Co. v. Cowling, 8 Va. App. 274, 277, 381 S.E.2d 24, 26 (1989) (quoting Brown v. Lukhard, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985))).

<sup>9</sup>Lampkins v. Commonwealth, 44 Va. App. 709, 717, 607 S.E.2d 722, 726 (2005) (refusing to find that, where two phrases were separated by “or,” first phrase modified second phrase); *see also* Smoot v. Commonwealth, 37 Va. App. 495, 501, 559 S.E.2d 409, 412 (2002) (noting that word “or” connects parts of sentence, but disconnects their meaning; disjunctive results in alternatives, which must be treated separately).

**OP. NO. 08-005**

**COUNTIES, CITIES AND TOWNS: INDUSTRIAL DEVELOPMENT AND REVENUE BOND ACT.**

**Dickenson County school bus driver is employee of School Board not employee of County; school bus driver may serve on Dickenson County Industrial Development Authority.**

THE HONORABLE CLARENCE E. “BUD” PHILLIPS  
 MEMBER, HOUSE OF DELEGATES  
 FEBRUARY 12, 2008

**ISSUES PRESENTED**

You ask whether an individual employed as a school bus driver by the Dickenson County School Board is also considered an employee of Dickenson County and, therefore, ineligible to serve on the Dickenson County Industrial Development Authority.

**RESPONSE**

It is my opinion that a school bus driver employed by the Dickenson County School Board is an employee of the School Board and not an employee of Dickenson County. It further is my opinion that such school bus driver is eligible to serve on the Dickenson County Industrial Development Authority.

**APPLICABLE LAW AND DISCUSSION**

Section 15.2-4904(C) provides that:

No director shall be an officer or employee of the locality except in towns under 3,500 people where members of the town governing body may serve as directors provided they do not comprise a majority of the board. Every director shall, at the time of his appointment and thereafter, reside in a locality within which the authority operates or in an adjoining locality. When a director

ceases to be a resident of such locality, the director's office shall be vacant and a new director may be appointed for the remainder of the term.

Section 15.2-102 defines "locality" to mean "a county, city, or town." "School board" means the school board that governs a school division.<sup>1</sup> Title 22 of the *Virginia Code* governs the hiring of school bus drivers by the school board.<sup>2</sup>

On numerous occasions, the Attorney General has determined that a school board essentially is a political subdivision.<sup>3</sup> As such, school boards are "separate juristic entit[ies]," and employees of a school board are not treated as employees of the county in which the school board is located.<sup>4</sup> Section 15.2-4904(C) specifically prohibits employees of a locality from serving on its industrial development authority; however, a locality is a county, city, or town.<sup>5</sup> Therefore, the prohibition in § 15.2-4904(C) is applicable to county employees and would not extend to employees of that county's school board.

#### CONCLUSION

Accordingly, it is my opinion that a school bus driver employed by the Dickenson County School Board is an employee of the School Board and not an employee of Dickenson County. It further is my opinion that such school bus driver is eligible to serve on the Dickenson County Industrial Development Authority.

<sup>1</sup>VA. CODE ANN. § 22.1-1 (2006).

<sup>2</sup>See, e.g., § 22.1-178 (2006).

<sup>3</sup>See 2006 Op. Va. Att'y Gen. 104, 106 and opinions cited therein.

<sup>4</sup>1985-1986 Op. Va. Att'y Gen. 198, 199; see also Op. Va. Att'y Gen.: 1976-1977 at 235, 236 (noting that although county school board is dependent on county board of supervisors for funding, it is separate entity); 1971-1972 at 457, 458 (noting that school board and board of supervisors are separate agencies).

<sup>5</sup>See VA. CODE ANN. § 15.2-102 (2003).

#### OP. NO. 08-058

#### COUNTIES, CITIES AND TOWNS: LOCAL CONSTITUTIONAL OFFICERS, COURTHOUSES AND SUPPLIES.

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

#### Authority for commissioner of revenue to have county employees placed under his supervision sworn as deputy commissioners of revenue.

THE HONORABLE RANDY N. WILLIAMS  
RUSSELL COUNTY COMMISSIONER OF REVENUE  
OCTOBER 15, 2008

#### ISSUE PRESENTED

You ask whether employees of the county assessor's office who are, by resolution of the board of supervisors, placed under your supervision may be sworn as deputy commissioners of the revenue.

**RESPONSE**

It is my opinion that employees of the county assessor’s office who are, by resolution of the board of supervisors, placed under your supervision may be sworn as deputy commissioners of the revenue.

**BACKGROUND**

You advise that, as the Russell County Commissioner of the Revenue, you requested that the Russell County Board of Supervisors (“Board”) pass a resolution placing the assessor’s office and all employees under the supervision and direction of your office. You relate that the Board unanimously passed the following resolution (“Resolution”):

WHEREAS, the function of the office of Real Estate Assessment supplements and provides necessary information concerning real estate values used by the Commissioner of the Revenue; and

WHEREAS, the employees of Real Estate Assessment are hired by the Russell County Board of Supervisors and employees of the constitutional office of the Commissioner of the Revenue are hired by the Commissioner of the Revenue; and

WHEREAS, the function of these offices is to provide an accurate valuation of real estate assessments and responsive answers to the citizens of Russell County.

NOW, THEREFORE, BE IT RESOLVED by the Russell County Board of Supervisors to designate that the Commissioner of the Revenue is hereby charged with supervision of the duties and responsibilities of the Real Estate Assessment Office.

Following receipt of the Resolution, you state that you requested the Russell County Clerk of the Circuit Court to swear in such employees, who are funded 100% by Russell County, as deputy commissioners. You related that the county administrator has requested that the employees be sworn as Russell County assessors/assistants and not as deputy commissioners.<sup>1</sup> You express the belief that as a result of the Resolution, these employees are employees of the Commissioner’s office; therefore, they are your deputies. You also state that it is your opinion that you should decide the title and duties of each such employee.

**APPLICABLE LAW AND DISCUSSION**

The commissioner of revenue (the “commissioner”) is a constitutional officer whose duties “shall be prescribed by general law or special act.”<sup>2</sup> The duties of commissioners are set out specifically in Article 1, Chapter 31 of Title 58.1, §§ 58.1-3100 through 58.1-3122.2, as well as generally in Titles 15.2 and 58.1.<sup>3</sup> Section 15.2-1603 provides that a commissioner “may ... appoint one or more deputies, who may discharge any of the official duties of [his] principal.” Prior opinions of the Attorney General conclude that the plain meaning of § 15.2-1603 “is to give the enumerated officers the discretionary power to appoint deputies.”<sup>4</sup> To implement this appointment,

§ 15.2-1603 provides that the commissioner “shall certify the appointment to the court in the clerk’s office of which the oath of the principal of such deputy is filed, and a record thereof shall be entered in the order book of such court.” Further, § 15.2-1603 provides that “[a]ny such deputy at the time his principal qualifies . . . or thereafter, and before entering upon the duties of his office, shall take and prescribe the oath [of office].” Because § 15.2-1603 authorizes a commissioner to appoint one or more deputies, the statute “provides the sole authority for the appointment of such deputies.”<sup>5</sup> Therefore, a commissioner, as a constitutional officer, has “the sole appointing power with respect to deputies and personnel under his supervision.”<sup>6</sup>

As a constitutional officer, a commissioner is independent of the control of the local governing body and, except as abrogated by statute, retains complete discretion in the day-to-day operations of the office, personnel matters, and the manner in which the duties of the office are performed.<sup>7</sup> Prior opinions of the Attorney General conclude that local governing bodies have no authority to supervise or intervene in the management and control of a constitutional officer’s duties.<sup>8</sup> These opinions support the long-standing rule that constitutional officers are independent of their respective localities’ management and control.<sup>9</sup> Furthermore, numerous prior opinions of the Attorney General conclude that the establishment of the working hours of constitutional officers is the direct responsibility of the officers themselves, subject to any controlling statute dealing directly with the matter.<sup>10</sup> In addition, Attorneys General consistently have opined that constitutional officers have exclusive control over the personnel policies of their offices.<sup>11</sup>

Chapter 32 of Title 58.1, §§ 58.1-3200 through 58.1-3389, comprehensively governs the assessment and reassessment of real estate for local taxation. Under Chapter 32, a local governing body has the option to provide for the assessment and reassessment of real estate as part of the operation of the local government by appointing a full-time real estate assessor or a board of assessors.<sup>12</sup> In the absence of an appointed assessing officer or officers, a commissioner is authorized to perform assessments as the local assessing officer.<sup>13</sup> Absent the consent of the commissioner, he is not required to make an annual or biennial assessment and equalization of real estate.<sup>14</sup>

In this instance, the Board unanimously adopted the Resolution that charges the commissioner with the supervision of the duties and responsibilities of the Real Estate Assessment Office. The common, ordinary meaning of the word “supervision” is “[t]he act of managing, directing, or overseeing persons or projects.”<sup>15</sup> The Board clearly has placed the function of assessment and reassessment of real estate within the office of the commissioner, as authorized by § 58.1-3270. The full-time employees of the Real Estate Assessment Office, although originally appointed by the Board, operate under the direct supervision and administration of the commissioner. A 1988 opinion concludes that the governing body has authority over the employment, including supervision and control, of a real estate assessor only when the assessor is appointed by the governing body and operates within the local government as

authorized by §§ 58.1-3253 and 58.1-3271.<sup>16</sup> Based on the above, it is my opinion that these assessors, in effect, operate as an employee of the commissioner. It further is my opinion that the commissioner may have the clerk of the circuit court swear in the employees of the assessor's office as deputy commissioners of the revenue.

#### CONCLUSION

Accordingly, it is my opinion that employees of the county assessor's office who are, by resolution of the board of supervisors, placed under your supervision may be sworn as deputy commissioners of the revenue.

<sup>1</sup>For the purposes of this opinion, I will assume that these employees are required to take an oath of office by virtue of the requirements for boards of supervisors pursuant to § 15.2-1512.

<sup>2</sup>VA. CONST. art. VII, § 4.

<sup>3</sup>See Op. Va. Att'y Gen.: 2005 at 157, 158; 2000 at 204, 205.

<sup>4</sup>Op. Va. Att'y Gen.: 1998 at 30, 31; 1982-1983 at 105, 105 (interpreting § 15.1-48, predecessor to § 15.2-1603); 1977-1978 at 466, 467 (interpreting § 15.1-48).

<sup>5</sup>1977-1978 Op. Va. Att'y Gen., *supra* note 4, at 467 (citing § 15.1-48 and noting that pursuant to § 14.1-51, predecessor to § 15.2-1636.8, Compensation Board determines salaries of constitutional officers); *see also* 1982-1983 Op. Va. Att'y Gen. 80, 81 (concluding that pursuant to § 14.1-141, Compensation Board determines number of deputies clerk may employ).

<sup>6</sup>1977-1978 Op. Va. Att'y Gen., *supra* note 4, at 467.

<sup>7</sup>See generally Op. Va. Att'y Gen.: 1985-1986 at 255, 255; *id.* at 219, 219; *id.* at 98, 98; 1984-1985 at 284, 284; *id.* at 72, 72; 1982-1983 at 128, 129; 1978-1979 at 289, 291.

<sup>8</sup>See, e.g., Op. Va. Att'y Gen.: 1993 at 59, 66-67 (concluding that county administrator may not require constitutional officer to agree to management or performance audit); 1989 at 71, 73 (concluding that there is no authority for board of supervisors to approve or deny purchases or change equipment specifications determined by constitutional officer); 1986-1987 at 69, 69 (concluding that commissioner has exclusive control over personnel policies of office); 1978-1979 at 289, 291-92 (concluding that treasurer is not subject to control of board of supervisors in determining what tax collection methods to employ); *id.* at 237, 237-38 (concluding that board of supervisors may not compel constitutional officer to assume additional duties not imposed by statute, although officer may agree to accept such duties voluntarily); 1976-1977 at 46, 47 (concluding that county government may not investigate personnel practices of constitutional officer).

<sup>9</sup>See, e.g., 1993 Op. Va. Att'y Gen., *supra* note 8, at 67.

<sup>10</sup>See Op. Va. Att'y Gen.: 1984-1985, *supra* note 7, at 72; 1974-1975 at 538, 539; 1971-1972 at 448, 448; 1967-1968 at 295, 296.

<sup>11</sup>See Op. Va. Att'y Gen.: 1985-1986 at 98, 98; 1984-1985, *supra* note 7, at 72-73; 1982-1983 at 107, 107-08.

<sup>12</sup>See VA. CODE ANN. § 58.1-3253(A) (Supp. 2008) (discussing role of full-time real estate appraiser or assessor relating to biennial reassessment); § 58.1-3271 (Supp. 2008) (authorizing appointment of board of real estate assessors or real estate appraiser to conduct annual or biennial assessment); Op. Va. Att'y Gen.: 1984-1985 at 304, 304 (interpreting § 58-778.1, predecessor to § 58.1-3253, and concluding that governing body may establish real estate assessment department to conduct biennial assessment); *id.* at 305, 306 n.1 (interpreting § 58-778.1 and concluding that governing body may employ full-time appraiser or assessor to conduct biennial assessment).

<sup>13</sup>See 1982-1983 Op. Va. Att'y Gen. 546, 547.

<sup>14</sup>See § 58.1-3270 (2004) (referencing annual and biennial assessment under § 58.1-3253).

<sup>15</sup>BLACK'S LAW DICTIONARY 1479 (8th ed. 2004). The word "supervision" also means "[t]he act, process, or occupation of supervising: direction, inspection, and critical evaluation: OVERSIGHT." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2296 (1993).

<sup>16</sup>See 1987-1988 Op. Va. Att'y Gen. 522, 524 (noting that facts indicate governing body appointed assessor to operate under administration of commissioner)

**OP. NO. 08-037**

**COUNTIES, CITIES AND TOWNS: LOCAL CONSTITUTIONAL OFFICERS, COURTHOUSES AND SUPPLIES – COURTHOUSES.**

**Statutory power and authority for board of supervisors (governing body) to assign office space in courthouse for offices that are not necessary for use and occupancy of circuit court.**

SCOT S. FARTHING  
WYTHE COUNTY ATTORNEY  
JUNE 16, 2008

**ISSUE PRESENTED**

You ask whether the Wythe County Board of Supervisors has the statutory power and authority to assign office spaces within the County courthouse complex.<sup>1</sup>

**RESPONSE**

It is my opinion that the Wythe County Board of Supervisors has the statutory power and authority to assign office spaces within the County courthouse complex for any offices that are not necessary for the use and occupancy of the circuit court.

**BACKGROUND**

You relate that the Wythe County courthouse complex contains three buildings: (1) the old courthouse building; (2) the circuit court and circuit court clerk's office building; and (3) the general district court and sheriff's office building. The County constitutional officers, the circuit court, general district court, and juvenile and domestic relations district court are located within this courthouse complex. The Board has supervised the remodeling of the courthouse complex buildings to modernize the office space and provide better utilization of the space for different offices. You advise that the Board is contemplating the relocation of the Commonwealth attorney's office. Further, you relate that the circuit court judge verbally has directed that no offices are to be relocated without his approval and before a security study is completed. You indicate that the Board does not believe the circuit court judge is authorized to control the use of the courthouse complex other than the circuit courtroom area.

**APPLICABLE LAW AND DISCUSSION**

Section 15.2-1638 provides that "[t]he governing body of every county and city shall provide courthouses with suitable space and facilities." Additionally, § 15.2-1638 requires that the cost of a courthouse "and [that] of keeping the same in good order, shall be chargeable to the county or city." Section 15.2-1639 provides in part:

The governing body of each county and city shall, if there are offices in the courthouses of the respective counties and cities available for such purposes, provide offices for the treasurer, attorney for the Commonwealth, sheriff, commissioner of the revenue, commissioner of accounts and division superintendent of schools for such county or city.

The use of the word “shall” in statutes generally indicates that the procedures are intended to be mandatory.<sup>2</sup> Because the statute does not define the term “courthouse,” it is necessary to employ the general definition of that word.<sup>3</sup> “[A] ‘courthouse’ is defined in part as ‘the principal building in which county offices are housed and in which county administrative affairs are conducted.’”<sup>4</sup> The description of the Wythe County courthouse complex that you provide fits clearly within this general definition.

The Supreme Court of Virginia has considered whether the governing body (a board of supervisors or a city council) possesses the statutory power and authority to relocate the offices utilized by constitutional officers.<sup>5</sup> The Court concluded that a circuit court has control over the assignment of space in the area of the courthouse building necessary for the use and occupancy of the circuit court.<sup>6</sup> Furthermore, the Court concluded that the governing body “has control of the use and occupancy of all other areas of the [courthouse] building.”<sup>7</sup> Therefore, I must conclude that the Wythe County Board of Supervisors has control of the use and occupancy of all areas of the County courthouse complex that are not necessary for the use and occupancy of the circuit court. In addition, the Board has the statutory power and authority to assign office spaces within the buildings in the complex in which county offices are housed and in which county administrative affairs are conducted.

#### CONCLUSION

Accordingly, it is my opinion is my opinion that the Wythe County Board of Supervisors has the statutory power and authority to assign office space within the County courthouse complex for any offices that are not necessary for the use and occupancy of the circuit court.

<sup>1</sup>You describe the courthouse complex as a group of buildings that are interconnected by corridors.

<sup>2</sup>See *Andrews v. Shepherd*, 201 Va. 412, 414, 111 S.E.2d 279, 281-82 (1959); *Op. Va. Att’y Gen.*: 2004 at 168, 169; 1994 at 64, 68.

<sup>3</sup>See *Hoffman Family, L.L.C. v. Alexandria*, 272 Va. 274, 284, 634 S.E.2d 722, 727 (2006); *McKeon v. Commonwealth*, 211 Va. 24, 27, 175 S.E.2d 282, 284 (1970).

<sup>4</sup>*Tullidge v. Bd. of Supvrs.*, 239 Va. 611, 614, 391 S.E.2d 288, 290 (1990) (quoting WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 523 (1986)).

<sup>5</sup>*Bd. of Supvrs. v. Bacon*, 215 Va. 722, 214 S.E.2d 137 (1975) (interpreting § 15.1-258, predecessor to § 15.2-1639); *Egerton v. City of Hopewell*, 193 Va. 493, 69 S.E.2d 326 (1952) (interpreting § 15-689, predecessor to § 15.2-1639).

<sup>6</sup>See *Bacon*, 215 Va. at 724, 214 S.E.2d at 138.

<sup>7</sup>*Id.*; see also *Egerton*, 193 Va. at 501, 69 S.E.2d at 331 (holding that city council has right to control use and occupancy of that part of municipal building not appointed to circuit court and may assign use of office space therein). I also note that a county is required to “provide suitable quarters” for the general district and juvenile and domestic relations district courts, but the manner in which the county provides such quarters appears to be within the purview of the locality. See VA. CODE ANN. § 16.1-69.50 (2003).

OP. NO. 08-106

COUNTIES, CITIES AND TOWNS: LOCAL GOVERNMENT PERSONNEL, QUALIFICATION FOR OFFICE, BONDS, DUAL OFFICE HOLDING AND CERTAIN LOCAL GOVERNMENT OFFICERS – QUALIFICATIONS; ELIGIBILITY, ETC., OF LOCAL ELECTED OFFICERS.

Member of Town Council of Town of Front Royal elected as mayor vacated position as Town Council member upon taking oath of office and qualifying as mayor.

THE HONORABLE DENNIS LEE HUPP  
JUDGE, TWENTY-SIXTH JUDICIAL CIRCUIT  
DECEMBER 11, 2008

#### ISSUE PRESENTED

You ask whether an elected member of the Town Council of the Town of Front Royal vacated his position on the Town Council upon qualifying as mayor and taking the oath of office for his elected position as mayor of the Town.

#### RESPONSE

It is my opinion that the member of Town Council of the Town of Front Royal who was elected as mayor of the Town vacated his position as a member of the Town Council upon taking the oath of office and qualifying as mayor.

#### BACKGROUND

You advise that the Town Council of the Town of Front Royal (“Town Council”) consists of six members and the mayor. The mayor does not have a vote, except as a tiebreaker. In May 2008, a Town Council member was elected to be the mayor of the Town of Front Royal (“Front Royal”). On June 25, 2008, the mayor-elect qualified as mayor by taking the oath of office for the term commencing on July 1, 2008 and expiring on June 30, 2010.

#### APPLICABLE LAW AND DISCUSSION

Section 6 of the Charter of the Town of Front Royal (the “Charter”) provides, in part, that:

On the first Tuesday in May, nineteen hundred ~~seventy-six-~~*ninety-four*, and every two years thereafter, there shall be elected by the qualified voters of the Town of Front Royal, a mayor, who shall be one of the electors of the town, and whose term of office shall begin on the first day of July succeeding his election and continue for two years thereafter, and until his duly elected successor has qualified.<sup>[1]</sup>

In addition, § 7 of the Charter provides that “[a]ll municipal officers of the town, before entering upon the duties of their respective offices, shall be sworn in accordance with the laws of the State by anyone authorized to administer oaths under the laws of the State.”<sup>2</sup> The mayor presides at the meetings of council; however, the mayor has no right to vote in the Town Council except as a tiebreaker.<sup>3</sup>

Section 15.2-1522 sets forth the general law regarding qualification of town officers:

Every elected ... town ... officer, unless otherwise provided by law, on or before the day on which his term of office begins, shall qualify by taking the oath prescribed by § 49-1 and give the bond, if any, required by law, before the circuit court for the county or city, having jurisdiction in the ... town ... for which he is elected or appointed, or before the clerk of the circuit court for such ... town .... However, members of governing bodies and elected school boards may qualify up to and including the day of the initial meeting of the new governing body or elected school board.

Any such oath of ... town mayors ... may be taken before any officer authorized by law to administer oaths. Such oath shall be returned to the clerk of the council of the town, who shall enter the same record on the minute book of the council[.]

The Charter is clear that the mayor, while serving as the presiding officer of the Town Council, is not a member of the Council. Section 10 of the Charter provides that “[t]he council of the town shall be composed of ... *six members*.”<sup>4</sup> Section 8 of the Charter provides that the mayor has no vote on questions before the Town Council, except in the case of a tie.<sup>5</sup> In the event of the mayor’s death, § 9 provides that the Council “shall choose one of the councilmen or some other qualified voter of the Town of Front Royal.”<sup>6</sup> Therefore, the Town Council is not limited to its own membership in choosing a mayor, but may select any qualified voter of Front Royal. It is clear that the Charter does not contemplate that a Town Council member chosen as mayor may serve in that capacity while retaining a seat on the Council. Therefore, it is my opinion that when a person is elected as mayor of Front Royal and qualifies by taking the oath of that office, his Town Council seat effectively is terminated by operation of law.

The Supreme Court of Virginia has held that an officeholder who becomes incapable of holding his office by virtue of acting in an incompatible office ceases to hold the first office; a subsequent resignation from the second incompatible office does not restore him to the first office.<sup>7</sup> Additionally, the Court has held that a county officer who moves to another state intending to establish residence in that state has thereby effectively resigned from his county office.<sup>8</sup> Further, if such officer returns to the county where he previously held office, he has no right to resume that office.<sup>9</sup>

Therefore, it is clear that taking the oath of office as mayor of Front Royal vacates the prior office as a Town Council member. Thus, on June 25, 2008, the day that the mayor-elect qualified as mayor by taking the oath of office as mayor of Front Royal, a vacancy occurred on the Town Council that must be filled by election or appointment.<sup>10</sup>

#### CONCLUSION

Accordingly, it is my opinion that the member of Town Council of the Town of Front Royal who was elected as mayor of the Town vacated his position as a member of the Town Council upon taking the oath of office and qualifying as mayor.

<sup>1</sup> See 1993 Va. Acts ch. 479, at 572, 573. The charter for the Town of Front Royal was enacted in 1937. See 1936-7 Va. Acts ch. 44, at 142. While § 6 of the charter was amended in 1993, the provision in § 6 concerning the filling of a vacancy on the town council remains essentially the same as originally enacted in 1937. Compare 1993 Va. Acts, *supra* at 573 (amending portions of § 6) with 1936-7 Va. Acts, *supra*, at 144 (enacting § 6).

<sup>2</sup> 1936-7 Va. Acts, *supra* note 1, at 144.

<sup>3</sup> See *id.*, § 8, at 144.

<sup>4</sup> 1993 Va. Acts, *supra* note 1, at 573; see also *id.*, § 4, at 572 (“The municipal officers of said town shall ... consist of a mayor [and] four councilmen .... [T]hereafter, the number of councilmen shall be six.”).

<sup>5</sup> 1936-7 Va. Acts, *supra* note 1, at 144.

<sup>6</sup> *Id.* at 145.

<sup>7</sup> *Shell v. Cousins*, 77 Va. 328, 331-32 (1883), *quoted in* *Dean v. Paolicelli*, 194 Va. 219, 236, 72 S.E.2d 506, 516-17 (1952); see also *Bunting v. Willis*, 68 Va. (27 Gratt.) 144, 161-62 (1876) (holding that by acting in capacity of second office, individual ceased to be sheriff and “throwing off” second office could not restore him to office).

<sup>8</sup> *Poulson v. Justices of Accomac*, 29 Va. (2 Leigh) 804, 805 (1830) (citing *Chew v. Justices of Spottsylvania*, 4 Va. (2 Va. Cas.) 208, 209 (1820)).

<sup>9</sup> *Id.*

<sup>10</sup> This opinion is consistent with the conclusion expressed in a prior opinion of the Attorney General. See 1990 Op. Va. Att’y Gen. 57.

#### OP. NO. 08-038

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

Preliminary subdivision plat must show all sections or phases of development at time local planning commission approves plat to invoke five-year period of validity. County planning department approval of subdivision construction plat showing phased or sectioned development does not operate as governmental approval as phased or sectioned development where approved preliminary plat did not show such development; § 15.2-2241(5) is not applicable to such plat. Section 15.2-2260(G) adds to existing validity period for preliminary plats for multiple phase developments where final plat is recorded; when such preliminary plat does not show phased or sectioned development, five-year validity period is not cumulative. Approved preliminary plat is extended for one five-year period from date of latest recorded subdivision plat of property. Underlying preliminary subdivision plat ‘for a multiple phase development’ remains immune from subdivision and zoning ordinance changes for period of five years from time approved final subdivision plat ‘for all or a portion of the property of a multiple phase development is recorded.’ Section 15.2-2260(G) applies only to underlying preliminary plat that was approved as multiple phase development. Deadlines in §§ 15.2-2241 and 15.2-2260 or enacted in local ordinances must be strictly construed; locality may not waive or extend such deadlines.

THE HONORABLE WILLIAM J. HOWELL  
SPEAKER, HOUSE OF DELEGATES  
AUGUST 26, 2008

#### ISSUE PRESENTED

You ask several questions regarding § 15.2-2260(G), a statute relating to local subdivision ordinances, as enacted by the 2008 Session of the General Assembly<sup>1</sup> and added to the enabling statutes governing subdivisions in Article 6, Chapter 22 of Title 15.2, §§ 15.2-2240 through 15.2-2279 (“Article 6”).

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**BACKGROUND**

You present a situation where a developer intends to subdivide “Blackacre.” You state that the developer submitted a preliminary subdivision plat for county approval that contained 189 lots. The proposed preliminary plat did not show or indicate that the development was a multiple phase development or that there were specified sections for the development. You state that the county planning commission approved the preliminary plat on July 24, 2003. On January 13, 2005, the developer submitted a final plat, entitled “Blackacre, Section 1,” for only 28 of the 189 lots.

Along with the plat, the developer submitted a construction plan showing the 189-lot subdivision divided into 7 sections with 28 lots shown as Section 1. Additionally, you state that the county planning commission approved the 28-lot plat, which was recorded on January 3, 2007, after the developer posted the surety required by the county subdivision ordinance. You relate that the developer took no further action until January 2008, when he requested a determination regarding the vesting of the preliminary subdivision plat.

The county planning department informed the developer that his preliminary plat is valid for five years from the date of approval, or until July 24, 2008, pursuant to § 15.2-2260. You state that the developer has challenged the planning director’s determination claiming the preliminary subdivision plat should be valid for five years from the date he recorded the 28-lot Section 1 plat, or until January 3, 2012, pursuant to § 15.2-2241(5). Furthermore, the developer advises that pursuant to § 15.2-2260(G), which became effective July 1, 2008, the preliminary plat is entitled to an additional five years of validity every time he records a final plat of a subsequent section. The developer’s position effectively could extend the validity of the preliminary plat for 35 years from the date the first section was recorded.

**APPLICABLE LAW AND DISCUSSION**

As a preliminary matter applicable to all of your questions and in accord with the rule of statutory construction *in pari materia*,<sup>2</sup> statutory provisions are not to be considered as isolated fragments of law. Such provisions are to be considered as a whole, or as parts of a greater connected, homogeneous system of laws, or a single and complete statutory compilation.<sup>3</sup> Statutes *in pari materia* are considered as if they constituted but one act, so that sections of one act may be considered as though they were parts of the other act.<sup>4</sup>

“[A]s a general rule, where legislation dealing with a particular subject consists of a system of related general provisions indicative of a settled policy, new enactments of a fragmentary nature on that subject are to be taken as intended to fit into the existing system and to be carried into effect conformably to it, and they should be so construed as to harmonize the general tenor or purport of the system and make the scheme consistent in all its parts and uniform in its operation, unless a different purpose is shown plainly or with

irresistible clearness. It will be assumed or presumed, in the absence of words specifically indicating the contrary, that the legislature did not intend to innovate on, unsettle, disregard, alter or violate a general statute or system of statutory provisions the entire subject matter of which is not directly or necessarily involved in the act.<sup>51</sup>

#### QUESTION 1

First, you ask whether a preliminary subdivision plat must show all sections or phases of a development at the time the local planning commission approves the preliminary plat to make the extended validity provisions contained in § 15.2-2241(5) applicable to such plat.

Section 15.2-2241 provides that “[a] subdivision ordinance shall include reasonable regulations and provisions that apply to or provide” and subsection 5 provides, in part, that:

If a developer records a final plat which may be a section of a subdivision as shown on an approved preliminary subdivision plat and furnishes to the governing body a certified check, cash escrow, bond, or letter of credit in the amount of the estimated cost of construction of the facilities to be dedicated within said section for public use and maintained by the locality, the Commonwealth, or other public agency, the developer shall have the right to record the remaining sections shown on the preliminary subdivision plat for a period of five years from the recordation date of the first section, or for such longer period as the local commission or other agent may, at the approval, determine to be reasonable, taking into consideration the size and phasing of the proposed development, subject to the terms and conditions of this subsection and subject to engineering and construction standards and zoning requirements in effect at the time that each remaining section is recorded.

The quoted language of § 15.2-2241(5) is clear and unambiguous and addresses the filing of final plats of sections of a subdivision “as shown on an approved preliminary subdivision plat.” Furthermore, the clear language of § 15.2-2241(5) provides that “the developer shall have the right to record *the remaining sections shown on the preliminary subdivision plat.*” (Emphasis added.) “Where a statute is unambiguous, the plain meaning is to be accepted without resort to the rules of statutory interpretation.”<sup>6</sup> Clearly, the preliminary subdivision plat is required to show all sections of the proposed development at the time the local planning commission approves the plat for the developer to benefit from the extended validity provision of § 15.2-2241(5).

Therefore, it is my opinion that a preliminary subdivision plat must show all sections or phases of development at the time it is approved by a local planning commission for the developer to benefit from the five-year period of validity pursuant to § 15.2-2241(5).

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**QUESTION 2**

Next, you present a situation where the county planning commission has approved a preliminary subdivision plat that does not show a phased or sectioned development. You ask whether subsequent approval by the county planning department of the construction plan for such subdivision that shows phased or sectioned development equates to government approval of the subdivision as a phased or sectioned development thereby making § 15.2-2241(5) applicable to the preliminary subdivision plat.

The power of a local governing body, unlike that of the General Assembly, “must be exercised pursuant to an express grant”<sup>7</sup> because the powers of a county “are limited to those conferred expressly or by necessary implication.”<sup>8</sup> Thus, the powers of a local planning department acting under the authority of either a local planning commission or a local governing body are also fixed by statute and are limited to those powers granted expressly or by necessary implication and those that are essential and indispensable.<sup>9</sup>

County zoning and subdivision ordinances are legislatively enacted.<sup>10</sup> Therefore, “waiver of any provision thereof, or delegation to subordinate officials to waive any such provision, likewise must come by legislation; there can be no implicit waiver or implicit delegation of such authority.”<sup>11</sup> Article 6 contains Virginia’s subdivision enabling statutes and is replete with express grants of powers to local governing bodies and their authorized agents to administer and enforce subdivision regulations.<sup>12</sup> I find no statutory authority that empowers a county planning department to bind the governing body of a county by implication.

Therefore, it is my opinion that subsequent approval by the county planning department of a subdivision construction plan that shows phased or sectioned development does not operate as governmental approval as a phased or sectioned development where the approved preliminary subdivision plat did not show a phased or sectioned development. Consequently, it is my opinion that § 15.2-2241(5) would not be applicable to such preliminary plat.

**QUESTION 3**

Next, you inquire concerning application of § 15.2-2260(G) as enacted by the 2008 Session of the General Assembly.<sup>13</sup> You ask whether approval by a locality of a preliminary subdivision plat that does not identify a phased or sectioned development provides the subdivider with the right to successive five-year periods of extension each time he records a final plat of a portion or section of that subdivision.

Section 15.2-2260(G) provides that:

Once an approved final subdivision plat for all or a portion of the property of a multiple phase development is recorded pursuant to § 15.2-2261, the underlying preliminary plat shall remain valid for a period of five years from the date of the latest recorded plat of subdivision for the property.

The primary goal of statutory interpretation is to interpret statutes in accordance with the legislature's intent and to construe them in a manner that gives effect to such intent.<sup>14</sup> Legislative intent "must be gathered from the words used, unless a literal construction would involve a manifest absurdity."<sup>15</sup> The entire statutory provision must be reviewed to ascertain legislative intent.<sup>16</sup>

A 2006 Opinion of the Attorney General<sup>17</sup> concludes that pursuant to § 15.2-2260(F), when a preliminary subdivision plat is approved by the local planning commission, or its agent, the plat is valid for a period of five years, provided the subdivider meets the conditions required by the statute. The conditions are that the subdivider must submit a final plat for at least a portion of the property within one year of the approval or such longer period as prescribed by local ordinance.<sup>18</sup> Another 2006 opinion concludes that pursuant to § 15.2-2260(F) the approval of a preliminary subdivision plat expires after the passing of one year when the subdivider or developer fails either to submit a final plat for at least a portion of the property within one year of the approval of the preliminary subdivision plat, or such longer period as prescribed by local ordinance, or diligently pursues approval of the final subdivision plat.<sup>19</sup>

The General Assembly is presumed to have knowledge of and acquiesce in the Attorney General's interpretation of a statute when no corrective amendments are thereafter enacted.<sup>20</sup> Section 15.2-2260(F) concerns preliminary subdivision plats submitted for approval while § 15.2-2260(G) concerns preliminary subdivision plats for multiple phase developments in relation to the recordation of final subdivision plats for such developments. Section 15.2-2260(G) adds to the existing validity period for preliminary subdivision plats for multiple phase developments in circumstances where a final subdivision plat is recorded. However, in cases where the preliminary subdivision plat did not show a phased or sectioned development, it is my opinion that the validity period of five years may not be read to be cumulative.<sup>21</sup> Therefore, I answer your inquiry in the negative.<sup>22</sup>

#### QUESTION 4

Depending on the size of the subdivision shown on an approved preliminary subdivision plat, you ask whether the language of § 15.2-2260(G) gives a developer multiple five-year periods in which to record any and all remaining portioned or sectioned final plats. Subsection G begins with the statutory condition precedent phrase "[o]nce an approved final subdivision plat for all or a portion of the property" for establishing the five-year validity period for an underlying preliminary plat. The phrase "from the date of the latest recorded plat of subdivision for the property" refers to the "final subdivision plat" contained in the opening statutory condition precedent phrase.

It is my opinion that the plain meaning of the words used in § 15.2-2260(G) is that the approved preliminary subdivision plat is extended for only one five-year period from the date of the latest recorded plat of subdivision for the property.<sup>23</sup>

## QUESTION 5

Regardless of the number of “final” plats that may be approved and recorded in relation to an approved preliminary subdivision plat, you next ask whether § 15.2-2260(G) intends that all such plats are vested regardless of the time that has lapsed. Further, you ask whether such plats are protected from any subsequent changes in the subdivision and zoning ordinances. The clear language of § 15.2-2260(G) pertains to “the underlying preliminary plat.” The five-year period of validity begins only “[o]nce an approved final subdivision plat for all or a portion of the property of a multiple phase development is recorded.”<sup>24</sup>

Accordingly, it is my opinion that it is the underlying preliminary subdivision plat “for a multiple phase development” that remains immune from changes in a subdivision and zoning ordinance for a period of five years from the time an approved final subdivision plat “for all or a portion of the property of a multiple phase development is recorded.”<sup>25</sup>

## QUESTION 6

You also ask whether the term “multiple phase development” in § 15.2-2260(G) limits the vesting period for a preliminary plat to only those preliminary plats that are submitted and approved by a locality’s planning commission as multiple phase developments. The meaning of doubtful words in a statute may be determined by reference to their association with related words and phrases. Thus, according to the maxim *noscitur a sociis*,<sup>26</sup> “the meaning of a word takes color and expression from the purport of the entire phrase of which it is a part, and it must be read in harmony with its context.”<sup>27</sup> The unambiguous language of § 15.2-2260(G) provides that recordation of “an approved final subdivision plat for *all or a portion* of the property of a multiple phase development” validates the “underlying preliminary plat” for a period of five years. (Emphasis added.)

Therefore, it is my opinion that § 15.2-2260(G) applies only to an underlying preliminary plat that was approved as a multiple phase development.

## QUESTION 7

Finally, you ask whether the time deadlines established in §§ 15.2-2241 and 15.2-2260 regarding approval and validity of preliminary subdivision plats are to be strictly construed. The General Assembly, “in providing for local control of land subdivision, delegated to each locality a portion of the police power of the [Commonwealth].”<sup>28</sup> Unlike the General Assembly, however, the “powers of boards of supervisors are fixed by statute and are only such as are conferred expressly or by necessary implication.”<sup>29</sup> This means that localities, “in the exercise of their powers, may validly act only within the authority conferred upon them.”<sup>30</sup>

Therefore, it is my opinion that the deadlines set forth in §§ 15.2-2241 and 15.2-2260 or enacted in local ordinances must be strictly construed. Accordingly, a locality does not have the ability to waive or extend such deadlines in matters where the

subdivider can show that application of the statutorily imposed deadlines would be fundamentally unfair given the circumstances that led to his failure to meet such deadlines for obtaining approval for the recording final plats.

<sup>1</sup>2008 Va. Acts. ch. 426, available at <http://leg1.state.va.us/cgi-bin/legp504.exe?081+ful+CHAP0426+pdf>.

<sup>2</sup>“*In para materia*” is the Latin phrase meaning “[o]n the same subject; relating to the same matter.” BLACK’S LAW DICTIONARY 807 (8th ed. 2004).

<sup>3</sup>See *Moreno v. Moreno*, 24 Va. App. 190, 198, 480 S.E.2d 792, 796 (1997).

<sup>4</sup>*Id.*

<sup>5</sup>*Prillaman v. Commonwealth*, 199 Va. 401, 405-06, 100 S.E.2d 4, 7 (1957) (quoting 50 AM. JUR., *Statutes*, § 349, at 345-47, quoted in *Washington v. Commonwealth*, 46 Va. App. 276, 298, 616 S.E.2d 774, 785 (2005) (Benton, J. & Fitzpatrick, C.J., dissenting)); see also *Smith v. Kelley*, 162 Va. 645, 651, 174 S.E. 842, 845 (1934) (noting that in absence of words to contrary, legislature did not intend to alter or repeal general statute or system).

<sup>6</sup>*Last v. Va. State Bd. of Med.*, 14 Va. App. 906, 910, 421 S.E.2d 201, 205 (1992).

<sup>7</sup>*Nat’l Realty Corp. v. Va. Beach*, 209 Va. 172, 175, 163 S.E.2d 154, 156 (1968).

<sup>8</sup>*Bd. of Supvrs. v. Horne*, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975).

<sup>9</sup>*Ticonderoga Farms, Inc. v. County of Loudoun*, 242 Va. 170, 173-74, 409 S.E.2d 446, 448 (1991).

<sup>10</sup>*Dick Kelly Enters. v. Norfolk*, 243 Va. 373, 382, 416 S.E.2d 680, 685 (1992); see also *Commonwealth v. Washington Gas Light Co.*, 221 Va. 315, 323, 269 S.E.2d 820, 825 (1980) (noting that power of State Corporation Commission to compromise and settle is not power to waive and exempt; refusing to find that Commission may imply authority to waive gross receipts when General Assembly did not expressly grant such authority). Neither waiver nor estoppel may be raised to bar the government from exercising its governmental functions when it acts in a governmental capacity. *Gwinn v. Alward*, 235 Va. 616, 621, 369 S.E.2d 410, 413 (1988); *Bd. of Supvrs. v. Booher*, 232 Va. 478, 481, 352 S.E.2d 319, 321 (1987); *McMahon v. Va. Beach*, 221 Va. 102, 108, 267 S.E.2d 130, 134 (1980); *Segaloff v. Newport News*, 209 Va. 259, 261, 163 S.E.2d 135, 137 (1968); *Main v. Dep’t of Highways*, 206 Va. 143, 150, 142 S.E.2d 524, 529 (1965).

<sup>11</sup>*Dick Kelly Enterprises*, 243 Va. at 382, 416 S.E.2d at 685.

<sup>12</sup>See, e.g., VA. CODE ANN. § 15.2-2245(A) (2008) (granting power to act on performance bonds); § 15.2-2254(2) (2003) (granting power to approve plats for recordation); § 15.2-2258 (2008) (granting power of planning commission to act on subdivision plans); §§ 15.2-2259, 15.2-2260, 15.2-2261(B)(1), 15.2-2271(1) (2008) (granting various powers of governing body regarding plats).

<sup>13</sup>See *supra* note 1.

<sup>14</sup>See *Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983); 1999 Op. Va. Att’y Gen. 198, 198.

<sup>15</sup>*Watkins v. Hall*, 161 Va. 924, 930, 172 S.E. 445, 447 (1934) (quoting *Floyd v. Harding*, 69 Va. (28 Gratt.) 401, 405 (1877)).

<sup>16</sup>See *Herndon v. St. Mary’s Hospital, Inc.*, 266 Va. 472, 476, 587 S.E.2d 567, 569 (2003) (“In ascertaining legislative intent, we will not single out a particular term or phrase in a statute. Instead, we will construe the words and terms at issue in the context of all the language contained in the statute.”); *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 to give effect to its component parts).

<sup>17</sup>2006 Op. Va. Att’y Gen. 75, 78.

<sup>18</sup>*Id.*

<sup>19</sup>2006 Op. Va. Att’y Gen. 71.

<sup>20</sup>See *Lee Gardens Arlington Ltd. P’ship v. Arlington County Bd.*, 250 Va. 534, 540, 463 S.E.2d 646, 649 (1995); 1996 Op. Va. Att’y Gen. 123, 124 n.4.

<sup>21</sup> See *supra* “Questions 1 and 2” and discussion therein.

<sup>22</sup> Since the fact situation you present, as contained in the “Background” section of this opinion, concerns a preliminary subdivision plat that does not show a phased or sectioned development, I answer your question based on that fact. However, you also ask concerning application of § 15.2-2260(G) where the approved preliminary subdivision plat *does* show a phased or sectioned development. In that factual situation, it is my opinion that the recordation of a final subdivision plat for all or a portion of the property of such phased or sectioned development would invoke subsection G and extend the validity period of the preliminary subdivision plat for a period of five years from the latest recorded plat provided all other requirements concerning preliminary and final plats are met. For example, assuming a preliminary subdivision plat for a phased development containing four sections is approved July 1, 2008, such preliminary plat is then valid under § 15.2-2260(F) until July 1, 2009. At that time, an approved final plat of all or a portion of the sections must be recorded. Assuming an approved final plat for Section 1 is recorded by July 1, 2009, the underlying preliminary plat is now valid until July 1, 2014. Assuming the approved final plat for Section 2 is recorded by July 1, 2014, the preliminary plat is now valid until July 1, 2019, etc. Should the approved final plat for Section 2 be recorded on May 1, 2012, the preliminary plat would be valid until May 1, 2017, and for like periods for the remaining sections.

<sup>23</sup> See *supra* note 22 and accompanying text.

<sup>24</sup> Section 15.2-2260(G) (2008).

<sup>25</sup> *Id.*

<sup>26</sup> “The meaning of a word ... takes color and expression from the purport of the entire phrase of which it is a part, and it must be construed so as to harmonize with the context as a whole.” *Kohlberg v. Va. Real Estate Comm’n*, 212 Va. 237, 239, 183 S.E.2d 170, 172 (1971) (explaining doctrine of *noscitur a sociis*). “[I]t is known by its associates.” BLACK’S LAW DICTIONARY, *supra* note 2, at 1087 (noting Latin derivation of *noscitur a sociis*); see also *Va. Beach v. Bd. of Supvrs.*, 246 Va. 233, 236-37, 435 S.E.2d 382, 384 (1993) (noting that words in statute are construed according to context in which they are used and by considering language used in statute and in other statutes dealing with closely related subjects).

<sup>27</sup> *Andrews v. Am. Health & Life Ins. Co.*, 236 Va. 221, 225, 372 S.E.2d 399, 401 (1988) (quoting *Turner*, 226 Va. at 460, 309 S.E.2d at 339).

<sup>28</sup> *National Realty*, 209 Va. at 174-75, 163 S.E.2d at 156; see also *Bd. of Supvrs. v. Georgetown Land Co.*, 204 Va. 380, 383, 131 S.E.2d 290, 292 (1963) (noting that enactment of Land Subdivision Act has delegated portion of police power of Commonwealth to localities).

<sup>29</sup> *Gordon v. Bd. of Supvrs.*, 207 Va. 827, 832, 153 S.E.2d 270, 274 (1967); *Johnson v. County of Goochland*, 206 Va. 235, 237, 142 S.E.2d 501, 502 (1965).

<sup>30</sup> *Sydnor Pump & Well Co. v. Taylor*, 201 Va. 311, 316, 110 S.E.2d 525, 529 (1959), quoted in *Segaloff*, 209 Va. at 261, 163 S.E.2d at 137.

## OP. NO. 08-025

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

**Section 15.2-2311 does not specifically describe type of notice required of local zoning administrator. Any person who denied some personal or property right, legal or equitable, or upon whom burden or obligation is imposed must receive written notice or order of zoning violation. Such notice or order must inform recipient of right to appeal within thirty days; decision is final unless appealed within thirty-day period.**

THE HONORABLE MARK L. COLE  
MEMBER, HOUSE OF DELEGATES  
JUNE 16, 2008

**ISSUE PRESENTED**

You inquire regarding the type of notice required of a local zoning administrator pursuant to § 15.2-2311(A) and to whom the zoning administrator must provide such notice.

**RESPONSE**

It is my opinion that § 15.2-2311(A) does not specifically describe the type of notice required of the local zoning administrator. It further is my opinion that any person who by virtue of a zoning violation is denied some personal or property right, legal or equitable, or upon whom a burden or obligation is imposed must receive a written notice or order of the violation. Finally, it is my opinion that such notice or order must include a statement informing the recipient of his right to appeal the notice or written order within thirty days and that the decision is final and unappealable if not so appealed in thirty days.

**APPLICABLE LAW AND DISCUSSION**

Section 15.2-2311 is a part of Article 7, Chapter 22 of Title 15.2, §§ 15.2-2280 through 15.2-2316, the enabling statutes governing zoning in Virginia. Section 15.2-2311(A) provides that:

An appeal to the board may be taken by any person aggrieved or by any officer, department, board or bureau of the locality affected by any decision of the zoning administrator or from any order, requirement, decision or determination made by any other administrative officer in the administration or enforcement of [Article 7], any ordinance adopted pursuant to [Article 7], or any modification of zoning requirements pursuant to § 15.2-2286. Notwithstanding any charter provision to the contrary, any written notice of a zoning violation or a written order of the zoning administrator dated on or after July 1, 1993, shall include a statement informing the recipient that he may have a right to appeal the notice of a zoning violation or a written order within 30 days in accordance with this section, and that the decision shall be final and unappealable if not appealed within 30 days. The appeal period shall not commence until the statement is given. The appeal shall be taken within 30 days after the decision appealed from by filing with the zoning administrator, and with the board, a notice of appeal specifying the grounds thereof. The zoning administrator shall forthwith transmit to the board all the papers constituting the record upon which the action appealed from was taken.

When the language of a statute is plain and unambiguous, general rules of statutory construction require that the plain meaning of the language be applied.<sup>1</sup> Consequently, “[w]here the language of a statute is clear and unambiguous rules of statutory construction are not required.”<sup>2</sup>

The clear and unambiguous language of § 15.2-2311(A) requires that any written notice of a zoning violation or written order issued by the zoning administrator must

apprise the recipient that an appeal must be taken within thirty days of issuance of such notice or order. Furthermore, a written notice or order must be provided to any person aggrieved by the decision of the zoning administrator or from any order, requirement, decision, or determination made by any other administrative officer who administers or enforces Article 7. The Supreme Court of Virginia has defined the term “aggrieved person”:

In order for a petitioner to be “aggrieved,” it must affirmatively appear that such person had some direct interest in the subject matter of the proceeding that he seeks to attack. The petitioner “must show that he has an immediate, pecuniary and substantial interest in the litigation, and not a remote or indirect interest.” Thus, it is not sufficient that the sole interest of the petitioner is to advance some perceived public right or to redress some anticipated public injury when the only wrong he has suffered is in common with other persons similarly situated. The word “aggrieved” in a statute contemplates a substantial grievance and means a denial of some personal or property right, legal or equitable, or imposition of a burden or obligation upon the petitioner different from that suffered by the public generally.<sup>[3]</sup>

The Virginia Supreme Court consistently has applied this definition<sup>4</sup> of an “aggrieved person.” I must also apply the Court’s definition to the situation about which you inquire. Finally, § 15.2-2311(A) provides that the period for an appeal “shall not commence until the statement [informing a recipient of the right to an appeal] is given.” Therefore, a local zoning administrator must provide a written notice or order to any person who has an immediate, pecuniary, and substantial interest in the decision of the zoning administrator or such other officer who administers or enforces Article 7.

#### CONCLUSION

Accordingly, it is my opinion that § 15.2-2311(A) does not specifically describe the type of notice required of the local zoning administrator. It further is my opinion that any person who by virtue of a zoning violation is denied some personal or property right, legal or equitable, or upon whom a burden or obligation is imposed must receive a written notice or order of the violation. Finally, it is my opinion that such notice or order must include a statement informing the recipient of his right to appeal the notice or written order within thirty days and that the decision is final and unappealable if not so appealed in thirty days.

<sup>1</sup>See *Vaughn, Inc. v. Beck*, 262 Va. 673, 677, 554 S.E.2d 88, 90 (2001); *Shelor Motor Co. v. Miller*, 261 Va. 473, 479, 544 S.E.2d 345, 348 (2001). Virginia follows the “plain meaning” rule. See *Berry v. Klinger*, 225 Va. 201, 208, 300 S.E.2d 792, 796 (1983).

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

<sup>3</sup>Va. Beach Beautification Comm'n v. Bd. of Zoning Appeals, 231 Va. 415, 419-20, 344 S.E.2d 899, 902-03 (1986) (citations omitted); *see also* Va. Ass'n of Ins. Agents v. Commonwealth, 201 Va. 249, 254, 110 S.E.2d 223, 227 (1959); Nicholas v. Lawrence, 161 Va. 589, 593, 171 S.E. 673, 674 (1933) (noting that for party to be aggrieved – substantial interest must be directly affected).

<sup>4</sup>*See, e.g.,* Trustees v. Taylor & Parrish, Inc., 249 Va. 144, 151-52, 452 S.E.2d 847, 851 (1995); Vulcan Materials Co. v. Bd. of Supvrs., 248 Va. 18, 24, 445 S.E.2d 97, 100 (1994).

#### **OP. NO. 08-076**

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

**Authority for Town of Charlotte Court House to appoint town sergeant and any necessary officers to enforce laws of Commonwealth within Town. Authority to enter into reciprocal agreement with Town of Drakes Branch pursuant to § 15.2-1726.**

DANIEL M. SIEGEL  
TOWN ATTORNEY FOR CHARLOTTE COURT HOUSE  
OCTOBER 9, 2008

#### **ISSUE PRESENTED**

You ask whether the Town of Charlotte Court House is authorized to appoint a town sergeant and any other necessary officers to enforce the laws of the Commonwealth within the Town. You also ask whether Charlotte Court House is authorized to enter into a reciprocal agreement with the Town of Drakes Branch pursuant to § 15.2-1726.

#### **RESPONSE**

It is my opinion that the Town of Charlotte Court House is authorized to appoint a town sergeant and any other necessary officers to enforce the laws of the Commonwealth within the Town. It further is my opinion that Charlotte Court House is authorized to enter into a reciprocal agreement with the Town of Drakes Branch pursuant to § 15.2-1726.

#### **BACKGROUND**

You advise that the Town Charter (the “Charter”) for the Town of Charlotte Court House provides that the Town “shall have and may exercise all powers which are now or hereafter may be conferred upon or delegated to towns under the Constitution and laws of the Commonwealth of Virginia, as fully and completely as though such powers were specifically enumerated herein.”<sup>1</sup> The Charter further provides that the town council may appoint “a town sergeant, who shall be the conservator of the peace.”<sup>2</sup>

You also advise that Charlotte Court House has entered into a reciprocal agreement with Drakes Branch for the provision of law enforcement assistance for the period from July 1, 2008 through June 30, 2009. Under the terms of the agreement, the officer serving as Drakes Branch’s town sergeant will provide law-enforcement assistance to Charlotte Court House for a total of fourteen hours per week at the rate of \$28.00 per hour.

You conclude that because the charters for the towns of Drakes Branch and Charlotte Court House authorize the towns to appoint a police force, both towns have the authority under § 15.2-1726 to enter into a reciprocal agreement for cooperation in the furnishing of police services upon the terms that the parties deem advisable.<sup>3</sup>

## APPLICABLE LAW AND DISCUSSION

Under the Dillon Rule of strict construction, municipal corporations possess and may exercise only those powers expressly granted by the General Assembly, powers necessarily or fairly implied from such express powers, and those powers that are essential and indispensable.<sup>4</sup> 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[.]

Section 15.2-1701 requires that, “[w]hen a locality<sup>5</sup> provides for a police department, the chief of police shall be the chief law enforcement officer of that locality. However, in towns, the chief law-enforcement officer may be called the town sergeant.”

Statutes using the word “may” are permissive rather than mandatory.<sup>6</sup> The Charter authorizes, but does not require, the Council to appoint “a town sergeant, who shall be the conservator of the peace.”<sup>7</sup> The town sergeant would be the chief law-enforcement officer of Charlotte Court House.<sup>8</sup> The applicable rule of statutory construction requires that words be given their ordinary meaning, given the context in which they are used.<sup>9</sup> The plain and unambiguous meaning of the words used in the Charter clearly authorizes the Council to appoint a town sergeant when the Council deems such an appointment to be necessary and proper.

Section 15.2-1726 authorizes localities to enter into reciprocal agreements concerning consolidation of police departments or for cooperation in furnishing police services and provides that:

Any locality may, in its discretion, enter into a *reciprocal agreement* with any other locality, ..., for such periods and under such conditions as the contracting parties deem advisable, for *cooperation* in the furnishing of police services.... 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 .... [Emphasis added.]

In interpreting a specific inquiry related to § 15.2-1726, a 2008 opinion<sup>10</sup> (the “2008 Opinion”) concluded that a municipality that does not have a police charter or a police force may not enter into a reciprocal agreement with another municipality that has a police charter and police force. For purposes of the 2008 Opinion only, “a municipality with ‘no police charter’ means a municipality that has not enacted an ordinance authorizing a police force pursuant to § 15.2-1701 or one that does not have a charter providing for the establishment of a police force.”<sup>11</sup> Furthermore, the 2008 Opinion relied upon a 1986 opinion (the “1986 Opinion”) interpreting portions of § 15.1-131.3, predecessor to § 15.2-1726, as being “uniquely applicable to the consolidation of *police* departments.”<sup>12</sup> Because the requesting county did not have a police force at the time of the proposed reciprocal agreement, the predecessor statute to § 15.2-1726 did not authorize two towns to contract with that county to have the county sheriff serve as chief of police for the towns and to provide law-enforcement services for the three localities.

The General Assembly has not substantially amended or changed the portion of § 15.2-1726 providing for “consolidation of police departments” considered by the Attorney General in the 1986 Opinion. While an opinion of the Attorney General is not binding on the courts of the Commonwealth, it is entitled to due consideration.<sup>13</sup> “The legislature is presumed to have had knowledge of the Attorney General’s interpretation of the statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General’s view.”<sup>14</sup> Therefore, § 15.2-1726 does not permit localities to contract for the consolidation of the police departments of separate localities when one of the contracting localities does not have a police department.

Section 15.2-1726 also permits localities to enter into reciprocal agreements “for cooperation in the furnishing of police services.” Based upon the definitions of “reciprocal”<sup>15</sup> and “reciprocity,”<sup>16</sup> the 2008 Opinion concluded that there must be mutual or bilateral action.<sup>17</sup> Consequently, all contracting localities must have a police department before they may enter into reciprocal agreements “for cooperation in the furnishing of police services.”<sup>18</sup>

You advise that Charlotte Court House has contracted with Drakes Branch to use the Drakes Branch town sergeant to enforce the laws of the Commonwealth within Charlotte Court House. You also advise that the town charters of both Drakes Branch and Charlotte Court House have provisions authorizing the appointment of a town sergeant.<sup>19</sup> Therefore, I conclude that Charlotte Court House is authorized to enter into a reciprocal agreement with Drakes Branch pursuant to § 15.2-1726.

#### CONCLUSION

Accordingly, it is my opinion that the Town of Charlotte Court House is authorized to appoint a town sergeant and any other necessary officers to enforce the laws of the Commonwealth within the Town. It further is my opinion that Charlotte Court House is authorized to enter into a reciprocal agreement with the Town of Drakes Branch pursuant to § 15.2-1726.

<sup>1</sup>1989 Va. Acts ch. 117, § 2.1, at 162, 162.

<sup>2</sup>*Id.*, § 4.1, at 163-64. Section 4.2 of the Charter provides that appointees serve at the pleasure of the council. *Id.* at 164.

<sup>3</sup>Section 2.2-505(B) requires that an opinion request from a town attorney “shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney’s legal conclusions.”

<sup>4</sup>*Norton v. City of Danville*, 268 Va. 402, 408 n.3, 602 S.E.2d 126, 129 n.3 (2004); *Arlington Co. v. White*, 259 Va. 708, 712, 528 S.E.2d 706, 708 (2000); *Bd. of Supvrs. v. Countryside Inv. Co.*, 258 Va. 497, 503, 522 S.E.2d 610, 613 (1999); *County of Fairfax v. S. Iron Works, Inc.*, 242 Va. 435, 448, 410 S.E.2d 674, 682 (1991).

<sup>5</sup>The term “locality,” as used in Title 15.2, “shall be construed to mean a county, city, or town as the context may require.” VA. CODE ANN. § 15.2-102 (2008).

<sup>6</sup>*See Op. Va. Att’y Gen.*: 1992 at 133, 135; 1991 at 225, 226.

<sup>7</sup>1989 Va. Acts, *supra* note 1, at 163-64 (using permissive “Council may appoint”).

<sup>8</sup>*See* § 15.2-1701 (2008) (providing that chief law-enforcement officer of town may be called town sergeant).

<sup>9</sup>*Va. Beach v. Bd. of Supvrs.*, 246 Va. 233, 236, 435 S.E.2d 382, 384 (1993).

<sup>10</sup>2008 Op. Va. Att’y Gen. 69.

<sup>11</sup>*Id.* at n.1.

<sup>12</sup>*Id.* (quoting 1986-1987 Op. Va. Att’y Gen. 130, 132 n.1) (emphasis in original).

<sup>13</sup>*See Twietmeyer v. City of Hampton*, 255 Va. 387, 393, 497 S.E.2d 858, 861 (1998) (quoting *Va. Beach v. Va. Rest. Ass’n*, 231 Va. 130, 135, 341 S.E.2d 198, 201 (1986)).

<sup>14</sup>*Browning-Ferris, Inc. v. Commonwealth*, 225 Va. 157, 161, 300 S.E.2d 603, 605-06 (1983) (quoting *Richard L. Deal & Assocs. v. Commonwealth*, 224 Va. 618, 622, 299 S.E.2d 346, 348 (1983)).

<sup>15</sup>*See* BLACK’S LAW DICTIONARY 1297 (8th ed. 2004) (defining “reciprocal” to mean “[d]irected by each toward the other or others; MUTUAL” or “BILATERAL”).

<sup>16</sup>*See id.* at 1298 (defining “reciprocity” to mean “[t]he mutual concession of advantages or privileges for purposes of commercial or diplomatic relations”).

<sup>17</sup>*See* 2008 Op. Va. Att’y Gen., *supra* note 10, at 71.

<sup>18</sup>Section 15.2-1726 (2008).

<sup>19</sup>*See* 1989 Va. Acts *supra* note 1, § 4.1, at 263-64 (authorizing town sergeant for Charlotte Court House); *see also* 1998 Va. Acts ch. 275, at 405, 405 (amending § 3 of Drakes Branch charter to remove mandatory office of sergeant and providing that town officers include mayor, six council members, “and such other officers as the council may deem proper and necessary”) (emphasis in original).

## OP. NO. 08-071

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

**Charter for town of Drakes Branch authorizes appointment of town sergeant when town council deems such appointment as proper and necessary. Towns of Drakes Branch and Charlotte Court House may enter into valid, reciprocal agreement to contract for services of town sergeant provided both towns’ charters authorize such appointment.**

JENNIFER LELACHEUR JONES  
TOWN ATTORNEY FOR DRAKES BRANCH  
OCTOBER 9, 2008

#### ISSUE PRESENTED

You ask whether the Charter (the “Charter”) for the Town of Drakes Branch authorizes the town council to appoint a town sergeant when the council deems such appointment

to be proper and necessary. You also ask whether the towns of Drakes Branch and Charlotte Court House may enter into a valid agreement to contract for the services of a town sergeant when the town charters of both towns authorize the appointment of a town sergeant.

#### RESPONSE

It is my opinion that the Charter for the Town of Drakes Branch authorizes the appointment of a town sergeant when the town council deems such appointment to be proper and necessary. It further is my opinion that the towns of Drakes Branch and Charlotte Court House may enter into a valid, reciprocal agreement to contract for the services of a town sergeant provided the town charters of both towns authorize the appointment of a town sergeant.

#### BACKGROUND

You advise that the Charter previously identified the office of town sergeant as one of the town's offices.<sup>1</sup> You relate that on November 17, 1997, the Town Council of Drakes Branch (the "Council") passed a resolution of intent to amend the Charter to make the position of town sergeant discretionary as opposed to mandatory.<sup>2</sup> You also note that the Council resolved to amend "Section 3" of the Charter to provide for a mayor, six council members, and "such other offices as the Council may deem proper and necessary."<sup>3</sup>

You state that on December 1, 1997, the Council passed a Resolution to Amend the Charter containing the proposed amendment to section 3. The 1998 Session of the General Assembly amended the Charter as requested by the Council.<sup>4</sup> You relate that Drakes Branch has continued to employ a town sergeant as an officer based upon the Council's determination that such position is necessary and proper.

You advise that in 2006 the town of Charlotte Court House contracted with Drakes Branch for the use of the Drake's Branch town sergeant to enforce the laws of the Commonwealth within Charlotte Court House. Finally, you note that Charlotte Court House has a town charter that specifically includes the office of "a town sergeant, who shall be the conservator of the peace."<sup>5</sup>

#### APPLICABLE LAW AND DISCUSSION

Under the Dillon Rule of strict construction, municipal corporations possess and may exercise only those powers expressly granted by the General Assembly, powers necessarily or fairly implied from such express powers, and those powers that are essential and indispensable.<sup>6</sup> 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[.]

Section 15.2-1701 requires that, “[w]hen a locality<sup>7</sup> provides for a police department, the chief of police shall be the chief law enforcement officer of that locality. However, in towns, the chief law-enforcement officer may be called the town sergeant.”

Statutes using the word “may” are permissive rather than mandatory.<sup>8</sup> The Charter authorizes, but does not require, the Council to appoint “such other officers as the council *may* deem proper and necessary for the government of the town and the conduct of its business.”<sup>9</sup> The town sergeant, if appointed, would be the chief law-enforcement officer of Drakes Branch.<sup>10</sup> The applicable rule of statutory construction requires that words be given their ordinary meaning, given the context in which they are used.<sup>11</sup> The plain and unambiguous meaning of the words used in the Charter clearly authorizes the Council to appoint a town sergeant when the Council deems such an appointment to be necessary and proper.

Section 15.2-1726 authorizes localities to enter into reciprocal agreements concerning consolidation of police departments or for cooperation in furnishing police services and provides that:

Any locality may, in its discretion, enter into a *reciprocal agreement* with any other locality, ..., for such periods and under such conditions as the contracting parties deem advisable, for *cooperation* in the furnishing of police services.... 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 .... [Emphasis added.]

In interpreting a specific inquiry related to § 15.2-1726, a 2008 opinion<sup>12</sup> (the “2008 Opinion”) concluded that a municipality that does not have a police charter or a police force may not enter into a reciprocal agreement with another municipality that has a police charter and police force. For purposes of the 2008 Opinion only, “a municipality with ‘no police charter’ means a municipality that has not enacted an ordinance authorizing a police force pursuant to § 15.2-1701 or one that does not have a charter providing for the establishment of a police force.”<sup>13</sup> Furthermore, the 2008 Opinion relied upon a 1986 opinion (the “1986 Opinion”) interpreting portions of § 15.1-131.3, predecessor to § 15.2-1726, as being “uniquely applicable to the consolidation of *police* departments.”<sup>14</sup> Because the requesting county did not have a police force at the time of the proposed reciprocal agreement, the predecessor statute to § 15.2-1726 did not authorize two towns to contract with that county to have the county sheriff serve as chief of police for the towns and to provide law-enforcement services for the three localities.

The General Assembly has not substantially amended or changed the portion of § 15.2-1726 providing for “consolidation of police departments” considered by the Attorney General in the 1986 Opinion. While an opinion of the Attorney General is not binding on the courts of the Commonwealth, it is entitled to due consideration.<sup>15</sup> “The legislature is presumed to have had knowledge of the Attorney General’s interpretation of the statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General’s view.”<sup>16</sup> Therefore, § 15.2-1726 does not permit localities to contract for the consolidation of the police departments of separate localities when one of the contracting localities does not have a police department.

Section 15.2-1726 also permits localities to enter into reciprocal agreements “for cooperation in the furnishing of police services.” Based upon the definitions of “reciprocal”<sup>17</sup> and “reciprocity,”<sup>18</sup> the 2008 Opinion concluded that there must be mutual or bilateral action.<sup>19</sup> Consequently, all contracting localities must have a police department before they may enter into reciprocal agreements “for cooperation in the furnishing of police services.”<sup>20</sup>

You advise that Charlotte Court House has contracted with Drakes Branch to use the Drakes Branch town sergeant to enforce the laws of the Commonwealth within Charlotte Court House. You also advise that the town charters of both Drakes Branch and Charlotte Court House have provisions authorizing the appointment of a town sergeant.<sup>21</sup> Therefore, I conclude that the reciprocal agreement between the Drakes Branch and Charlotte Court House is a valid agreement to contract for the services of a town sergeant when the town charters of both towns authorize the appointment of a town sergeant.

#### CONCLUSION

Accordingly, it is my opinion that the Charter for the Town of Drakes Branch authorizes the appointment of a town sergeant when the town council deems such appointment to be proper and necessary. It further is my opinion that the towns of Drakes Branch and Charlotte Court House may enter into a valid, reciprocal agreement to contract for the services of a town sergeant provided the town charters of both towns authorize the appointment of a town sergeant.

<sup>1</sup>See 1902-3-4 Va. Acts ch. 150, at 229, 229 (incorporating Drakes Branch (§ 1) and establishing mandatory office of sergeant (§ 3)).

<sup>2</sup>See Resolution of Intent to Amend the Charter of the Town of Drakes Branch (Nov. 17, 1997) (providing that “the Town Council has determined that the position of Town Sergeant should be discretionary rather than mandatory”) (copy provided to this Office).

<sup>3</sup>See Resolution to Amend the Charter of the Town of Drakes Branch, Section 3 (Dec. 1, 1997) (copy provided to this Office).

<sup>4</sup>1998 Va. Acts ch. 275, at 405, 405 (amending § 3 to remove mandatory office of sergeant and providing that town officers include mayor, six council members, “and such other officers as the council *may* deem proper and necessary”) (emphasis in original).

<sup>5</sup> 1989 Va. Acts ch. 117, § 4.1, at 162, 163-64. Section 4.2 of the Charter provides that appointees serve at the pleasure of the council. *Id.* at 164.

<sup>6</sup> *Norton v. City of Danville*, 268 Va. 402, 408 n.3, 602 S.E.2d 126, 129 n.3 (2004); *Arlington Co. v. White*, 259 Va. 708, 712, 528 S.E.2d 706, 708 (2000); *Bd. of Supvrs. v. Countryside Inv. Co.*, 258 Va. 497, 503, 522 S.E.2d 610, 613 (1999); *County of Fairfax v. S. Iron Works, Inc.*, 242 Va. 435, 448, 410 S.E.2d 674, 682 (1991).

<sup>7</sup> The term “locality,” as used in Title 15.2, “shall be construed to mean a county, city, or town as the context may require.” VA. CODE ANN. § 15.2-102 (2008).

<sup>8</sup> *See Op. Va. Att’y Gen.*: 1992 at 133, 135; 1991 at 225, 226.

<sup>9</sup> 1998 Va. Acts, *supra* note 4, at 405 (emphasis in original).

<sup>10</sup> *See* § 15.2-1701 (2008) (providing that chief law-enforcement officer of town may be called town sergeant).

<sup>11</sup> *Va. Beach v. Bd. of Supvrs.*, 246 Va. 233, 236, 435 S.E.2d 382, 384 (1993).

<sup>12</sup> 2008 Op. Va. Att’y Gen. 69.

<sup>13</sup> *Id.* at n.1.

<sup>14</sup> *Id.* (quoting 1986-1987 Op. Va. Att’y Gen. 130, 132 n.1) (emphasis in original).

<sup>15</sup> *See Twietmeyer v. City of Hampton*, 255 Va. 387, 393, 497 S.E.2d 858, 861 (1998) (quoting *Va. Beach v. Va. Rest. Ass’n*, 231 Va. 130, 135, 341 S.E.2d 198, 201 (1986)).

<sup>16</sup> *Browning-Ferris, Inc. v. Commonwealth*, 225 Va. 157, 161, 300 S.E.2d 603, 605-06 (1983) (quoting *Richard L. Deal & Assocs. v. Commonwealth*, 224 Va. 618, 622, 299 S.E.2d 346, 348 (1983)).

<sup>17</sup> *See* BLACK’S LAW DICTIONARY 1297 (8th ed. 2004) (defining “reciprocal” to mean “[d]irected by each toward the other or others; MUTUAL” or “BILATERAL”).

<sup>18</sup> *See id.* at 1298 (defining “reciprocity” to mean “[t]he mutual concession of advantages or privileges for purposes of commercial or diplomatic relations”).

<sup>19</sup> *See* 2008 Op. Va. Att’y Gen., *supra* note 12, at 71.

<sup>20</sup> Section 15.2-1726 (2008).

<sup>21</sup> *See supra* notes 1, 4-5 and accompanying text.

## OP. NO. 08-028

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

#### CRIMINAL PROCEDURE: TRIAL AND ITS INCIDENTS – VENUE.

**No authority for municipality with police charter and police force to enter into agreement with another municipality that does not have such charter or force. Absent agreement, authority for officer to operate outside his jurisdiction is limited by § 19.2-250. No authority to transfer fines between jurisdictions.**

THE HONORABLE THOMAS D. JONES  
SHERIFF, CHARLOTTE COUNTY  
JULY 28, 2008

#### ISSUES PRESENTED

You inquire concerning § 15.2-1726, which governs consolidation of police departments. Specifically, you ask whether a municipality that has a police charter and police force may enter into an agreement with another municipality that has no police charter<sup>1</sup> or police force. Further, you ask whether pursuant to such an agreement, an

officer from one jurisdiction may enforce laws in the other jurisdiction. Finally, you ask whether fines for a summons issued in the second jurisdiction may be transferred back to the first jurisdiction to pay for the officer's salary in the second jurisdiction.

#### RESPONSE

It is my opinion that § 15.2-1726 does not authorize a municipality that has a police charter and police force to enter into an agreement with another municipality that does not have such a charter or force. Absent such an agreement, authority for an officer to operate outside his jurisdiction is limited by § 19.2-250. Finally, it is my opinion that in the situation you present, fines assessed in one jurisdiction are not transferrable to another.

#### APPLICABLE LAW AND DISCUSSION

Section 15.2-1726 authorizes localities to enter into reciprocal agreements concerning consolidation of police departments or for cooperation in furnishing police services. In relevant part, § 15.2-1726 provides 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, Division of Capitol Police, 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. [Emphasis added.]

The term "reciprocal agreement" is not defined by statute. Absent a statutory definition, words are given their ordinary meaning.<sup>2</sup> Consequently, unless a contrary legislative intent is manifest, words used in an act must be given their common, ordinary, and accepted meanings in use at the time of the statute.<sup>3</sup> "Reciprocal" means "[d]irected by

each toward the other or others; MUTUAL.”<sup>4</sup> It also means “BILATERAL.”<sup>5</sup> “Reciprocity” means “[m]utual or bilateral action” or “[t]he mutual concession of advantages or privileges for purposes of commercial or diplomatic relations.”<sup>6</sup>

The proposed agreement you describe is deficient because it does not contemplate a “reciprocal agreement.” There is no mutual or bilateral action. The second municipality does not have a police force with which to cooperate or consolidate, and it has no authority to establish a police force. Thus, the second municipality fails to contribute to, or reciprocate in, the proposed agreement.

A 1986 opinion of the Attorney General (“1986 Opinion”) concluded that § 15.1-131.3, the predecessor statute to § 15.2-1726, did not authorize two towns to contract with a county to have the county sheriff serve as chief of police for the towns and to provide law-enforcement services for the three localities.<sup>7</sup> A crucial detail was the fact that the county did not have a police force at the time of the proposed contract.<sup>8</sup> “[C]learly, [§ 15.1-131.3] does not authorize the arrangement requested because Grayson County has no police department, and this portion of the statute<sup>9</sup> is uniquely applicable to the consolidation of *police* departments.”<sup>10</sup> The fact pattern discussed in the 1986 Opinion is consistent with your question.

“[A] fundamental rule of statutory construction requires that courts view the entire body of legislation and the statutory scheme to determine the ‘true intention of each part.’”<sup>11</sup> “In construing statutes, courts should give the fullest possible effect to the legislative intent embodied in the entire statutory enactment.”<sup>12</sup> A reading of § 15.2-1730.1 in conjunction with § 15.2-1726 further bolsters my opinion that the situation that you present is not statutorily permitted. Section 15.2-1730.1 provides that:

In counties where no police department has been established and the sheriff is the chief law-enforcement officer, the sheriff may enter into agreements with any other governmental entity providing law-enforcement services in the Commonwealth, and may furnish and receive interjurisdictional law-enforcement assistance for all law-enforcement purposes, including those described in this chapter, and for purposes of Chapter 3.2 (§ 44-146.13 et. seq.) of Title 44.

Under accepted rules of statutory construction, the mention of one thing in a statute implies the exclusion of another.<sup>13</sup> Moreover, when a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute.<sup>14</sup> By enacting § 15.2-1730.1, the General Assembly clearly has authorized sheriffs to enter into agreements with counties to provide law-enforcement services in certain situations. Section 15.2-1730.1 does not authorize any other individual or entity to contract with counties for the provision of law-enforcement services.

Because § 15.2-1726 does not authorize agreements between municipalities when both do not have operational police departments, or at least the authority to establish

a police force, it is my opinion that there is no authority for a police officer to operate outside the jurisdictional confines of § 19.2-250. Section 19.2-250(A) limits the jurisdiction of corporate authorities in adjoining jurisdictions. Further, § 19.2-250(A) provides that “the jurisdiction of the corporate authorities of each town or city, in criminal cases involving offenses against the Commonwealth, shall extend within the Commonwealth one mile beyond the corporate limits of such town or city.”<sup>15</sup> Section 19.2-250 does not confer law-enforcement authority to local police departments outside of the corporate limits of the localities that they serve.

Additionally, in the situation you present, you ask whether fines collected for a summons issued in one jurisdiction may be transferred to a second jurisdiction to pay for an officer’s salary in the second jurisdiction. I find no authorization for such a transfer of funds between municipalities. Virginia adheres to the Dillon Rule of strict construction regarding powers of local governing bodies.<sup>16</sup> Further, I find no authority for municipalities to agree to transfer fees collected in one jurisdiction to another jurisdiction absent a valid reciprocal agreement.<sup>17</sup>

#### CONCLUSION

Accordingly, it is my opinion that § 15.2-1726 does not authorize a municipality that has a police charter and police force to enter into an agreement with another municipality that does not have such a charter or force. Absent such an agreement, authority for an officer to operate outside his jurisdiction is limited by § 19.2-250. Finally, it is my opinion that in the situation you present, fines assessed in one jurisdiction are not transferrable to another.

<sup>1</sup>For purposes of this opinion, a municipality with “no police charter” means a municipality that has not enacted an ordinance authorizing a police force pursuant to § 15.2-1701 or one that does not have a charter providing for the establishment of a police force.

<sup>2</sup>1987-1988 Op. Va. Att’y Gen. 513, 514.

<sup>3</sup>See *Commonwealth v. Orange-Madison Coop. Farm Serv.*, 220 Va. 655, 658, 261 S.E.2d 532, 533-34 (1980) (noting that in absence of statutory definition, statutory term is given its ordinary meaning, given context in which it is used); 1987-1988 Op. Va. Att’y Gen., *supra* note 2, at 514.

<sup>4</sup>BLACK’S LAW DICTIONARY 1297 (8th ed. 2004).

<sup>5</sup>*Id.*

<sup>6</sup>*Id.* at 1298.

<sup>7</sup>1986-1987 Op. Va. Att’y Gen. 130.

<sup>8</sup>*Id.* at 132 n.1.

<sup>9</sup>See *id.* (interpreting portion of § 15.1-131.3 providing for “consolidation of police departments”).

<sup>10</sup>*Id.* (emphasis in original).

<sup>11</sup>*Va. Real Estate Bd. v. Clay*, 9 Va. App. 152, 157, 384 S.E.2d 622, 625 (1989) (citation omitted).

<sup>12</sup>*Id.*

<sup>13</sup>See *Grigg v. Commonwealth*, 224 Va. 356, 364, 297 S.E.2d 799, 803 (1982) (explaining maxim “*expressio unius est exclusio alterius*”).

<sup>14</sup> See 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47.23 (7th ed. 2007); Op. Va. Att’y Gen.: 1992 at 145, 146; 1989 at 252, 253; 1980-1981 at 209, 209-10.

<sup>15</sup> Notwithstanding § 19.2-250, §§ 19.2-77 and 15.2-1724 provide law-enforcement officers with expanded law-enforcement powers in limited situations. Section 19.2-77 provides that, “[w]henver a person in the custody of an officer shall escape or whenever a person shall flee from an officer attempting to arrest him, such officer . . . may pursue such person anywhere in the Commonwealth and, when actually in close pursuit, may arrest him wherever he is found.” Section 15.2-1724 authorizes police officers to “lawfully go or be sent beyond the territorial limits of such locality . . . to assist in meeting such emergency or need” in four limited situations: (1) enforcement of laws related to use or sale of controlled drugs; (2) law-enforcement emergencies involved threats to life or public safety; (3) execution of orders related to temporary detention or emergency custody regarding mental health evaluations; and (4) emergencies related to state of war or public disasters. I note that none of these situations appear to be applicable to the questions you present.

<sup>16</sup> Commonwealth v. County Bd., 217 Va. 558, 573, 232 S.E.2d 30, 40 (1977).

<sup>17</sup> I do not opine regarding a financial arrangement in connection with a valid reciprocal agreement as that issue is not presented.

**OP. NO. 08-067**

**COUNTIES, CITIES AND TOWNS: VIRGINIA WATER AND WASTE AUTHORITIES ACT – COMMUNITY DEVELOPMENT AUTHORITIES.**

**No authority for Virginia county to enact ordinance creating Community Development Authority that permits subsequent release or withdrawal of land from Authority district.**

THE HONORABLE MARK L. COLE  
MEMBER, HOUSE OF DELEGATES  
OCTOBER 20, 2008

**ISSUE PRESENTED**

You ask whether a Virginia county is authorized to enact an ordinance creating a Community Development Authority (“Authority”) that permits the subsequent release or withdrawal of land from the Authority district.

**RESPONSE**

It is my opinion that a Virginia county may not enact an ordinance creating an Authority that permits the subsequent release or withdrawal of land from the Authority district.

**BACKGROUND**

You advise that after publishing the notice and conducting a hearing as required by § 15.2-5156, a Virginia county adopted an ordinance creating an Authority pursuant to § 15.2-5155. You state that the ordinance was adopted on May 23, 2006 (the “Ordinance”).<sup>1</sup> The second paragraph of the ordinance establishes the boundaries of the Authority and provides that:

The Board of Supervisors, upon the request of the [Spotsylvania Harrison Road Connector Community Development Authority (the “CDA”)] or the Spotsylvania Mall Company (the “Developer”), may, by resolution, release or exclude from the CDA district (i) at any time before the issuance of the Bonds certain portions of land

as long as at least 100 acres of land remain in the CDA district and (ii) after the issuance of the Bonds only *de minimis* portions of land not to exceed approximately two acres.<sup>[2]</sup>

You note that a locality must create an Authority according to §§ 15.2-5152 through 15.2-5158. Further, you state that § 15.2-5152 appears to incorporate the requirement in § 15.2-5156 that an Authority be created only upon the petition of owners of fifty-one percent of the land area or assessed value of the tract at issue as set forth in § 15.2-5153. Finally, you observe that § 15.2-5156(B) provides that if all of the petitioning landowners waive the right to withdraw their signatures from the petition, the local governing body may adopt the Authority ordinance provided the body has complied with all other requirements and provisions of law.

You note that the Ordinance represents the fact that all petitioning landowners for the proposed Authority have waived the right to withdraw signatures from the petition in accordance with § 15.2-5156.<sup>3</sup> You believe that such waiver implicitly assures compliance with the petition requirements to create an Authority.

You further state that an educational foundation is the largest landowner of the petitioning landowners within the proposed district. You represent that the foundation owns two tracts of land totaling 316.15 acres of the proposed district, which is comprised of 523.822 acres. Accordingly, it is your view that the educational foundation is a necessary landowner to meet the fifty-one percent land area requirement within the proposed district.<sup>4</sup> You emphasize that the foundation, along with all other landowners, waived the right to withdraw their signatures from the petition. Thereby, you believe such waiver permitted the local governing body to pass the Ordinance without waiting the required thirty-day period from the public hearing.

You further advise that on January 31, 2008, the educational foundation signed an agreement (the “Agreement”) with the Authority requesting that its parcels be withdrawn from the Authority boundaries. The Agreement, which you provide for review, is entitled “Agreement and Declaration of Restrictive Covenants.” You observe that the first paragraph of the Agreement modifies the Authority district boundaries by excluding the foundation’s property as requested by the Authority and the locality. Therefore, your view is that the educational foundation, which owns more than fifty-one percent of the land area in the Authority district, has withdrawn from the Authority although the foundation previously waived such right. Your concern is that absent the authority to enact such a withdrawal provision in the Ordinance creating the Authority, the Ordinance is void *ab initio*.

#### APPLICABLE LAW AND DISCUSSION

Article 6, Chapter 51 of Title 15.2, §§ 15.2-5152 through 15.2-5158, of the Virginia Water and Waste Authorities Act<sup>5</sup> (“Article 6”), governs community development authorities. Such authorities typically are created to construct some particular improvement for a community. Section 15.2-5152(C) provides that “[a]ny county

may by ordinance elect to assume the power to consider petitions for the creation of community development authorities in accordance with [Article 6]. A public hearing shall be held on such ordinance.”

Section 15.2-5153 provides that:

The owners of at least 51 percent of the *land area or assessed value of land* in the following tracts may, by petitioning the locality or localities in which the tract is located, propose the creation of a community development authority:

....

3. Any tract of any size in any country which has elected to consider such petitions pursuant to subsection C of § 15.2-5152. [Emphasis added.]

Section 15.2-5156 provides that:

A. An ordinance or resolution creating a community development authority shall not be adopted or approved until a public hearing has been held by the governing body on the question of its adoption or approval. Notice of the public hearing shall be published once a week for three successive weeks in a newspaper of general circulation within the locality. The petitioning landowners shall bear the expense of publishing the notice. The hearing shall not be held sooner than ten days after completion of publication of the notice.

B. After the public hearing and before adoption of the ordinance or resolution, the local governing body shall mail a true copy of its proposed ordinance or resolution creating the development authority to the petitioning landowners or their attorney in fact. Unless waived in writing, any petitioning landowner shall have thirty days from mailing of the proposed ordinance or resolution in which to withdraw his signature from the petition in writing prior to the vote of the local governing body on such ordinance or resolution. If any signatures on the petition are so withdrawn, the local governing body may pass the proposed ordinance or resolution only upon certification by the petitioners that the petition continues to meet the requirements of § 15.2-5152. If all petitioning landowners waive the right to withdraw their signatures from the petition, the local governing body may adopt the ordinance or resolution upon compliance with the provisions of subsection A and any other applicable provisions of law.

The overriding goal of statutory interpretation is to discern and give effect to legislative intent.<sup>6</sup> Virginia long has followed and still adheres to the Dillon Rule<sup>7</sup> of strict construction of statutory provisions and its corollary that “[t]he powers of county boards of supervisors are fixed by statute and are limited to those powers

conferred expressly or by necessary implication.”<sup>8</sup> Additionally, the powers of boards of supervisors are fixed by statute and are limited to those conferred expressly or by necessary implication.<sup>9</sup> “[T]he Dillon Rule is applicable to determine in the first instance, from express words or by implication, whether a power exists at all. If the power cannot be found, the inquiry is at an end.”<sup>10</sup> The Dillon Rule requires a narrow interpretation of all powers conferred on local governments since they are delegated powers.<sup>11</sup> Therefore, any doubt as to the existence of power must be resolved against the locality.<sup>12</sup>

The applicable rule of statutory construction requires that words be given their ordinary meaning, given the context in which they are used in a statute.<sup>13</sup> Section 15.2-5152(C) grants to counties the authority to consider petitions for the creation of community development authorities.<sup>14</sup> Should a county elect to consider such a petition, § 15.2-5156(A) requires that a public hearing be held on the question of adoption or approval of such an ordinance or resolution creating an Authority. Following the public hearing, the county is required to: (1) mail the proposed ordinance or resolution to the petitioning landowners; or (2) obtain from the petitioning landowners a written waiver of the right to withdraw their signatures from the petition.<sup>15</sup> When the petitioning landowners do not waive their right to withdraw, the county must give such landowners thirty days from the mailing of the proposed ordinance or resolution to withdraw their signatures before the proposed ordinance or resolution may be adopted.<sup>16</sup> However, where all of the petitioning landowners have waived their right to withdraw, the county may adopt the ordinance creating an Authority upon compliance with § 15.2-5156(A).<sup>17</sup>

“The manifest intention of the legislature, clearly disclosed by its language, must be applied.”<sup>18</sup> The General Assembly has not expressly granted to counties the statutory authority to permit petitioning landowners to withdraw their signatures from the petition after adoption of the ordinance or resolution creating the Authority. The Dillon Rule prevents a county from acting indirectly when it is not authorized to do so by express statutory language.<sup>19</sup> I cannot conclude that, by necessary implication, a county may permit petitioning landowners to withdraw their signatures from a petition seeking formation of an Authority subsequent to the adoption of the Authority by ordinance or resolution. I am required to conclude that a county is not indirectly, by implication, authorized to permit such withdrawal.

Because local governments are subordinate creatures of the Commonwealth, they possess only those powers conferred upon them by the General Assembly.<sup>20</sup> An *ultra vires* act is one that is beyond the powers conferred upon a county by law.<sup>21</sup> Such acts are void *ab initio*, from the beginning.<sup>22</sup> Because I conclude that a county is not directly or “by necessary implication,”<sup>23</sup> authorized to enact an ordinance permitting petitioning landowners to withdraw from an Authority once it has been created, I must also conclude that enacting an ordinance containing such unauthorized provision is an *ultra vires* act. Therefore, such an ordinance is void *ab initio*.

## CONCLUSION

Accordingly, is my opinion that a Virginia county may not enact an ordinance creating an Authority that permits the subsequent release or withdrawal of land from the Authority district.

<sup>1</sup> See Spotsylvania County, Va., Ordinance No. 2006-03 (May 23, 2006) (recorded with minutes of Board of Supervisors), available at <http://www.spotsylvania.va.us/downloadfiles/minutes/bos/05232006.pdf>.

<sup>2</sup> *Id.*, para. 2, at \*8-9.

<sup>3</sup> “WHEREAS, each Landowner has waived in writing the right to withdraw its signature from the Petition in accordance with § 15.2-5156 of the [Virginia Water and Waste Authorities] Act.” *Id.*, at \*8.

<sup>4</sup> It is not clear from the information you provide whether the educational foundation’s land also represents at least fifty-one percent of the assessed value of the tracts of land.

<sup>5</sup> See VA. CODE ANN. §§ 15.2-5100 to 15.2-5158 (2008).

<sup>6</sup> See *Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983); *Vollin v. Arlington Co. Electoral Bd.*, 216 Va. 674, 678-79, 222 S.E.2d 793, 797 (1976); 1990 Op. Va. Att’y Gen. 155, 155 and opinions cited therein.

<sup>7</sup> *City of Richmond v. Bd. of Supvrs.*, 199 Va. 679, 684-85, 101 S.E.2d 641, 644-45 (1958) (noting Dillon Rule that municipal corporations have only those powers expressly granted, those necessarily or fairly implied therefrom, and those that are essential and indispensable).

<sup>8</sup> *County Bd. v. Brown*, 229 Va. 341, 344, 329 S.E.2d 468, 470 (1985).

<sup>9</sup> *Gordon v. Bd. of Supvrs.*, 207 Va. 827, 832, 153 S.E.2d 270, 274 (1967); *Johnson v. County of Goochland*, 206 Va. 235, 237, 142 S.E.2d 501, 502 (1965).

<sup>10</sup> *Commonwealth v. County Bd.*, 217 Va. 558, 575, 232 S.E.2d 30, 41 (1977).

<sup>11</sup> See *Bd. of Supvrs. v. Countryside Invest. Co.*, 258 Va. 497, 522 S.E.2d 610 (1999) (holding that county board of supervisors does not have unfettered authority to decide what matters to include in subdivision ordinance; must include requirements mandated by Land Subdivision and Development Act, and may include optional provisions contained in Act); Op. Va. Att’y Gen.: 2002 at 77, 78; 1974-1975 at 403, 405.

<sup>12</sup> 2A EUGENE MCQUILLEN, *THE LAW OF MUNICIPAL CORPORATIONS* § 10.19, at 369 (3d ed. 1996); see also Op. Va. Att’y Gen.: 2002 at 83, 84; 2000 at 75, 76.

<sup>13</sup> *Va. Beach v. Bd. of Supvrs.*, 246 Va. 233, 236, 435 S.E.2d 382, 384 (1993).

<sup>14</sup> The Supreme Court of Virginia has noted that while the effect of the word “shall” primarily is mandatory, and “may” primarily is permissive, “courts, in endeavoring to arrive at the meaning of written language, whether used in a will, a contract, or a statute, will construe ‘may’ and ‘shall’ as permissive or mandatory in accordance with the subject matter and context.” *Pettus v. Hendricks*, 113 Va. 326, 330, 74 S.E. 191, 193 (1912).

<sup>15</sup> Section 15.2-5156(B).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Barr v. Town & Country Props., Inc.*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990) (quoting *Anderson v. Commonwealth*, 182 Va. 560, 566, 29 S.E.2d 838, 841 (1944)).

<sup>19</sup> See *supra* notes 7-12 and accompanying text.

<sup>20</sup> See *Gordon*, 207 Va. at 834-35, 153 S.E.2d at 275-76 (finding that county board of supervisors did not abuse its discretion in voting to lend money to airport authority; power exercised by board was expressly implied from legislative act allowing local governing body to lend real property to any authority it created).

<sup>21</sup>The term “*ultra vires*” means “[u]nauthorized; beyond the scope of power allowed or granted . . . by law.” BLACK’S LAW DICTIONARY 1559 (8th ed. 2004); *see also* Jenkins v. City of Henderson, 214 N.C. 244, 248-49, 199 S.E. 37, 40 (1938) (holding that *ultra vires* contract is void and municipality cannot be estopped to deny validity of contract; such contract has no legal effect and there is no right of action upon such contract); *see also* Op. Va. Att’y Gen.: 2000 at 204, 205 (concluding that absent specific legislation, local governing bodies have no authority to specify duties of constitutional officers); 1982-1983 at 66 (concluding that town’s contract for indebtedness beyond its charter limitations is void, at least to extent of excess).

<sup>22</sup>BLACK’S LAW DICTIONARY, *supra* note 21, at 5 (defining “*ab initio*”); *see also* Op. Va. Att’y Gen.: 2005 at 157, 158 (concluding that *ultra vires* act is beyond powers of constitutional officer and such act is void *ab initio*); 1986-1987 at 315, 316 (concluding that city council’s reassessment of personal property taxes improperly refunded was void because it lacked authority); 1982-1983, *supra* note 21, at 67 (concluding that town’s contract for indebtedness beyond its charter limitations is void, at least to extent of excess).

<sup>23</sup>*See supra* note 9 and accompanying text.

#### OP. NO. 08-041

#### COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS – CONFIDENTIALITY AND EXPUNGEMENT.

**Where statute designates records as ‘open for inspection’ to certain individuals, such individuals are not authorized to copy records.**

THE HONORABLE ROBERT B. WILSON V  
CHIEF JUDGE, EIGHTH JUDICIAL CIRCUIT  
JUVENILE & DOMESTIC RELATIONS DISTRICT COURT  
JUNE 16, 2008

#### ISSUE PRESENTED

You ask whether persons entitled to inspect juvenile court records pursuant to § 16.1-305(A), (B), (B1) and (C) are also authorized to obtain copies of such records.

#### RESPONSE

It is my opinion that where § 16.1-305 designates records as “open for inspection” to certain individuals, such individuals are not authorized to copy the records.<sup>1</sup>

#### APPLICABLE LAW AND DISCUSSION

Section 16.1-305(A) provides that “[s]ocial, medical and psychiatric or psychological records” of juveniles before the court “shall be open for inspection only to” the certain individuals and entities named in subsections (A)(1)-(5). Section 16.1-305(C) makes all other juvenile records filed with a case “open to inspection only by those persons and agencies designated in subsections A and B of this section.” Further, § 16.1-305(B) provides that “[a]ll or any part of the records enumerated in subsection A . . . , which is presented to the judge in court . . . shall also be made available to the parties to the proceeding and their attorneys.” Section 16.1-305(B1) provides that certain delinquency court records “shall be open to the public.”

I note that §16.1-305(D),<sup>2</sup> (D1),<sup>3</sup> (E),<sup>4</sup> and (G)<sup>5</sup> provide authority to make or possess copies of certain court records in specific circumstances. However, § 16.1-305(A), (B), (B1), or (C) does not reference or provide authority to make or obtain copies of records.

It is a fundamental rule of statutory construction that a statute must be read as a whole, and all of its parts must be examined to make it harmonious, if possible.<sup>6</sup>

Furthermore, statutes relating to the same subject should not be read in isolation.<sup>7</sup> Finally, the inclusion of one item in a statute implies the exclusion of others and when the items are contained in a list, that which is not listed is not included.<sup>8</sup> Section 16.1-305(D), (D1), (E), and (G) specifically provides for copies. However, § 16.1-305(A), (B), (B1), and (C) does not; therefore, it is clear that the General Assembly did not intend for these subsections to authorize copies. Moreover, when the General Assembly intends that the copying of records be allowed, it expressly authorizes such copies.<sup>9</sup>

### CONCLUSION

Accordingly, it is my opinion that where § 16.1-305 designates records as “open for inspection” to certain individuals, such individuals are not authorized to copy the records.<sup>10</sup>

<sup>1</sup> A prior opinion of the Attorney General (the “1980 Opinion”) considered whether a juvenile court judge could allow school authorities to examine a drug analysis record in the court’s file pursuant to § 16.1-305(A)(4). 1979-1980 Op. Va. Att’y Gen. 132. The 1980 Opinion concluded that school authorities met the requirement of having “a legitimate interest in the case, in the work of the law-enforcement agency, or in the work of the court” because school authorities have an interest in controlling possession and distribution of illegal drugs on school grounds. *Id.* at 133. “If a court order authorizes it, a copy of the drug analysis report can be furnished to appropriate school authorities by the clerk of the juvenile court, Commonwealth’s attorney’s office or the law enforcement agency.” *Id.* To the extent that the 1980 Opinion concluded that a copy of a record could be provided, it is superseded by this opinion.

<sup>2</sup> See VA. CODE ANN. § 16.1-305(D) (Supp. 2007) (providing that attested copies of records in connection with adjudication of guilt in certain motor vehicle offenses are furnished to Commonwealth’s attorney as needed for evidence in certain pending proceedings).

<sup>3</sup> See § 16.1-305(D1) (providing that attested copies of records in connection with adjudication of guilt for delinquent act that would be adult felony may be furnished to Commonwealth’s attorney as needed for pending criminal prosecution for possession of firearms).

<sup>4</sup> See § 16.1-305(E) (providing that when requested by Virginia Workers’ Compensation Commission, copy of dispositional order in delinquency case may be provided for purposes of awards to crime victims).

<sup>5</sup> See § 16.1-305(G) (providing that any record open for inspection to Department of Juvenile Justice staff may be transmitted in electronic format to that Department).

<sup>6</sup> See *Jones v. Conwell*, 227 Va. 176, 181, 314 S.E.2d 61, 64 (1984); *Gallagher v. Commonwealth*, 205 Va. 666, 669, 139 S.E.2d 37, 39 (1964); Op. Va. Att’y Gen.: 1994 at 93, 95; 1993 at 173, 174; 1992 at 48, 50; 1991 at 13, 17; 1986-1987 at 152, 153; 1983-1984 at 245, 246. “A statute is passed as a whole and not in parts or sections and is animated by one general purpose and intent. Consequently, each part or section should be construed in connection with every other part or section so as to produce a harmonious whole.” 2A NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46:5, at 189-90 (Thompson/West 7th ed. 2007) [hereinafter “SINGER”].

<sup>7</sup> See *McDaniel v. Commonwealth*, 199 Va. 287, 292, 99 S.E.2d 623, 627 (1957) (noting that courts generally look to whole body of statute to determine intention of each part).

<sup>8</sup> See 2A SINGER § 47.23; 1997 Op. Va. Att’y Gen. 99, 99; see also 1981-1982 Op. Va. Att’y Gen. 287, 288 (discussing maxim “*expressio unius est exclusio alterius*”; mention of one thing implies exclusion of another).

<sup>9</sup> See, e.g., § 16.1-266(G) (Supp. 2007) (authorizing guardian ad litem “to inspect and copy” mental health and treatment records of child he is appointed to represent); § 16.1-343 (Supp. 2007) (providing that any agency, institution, or individual shall permit attorney appointed to represent minor in involuntary commitment proceeding “to inspect and copy” records relating to minor).

<sup>10</sup> See *supra* note 1.

OP. NO. 08-065

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

**Certificate of analysis is proper evidence of defendant’s blood alcohol level in prosecution for driving while intoxicated.**

THE HONORABLE CHRISTOPHER K. PEACE  
MEMBER, HOUSE OF DELEGATES  
SEPTEMBER 22, 2008

**ISSUE PRESENTED**

You ask what evidence is acceptable in a prosecution for driving while intoxicated. Specifically, you ask whether the evidence may be the breath test result, recorded on the arrest warrant, or whether the certificate of analysis is required.

**RESPONSE**

In a prosecution for driving while intoxicated, it is my opinion that the certificate of analysis is the proper evidence of the defendant’s blood alcohol level.

**BACKGROUND**

You advise that in certain localities, when an individual suspected of driving while intoxicated is taken before a magistrate, the result of the breath test is entered on the arrest warrant. Further, you note that some trial court judges find this notation improper and refuse to consider it as evidence. Therefore, you state that the Commonwealth is unable to prove the necessary blood alcohol level to mandate the enhanced punishment under certain statutes.

**APPLICABLE LAW AND DISCUSSION**

Pursuant to §§ 18.2-268.7 and 18.2-268.9, a certificate of analysis of blood alcohol content is admissible as evidence. A certificate of analysis for a blood test, when performed in accordance with the statutory rules, “shall ... be admissible in any court, in any criminal or civil proceeding, as evidence of the facts therein stated and of the results of such analysis.”<sup>1</sup> Additionally, such a certificate for a breath test, when performed in accordance with the statutory rules, “shall be admissible in any court in any criminal or civil proceeding as evidence of the facts therein stated and of the results of such analysis.”<sup>2</sup> The certificate for a breath test creates a rebuttable presumption of intoxication<sup>3</sup> and is an exception to the rule of hearsay evidence.<sup>4</sup>

Conversely, a warrant, as a general rule, is not evidence of guilt and should not be accepted as such.<sup>5</sup> Indeed, because the only “evidence” of an essential element of the crime of conviction came from the prosecutor’s statements and the indictment, the Court of Appeals of Virginia overturned a felony conviction for insufficient evidence.<sup>6</sup>

Warrants sometimes are accepted, absent any objection, as evidence on a particular point in criminal prosecutions, and Virginia appellate courts have upheld these convictions.<sup>7</sup> However, it is the certificate of analysis, not the warrant, that is the proper evidence of a defendant’s blood alcohol content.

### CONCLUSION

Accordingly, in a prosecution for driving while intoxicated, it is my opinion that the certificate of analysis is the proper evidence of the defendant's blood alcohol level.

<sup>1</sup>V.A. CODE ANN. § 18.2-268.7(B) (Supp. 2008).

<sup>2</sup>Section 18.2-268.9 (Supp. 2008).

<sup>3</sup>See 18.2-269(A) (Supp. 2008); *see also* Wing v. Commonwealth, Case No. 1760-03-4, 2004 Va. App. LEXIS 368, at \*14-16 (Va. App. Aug. 3, 2004) (noting that § 18.2-269 creates rebuttable presumption that person tested was under influence when “breath test shows a reading of 0.08% or greater”).

<sup>4</sup>See Luginbyhl v. Commonwealth, 46 Va. App. 460, 466-67, 618 S.E.2d 347, 351 (2005) (noting that evidence that is not statement from human witness or declarant is not hearsay; breath test is generated from machine and result does not constitute hearsay), *substituted opinion, on reh'g at, en banc*, 48 Va. App. 58, 65-66, 628 S.E.2d 74, 78-79 (2006) (assuming without deciding that breath analysis result was harmless error and declining to address constitutional issue).

<sup>5</sup>See Swift v. Commonwealth, 199 Va. 420, 425, 100 S.E.2d 9, 13 (1957); *see also* Crowder v. Commonwealth, 41 Va. App. 658, 663-65, 588 S.E.2d 384, 387-88 (2003) (rejecting prosecutor's statement of damage amount as listed in indictment).

<sup>6</sup>See Crowder, 41 Va. App. at 664-65, 588 S.E.2d at 387-88.

<sup>7</sup>See, e.g., Johnson v. Commonwealth, 21 Va. App. 102, 106-07, 462 S.E.2d 125, 127 (1995) (holding that arrest warrant was sufficient to prove criminal element that defendant was in custody).

#### OP. NO. 08-026

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

#### ADMINISTRATION OF GOVERNMENT: ADMINISTRATIVE PROCESS ACT.

**Requirement that Commission on Virginia Alcohol Safety Action Program adopt regulations pursuant to Administrative Process Act to govern certification of ignition interlock systems. Any regulatory scheme must allow for multiple vendors of ignition interlock systems if such systems meet certification requirements.**

THE HONORABLE H. MORGAN GRIFFITH  
MEMBER, HOUSE OF DELEGATES  
MAY 5, 2008

#### ISSUE PRESENTED

You ask whether § 18.2-270.2 requires the Commission on the Virginia Alcohol Safety Action Program to adopt regulations pursuant to the Administrative Process Act<sup>1</sup> that govern the certification of ignition interlock systems. Further, you ask whether § 18.2-270.2 requires the Commission, in adopting such regulations, to allow any ignition interlock system that meets the certification requirements regardless of the vendor. In other words, you ask whether such regulations must provide for the possibility of multiple vendors of ignition interlock systems when such vendors' systems meet the certification requirements of the Commission.

#### RESPONSE

It is my opinion that the Commission on the Virginia Alcohol Safety Action Program is required to adopt regulations pursuant to the Administrative Process Act to govern

the certification of ignition interlock systems. It further is my opinion that any regulatory scheme must allow for multiple vendors of ignition interlock systems if in fact their systems meet such certification requirements.

#### BACKGROUND

You relate that the Commission on the Virginia Alcohol Safety Action Program (VASAP)<sup>2</sup> (“Commission”) currently does not have regulations governing ignition interlock systems and services in Virginia. Further, you note that the Commission has selected one vendor through a request for proposal (“RFP”) to provide such services.<sup>3</sup> You note that a similar RFP in 2007 to solicit bids may result in the selection of two or more vendors. Therefore, you seek clarification regarding the adoption of regulations to govern this process.

#### APPLICABLE LAW AND DISCUSSION

Section 18.2-270.2(A) provides that:

The Executive Director of the Commission on VASAP or his designee shall, pursuant to approval by the Commission, certify ignition interlock systems for use in this Commonwealth and adopt *regulations* and forms for the installation, maintenance and certification of such ignition interlock systems. [Emphasis added.]

The General Assembly has directed the Executive Director or his designee to adopt regulations governing ignition interlock systems subject to approval by the Commission. The Administrative Process Act (“APA”) requires “any authority, instrumentality, officer, board or other unit of the state government empowered by the basic laws to make regulations or decide cases”<sup>4</sup> and to provide notice and public comment procedures for the enactment of regulations.<sup>5</sup>

The Commission is a “unit of state government” in the legislative branch.<sup>6</sup> I am not aware of any exemption from APA requirements for the Commission.<sup>7</sup> Entities that are exempt are expressly enumerated by statute, and the Commission is not one of them.<sup>8</sup> It is well-settled that “[i]f the language of a statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it.”<sup>9</sup> It is unnecessary to resort to any rules of statutory construction when the language of a statute is unambiguous.<sup>10</sup>

You relate that the Commission currently does not have regulations on this subject that have been adopted pursuant to the Administrative Process Act. I must conclude that the Commission is required to promulgate such regulations pursuant to the APA.

In adopting regulations, you ask whether § 18.2-270.2 requires the Commission to allow any ignition interlock system that meets certification requirements regardless of the vendor. Specifically, you ask whether the regulations must provide for multiple vendors of ignition interlock systems provided such systems meet the Commission’s certification requirements.

The final paragraph of § 18.2-270.2(A) provides that:

The Commission shall publish a list of certified ignition interlock *systems* and shall ensure that such systems are available throughout the Commonwealth. The local alcohol safety action program shall make the list available to eligible offenders, who shall have the responsibility and authority to choose which certified ignition interlock company will supply the offender's equipment. A manufacturer or distributor of an ignition interlock system that seeks to sell or lease the ignition interlock system to persons subject to the provisions of § 18.2-270.1 shall pay the reasonable costs of obtaining the required certification, as set forth by the Commission. [Emphasis added.]

This provision clearly indicates an intention that offenders would have a choice of certified ignition interlock companies. The Commission, in determining which systems and companies to certify, is required to “ensure that such systems are available throughout the Commonwealth.”<sup>11</sup> The proposed 2008 RFP should follow regulations established pursuant to the APA and provide for the possibility of multiple vendors.

#### CONCLUSION

Accordingly, it is my opinion that the Commission on the Virginia Alcohol Safety Action Program is required to adopt regulations pursuant to the Administrative Process Act to govern the certification of ignition interlock systems. It further is my opinion that any regulatory scheme must allow for multiple vendors of ignition interlock systems if in fact their systems meet such certification requirements.

<sup>1</sup>See VA. CODE ANN. tit. 2.2, ch. 40, §§ 2.2-4000 to 2.2-4031 (2005 & Supp. 2007).

<sup>2</sup>See VA. CODE ANN. § 18.2-271.2(A) (Supp. 2007) (establishing Commission on VASAP in legislative branch of Commonwealth).

<sup>3</sup>The materials accompanying your request relate that the current vendor scheme evolved from a 2003 request for proposal that resulted in a single vendor being selected to provide ignition interlock system services throughout the Commonwealth.

<sup>4</sup>See § 2.2-4001 (Supp. 2007) (defining “agency”).

<sup>5</sup>See § 2.2-4007.01 (Supp. 2007); 1996 Op. Va. Att’y Gen. 217, 218 (citing § 9-6.14:7.1, predecessor statute to § 2.2-4007.01).

<sup>6</sup>See § 18.2-271.2(A) (establishing Commission in legislative branch of Commonwealth); see also Virginia General Assembly website, “More Legislative Agencies,” available at [http://legis.state.va.us/1\\_home/more\\_agencies.html](http://legis.state.va.us/1_home/more_agencies.html) (listing Commission on VASAP as state agency).

<sup>7</sup>See, generally, § 2.2-4002 for exemptions from APA.

<sup>8</sup>*Id.*

<sup>9</sup>Temple v. Petersburg, 182 Va. 418, 423, 29 S.E.2d 357, 358 (1944).

<sup>10</sup>See 1996 Op. Va. Att’y Gen., *supra* note 5, at 218.

<sup>11</sup>Section 18.2-270.2(A) (2004).

OP. NO. 08-040

**CRIMINAL PROCEDURE: FORFEITURES IN DRUG CASES.**

**TAXATION: LOCAL OFFICERS – TREASURERS — REVIEW OF LOCAL TAXES – COLLECTION BY TREASURERS, ETC.**

**Responsibility for county treasurer to receive any asset forfeiture funds, which must be held and used only for law-enforcement purposes. Sheriff may not establish separate account or ‘treasury’ for such funds separate and apart from locality he serves. No requirement in Guidelines of Department of Criminal Justice Services that asset forfeiture funds be paid only to law-enforcement agencies, but such funds may be used for law-enforcement purposes only.**

THE HONORABLE H. ROGER ZURN JR.  
TREASURER, COUNTY OF LOUNDON  
AUGUST 26, 2008

#### ISSUES PRESENTED

You ask whether state asset forfeiture funds must be received and held by the county treasurer for the use of the sheriff or whether the sheriff may receive and hold such funds in a separate account under his management without the oversight of the county treasurer. Next, you ask the same questions regarding federal asset forfeiture funds. You further inquire whether a sheriff may have his own “treasury” as an “agency” separate and apart from the locality he serves. Finally, you ask whether the guidelines of the Department of Criminal Justice Services require asset forfeiture funds to be paid to law-enforcement agencies only or whether such funds may be placed into a county account.

#### RESPONSE

It is my opinion that the county treasurer is responsible for receiving any asset forfeiture funds, which must be held and used only for law-enforcement purposes. It further is my opinion that a sheriff may not establish a separate account or “treasury” for such funds separate and apart from the locality he serves. Finally, it is my opinion that the guidelines of the Department of Criminal Justice Services do not require that asset forfeiture funds be paid only to law-enforcement agencies, but such funds only may be used for law-enforcement purposes.

#### APPLICABLE LAW AND DISCUSSION

Chapter 22.1 of Title 19.2, §§ 19.2-386.1 through 19.2-386.14, governs forfeiture of assets. Section 19.2-386.14 provides that:

B. Any federal, state or local agency or office that directly participated in the investigation or other law-enforcement activity which led, directly or indirectly, to the seizure and forfeiture shall be eligible for, and may petition the Department [of Criminal Justice Services] for, return of the forfeited asset or an equitable share of the net proceeds, based upon the degree of participation in the law-enforcement effort resulting in the forfeiture, taking into account the total value of all property forfeited and the total law-enforcement

effort with respect to the violation of law on which the forfeiture is based. Upon finding that the petitioning agency is eligible for distribution and that all participating agencies agree on the equitable share of each, the Department shall distribute each share *directly to the appropriate treasury* of the participating agency.

....

D. *All forfeited property*, including its proceeds or cash equivalent, received by a participating state or local agency pursuant to this section *shall be used to promote law enforcement* but shall not be used to supplant existing programs or funds. The [Criminal Justice Services] Board shall promulgate regulations establishing an audit procedure to ensure compliance with this section. [Emphasis added.]

The powers and duties of a treasurer are set out generally in Article 2, Chapters 31, §§ 58.1-3123 through 58.1-3172.1, and 39, §§ 58.1-3910 through 58.1-3939, of Title 58.1. Section 58.1-3127(A) provides that:

Each treasurer shall receive the state revenue and the levies and other amounts payable into the treasury of the political subdivision of the Commonwealth served by the treasurer. Such treasurer shall account for and pay over the revenue received in the manner provided by law.

Additionally, 58.1-3127.1 provides, in part, that:

All amounts to be received or expended by any department or agency, or department or agency head, of a political subdivision of the Commonwealth by virtue of a federal grant, gift, or forfeiture or other disposition of federal funds shall be made payable to the treasury or treasurer of the political subdivision and shall not be made payable to such department or agency, or department or agency head.

Finally, § 15.2-1615(A) directs a sheriff to promptly deposit all monies received with the county or city treasurer except

that the sheriff shall maintain an official account for (i) funds collected for or on account of the Commonwealth or any locality or person pursuant to an order of the court and fees as provided by law and (ii) funds held in trust for prisoners held in local correctional facilities, in accordance with procedures established by the Board of Corrections pursuant to § 53.1-68.

The applicable rule of statutory construction requires that words be given their ordinary meaning, given the context in which they are used.<sup>1</sup> The words used in § 19.2-386.14(B) express the clear intent of the General Assembly that all asset forfeiture funds be paid to and received by the appropriate treasury of the participating agency. The appropriate treasury for a county sheriff is the county treasury. Therefore,

because asset forfeiture funds do not meet the requirements in § 15.2-1615(A) for a sheriff's official account, the asset forfeiture funds must be deposited into the county treasury. Section 19.2-386.14(D), however, requires that any funds received by a law-enforcement agency through the asset forfeiture sharing program "be used to promote law enforcement but shall not be used to supplant existing programs or funds."

A treasurer is responsible for collecting taxes and other revenues payable into the treasury of the locality served by the treasurer.<sup>2</sup> The treasurer is required to "account for ... the revenue received in the manner provided by law."<sup>3</sup> Therefore, the role of the treasurer is to receive, distribute, and account for the asset forfeiture funds for law-enforcement purposes.

You also inquire regarding the receipt, distribution, and accounting of federal asset forfeiture funds. I note that the authority to share federally forfeited property with state and local law enforcement agencies is vested with the Attorney General of the United States ("Attorney General").<sup>4</sup> The exercise of this authority is discretionary.<sup>5</sup> Should the Attorney General exercise his discretionary authority to share federally forfeited property with state and local law-enforcement agencies, he has "pre-approved" a number of expenses as permissible uses of shared funds and property.<sup>6</sup> All of the shared funds and property must supplement and not supplant existing resources of the law-enforcement agency.<sup>7</sup> The pre-approved uses provide that "priority should be given to supporting community policing activities, training, and law enforcement operations calculated to result in further seizures and forfeitures."<sup>8</sup>

Therefore, it is clear that the Attorney General's requirement regarding use of federally forfeited funds shared with state and local law-enforcement agencies is similar to the requirements of the Criminal Justice Services Board. Federally forfeited funds that are shared with local law enforcement agencies must be used only for law-enforcement purposes, with priority given to supporting community policing activities, training, and law enforcement operations calculated to result in further seizures and forfeitures.<sup>9</sup> In addition, the Attorney General requires that the shared federally forfeited funds be maintained in a separate revenue account that is used solely for federal sharing proceeds.<sup>10</sup> Thus, the role of a county treasurer, with reference to federal sharing proceeds, is also to receive, distribute, and account for asset forfeiture funds for law-enforcement purposes.<sup>11</sup>

Finally, you inquire whether a sheriff may maintain his own treasury for asset forfeiture funds. A sheriff is an independent constitutional officer whose duties "shall be prescribed by general law or special act."<sup>12</sup> The Commonwealth follows the Dillon Rule of strict construction<sup>13</sup> that local governing bodies have only those powers that are expressly granted, those that are necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.<sup>14</sup> The Dillon Rule is applicable to constitutional officers.<sup>15</sup> As a general rule, the duties of a sheriff and his deputies are regulated and defined by statute.<sup>16</sup> As previously discussed, §§ 58.1-3127(A), 58.1-3127.1, and 15.2-1615(A) preclude a separate

treasury for asset forfeiture funds. Furthermore, § 15.2-1615(A) provides only limited circumstances in which a sheriff may maintain an official account. Consequently, a sheriff may not maintain his own treasury account for asset forfeiture funds or for any purpose unless authorized by statute.

#### CONCLUSION

Accordingly, it is my opinion that the county treasurer is responsible for receiving any asset forfeiture funds, which must be held and used only for law-enforcement purposes. It further is my opinion that a sheriff may not establish a separate account or “treasury” for such funds separate and apart from the locality he serves. Finally, it is my opinion that the guidelines of the Department of Criminal Justice Services do not require that asset forfeiture funds be paid only to law-enforcement agencies, but such funds only may be used for law-enforcement purposes.

<sup>1</sup>Va. Beach v. Bd. of Supvrs., 246 Va. 233, 236, 435 S.E.2d 382, 384 (1993).

<sup>2</sup>See § 58.1-3127(A) (2004) (mandating that treasurer receive state revenue and levies and other amounts payable to such treasury); § 58.1-3910 (2004) (mandating that county treasurer receive local taxes and other amounts payable to such treasury).

<sup>3</sup>Section 58.1-3127(A).

<sup>4</sup>See 18 U.S.C.A. § 981(e)(2) (West 2000); 19 U.S.C.A. § 1616a(c)(B)(ii) (West 1999); 21 U.S.C.A. § 881(e)(1)(A), (e)(3) (West 1999).

<sup>5</sup>U.S. DEP’T OF JUST., A GUIDE TO EQUITABLE SHARING OF FEDERALLY FORFEITED PROPERTY FOR STATE AND LOCAL LAW ENFORCEMENT AGENCIES, § I, (Mar. 1994), available at <http://www.usdoj.gov/criminal/afmls/publications/guidetoeq.pdf> [hereinafter “GUIDE”].

<sup>6</sup>See *id.* § X(A)(1), (3).

<sup>7</sup>See *id.* § X(B).

<sup>8</sup>*Id.* § X(A)(1).

<sup>9</sup>See *supra* notes 4 and 8 and accompanying text.

<sup>10</sup>See GUIDE, *supra* note 5, at § XI, apps. C-D.

<sup>11</sup>See *id.* apps. C-D.

<sup>12</sup>VA. CONST. art. VII, § 4; VA CODE ANN. § 15.2-1600(A) (2003) (parallel statute).

<sup>13</sup>See Commonwealth v. County Bd., 217 Va. 558, 573, 232 S.E.2d 30, 40 (1977); City of Richmond v. Bd. of Supvrs., 199 Va. 679, 684-85, 101 S.E.2d 641, 644-45 (1958).

<sup>14</sup>See, e.g., Op. Va. Att’y Gen.: 2007 at 53, 54; 2006 at 200, 201; 1987-1988 at 146, 146.

<sup>15</sup>See, e.g., Op. Va. Att’y Gen.: 2006, *supra* note 14, at 201; 1984-1985 at 284, 284.

<sup>16</sup>See Hilton v. Amburgey, 198 Va. 727, 729, 96 S.E.2d 151, 152 (1957); Narrows Grocery Co. v. Bailey, 161 Va. 278, 284, 170 S.E. 730, 732 (1933).

#### OP. NO. 08-034

#### EDUCATION: GENERAL POWERS AND DUTIES OF SCHOOL BOARDS.

**When circumstances change, school board may revisit decision regarding consolidation of schools based on changed circumstances; unless amending or abandoning consolidation contributes to efficiency of school division, it is not proper factor for school board’s analysis.**

**Whether planned consolidation or amendment or abandonment thereof contributes to school division efficiency is factual determination.**

THE HONORABLE DAN C. BOWLING  
MEMBER, HOUSE OF DELEGATES  
JULY 10, 2008

**ISSUE PRESENTED**

You ask if a school board makes a decision to consolidate certain schools within a county, whether the school board may reconsider its decision based on passage of a referendum that would fund the continued operation of the schools originally designated for consolidation.

**RESPONSE**

It is my opinion that when circumstances change, a school board may revisit any decision regarding consolidation of schools. However, unless the amendment to or abandonment of a consolidation proposal contributes to the efficiency of the school division, it is not properly a factor in the school board's analysis. Finally, it is my opinion that whether a planned consolidation or an amendment of abandonment thereof contributes to the efficiency of a school division is a factual determination and not a legal conclusion.<sup>1</sup>

**BACKGROUND**

You advise that the Tazewell County School Board ("School Board") voted to consolidate Pocahontas High School and Pocahontas Middle School with other Tazewell County schools. Thereafter, the Tazewell County Board of Supervisors adopted a motion requesting a referendum<sup>2</sup> to enact a meals tax. You relate that the Board of Supervisors has proposed that a portion of the monies received from the meals tax, if approved, would be used to fund the continued operation of Pocahontas High School and Pocahontas Middle School for two years. If the number of students does not improve within the two-year period, the funding for these schools would end. Therefore, you ask whether the School Board may reconsider its original decision to consolidate the specified schools or whether § 22.1-79 prohibits the School Board from considering the Supervisors' meal tax funding proposal.

**APPLICABLE LAW AND DISCUSSION**

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." "School 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."<sup>3</sup> Virginia follows the Dillon Rule of strict construction concerning the powers of local governing bodies, whereby such powers are limited to those conferred expressly by law or necessarily implied from conferred powers.<sup>4</sup> "[T]he Dillon Rule is applicable to determine in the first instance, from express words or by implication, whether a power exists at all. If the power cannot be found, the inquiry is at an end."<sup>5</sup> Thus, the initial inquiry is whether school boards have an express grant of power to establish school boundaries.

Section 22.1-79 enumerates powers and duties of school boards, which include an obligation to “[p]rovide for the consolidation of schools or redistricting of school boundaries or adopt pupil assignment plans whenever such procedure will contribute to the efficiency of the school division.”<sup>6</sup> Although § 22.1-79 expressly grants to local school boards the authority to redistrict school boundaries, such authority is limited to situations where redistricting “will contribute to the efficiency of the school division.”

You do not specify the criteria which the School Board considered in deciding to consolidate or identify the “efficiency” findings of the School Board justifying its original consolidation decision. Based on the information you provide, one may only speculate whether the proposed meals tax, if adopted, might affect the School Board’s deliberations or conclusions regarding the efficiency of the school system. I find nothing in § 22.1-79 that prohibits or limits the authority of a school board to modify decisions regarding consolidation in light of a change in circumstances. Section 22.1-79 does not compel consolidation even when efficiencies may be realized; however, such a finding is a condition precedent to consolidation. If, in light of changed circumstances, a school board determines that continuing with a proposed consolidation does not contribute to the efficiency of the school system, it is my opinion that the school board must reconsider its earlier decision. In any other circumstances, a school board may reconsider its earlier decision.

#### CONCLUSION

Accordingly, it is my opinion that when circumstances change, a school board may revisit any decision regarding consolidation of schools. However, unless the amendment to or abandonment of a consolidation proposal contributes to the efficiency of the school division, it is not properly a factor in the school board’s analysis. Finally, it is my opinion that whether a planned consolidation or an amendment or abandonment thereof contributes to the efficiency of a school division is a factual determination and not a legal conclusion.<sup>7</sup>

<sup>1</sup>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; 1991 at 122, 124.

<sup>2</sup>Based on the information you provide, it appears that the referendum has not yet been held. Thus, the status of the additional funding is unresolved.

<sup>3</sup>*Kellam v. Sch. Bd.*, 202 Va. 252, 254, 117 S.E.2d 96, 98 (1960), *quoted in* *Commonwealth v. County Bd.*, 217 Va. 558, 574, 232 S.E.2d 30, 40 (1977).

<sup>4</sup>*See* 1999 Op. Va. Att’y Gen. 101, 102.

<sup>5</sup>*County Board*, 217 Va. at 575, 232 S.E.2d at 41.

<sup>6</sup>Va. CODE ANN. § 22.1-79(4) (2006).

<sup>7</sup>*See supra* note 1.

OP. NO. 08-019

**EDUCATIONAL INSTITUTIONS.**

**Authority for college board of visitors to establish policy applying standards of conduct and reasonable rules and regulations to student organizations. If college allows student organizations to have access to its facilities, it may deny access to student group only for viewpoint-neutral reasons. College must be viewpoint neutral in collection and dissemination of student activity fees. Board may adopt viewpoint-neutral policies regulating student organization-sponsored performances on campus, providing funding for such performances, and limiting use of institution's facilities to performances that comply with adopted policies.**

THE HONORABLE TIMOTHY D. HUGO  
MEMBER, HOUSE OF DELEGATES

THE HONORABLE ROBERT G. MARSHALL  
MEMBER, HOUSE OF DELEGATES  
OCTOBER 29, 2008

**ISSUES PRESENTED**

You inquire about student organization-sponsored activities that occur at Virginia's public colleges and universities. First, you inquire concerning the authority of a public college or university ("college") to limit forums for student expression. Second, you ask about the authority of a college regarding the use of "student activity monies." Finally, you inquire concerning the authority of a college to regulate the appearance of student organization-sponsored performances on campus, particularly performances that may be considered "sexually explicit or pervasively vulgar."

**RESPONSE**

It is my opinion that the board of visitors of a college has the authority to establish a policy applying standards of conduct and reasonable rules and regulations to student organizations. If a college allows student organizations to have access to its facilities, it may deny access to a student group only for viewpoint-neutral reasons. Likewise, in both the collection and dissemination of student activity fees, it is my opinion that a college must be viewpoint neutral. Finally, it is my opinion that a board of visitors may adopt viewpoint-neutral policies regulating student organization-sponsored performances on campus, providing funding for such performances, and limiting use of the institution's facilities to performances that comply with the adopted policies.

**APPLICABLE LAW AND DISCUSSION**

It is well established in Virginia that a college, through its board of visitors, "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."<sup>1</sup> This authority does not supersede statutes regarding specific topics.<sup>2</sup>

The Supreme Court of the United States and several federal circuit court opinions have examined appropriate treatment of student organizations in the higher education context.<sup>3</sup> These cases provide the constitutional parameters within which boards of visitors may regulate student organizations, programs, and access to facilities and funding.

## I. OBLIGATIONS OF EDUCATIONAL INSTITUTIONS

A preliminary review of the relationship between colleges and student organizations is useful. A college is not obligated to create a forum for student expression. Rather than delegating performance selection decisions to student groups, it may decide that performances or events it sponsors must meet certain qualitative standards.<sup>4</sup> If a college decides that it, rather than student groups, will select which events occur on campus, it may still seek student input without creating a public forum.<sup>5</sup> The program's funding and selection criteria should inform students clearly that input by student organizations does not create a limited public forum and that decision-making authority for any college-sponsored event rests with the college.

Likewise, there is no legal requirement that compels colleges to recognize student organizations. However, as a practical matter, colleges generally consider student extracurricular activities and organizations to be an integral part of the collegiate experience. Once a college recognizes student organizations, its board and administration must operate under numerous constitutional constraints.

## II. STUDENT ORGANIZATIONS

### A. RECOGNITION

The United States Supreme Court in *Healy*<sup>6</sup> held that student organizations have an associational right to be recognized by their college, unless there is a legitimate justification for nonrecognition.<sup>7</sup> A college "may not restrict speech or association simply because it finds the views expressed by any group to be abhorrent."<sup>8</sup> Further, the *Healy* Court held that denying recognition to any organization meeting the institution's reasonable viewpoint-neutral requirements for recognition equates to prior restraint under the First Amendment<sup>9</sup> because the organization would be prevented from engaging in the various associational activities of other groups.<sup>10</sup> In identifying what would provide a college with a legitimate justification for denying recognition, the Supreme Court noted:

The critical line heretofore drawn for determining the permissibility of regulation is the line between mere advocacy and advocacy "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action." In the context of the "special characteristics of the school environment," the power of the government to prohibit "lawless action" is not limited to acts of a criminal nature. Also prohibitable are actions which "materially and substantially disrupt the work and discipline of the school." Associational activities need not be tolerated where they infringe reasonable campus rules, interrupt classes, or substantially interfere with the opportunity of other students to obtain an education.<sup>[11]</sup>

In speaking to reasonable requirements a college may impose upon the student organizations that it recognizes, the Court noted

“that a college has the inherent power to promulgate rules and regulations; that it has the inherent power properly to discipline; that it has power appropriately to protect itself and its property; that it may expect that its students adhere to generally accepted standards of conduct.”<sup>12]</sup>

The *Healy* Court indicated that the “Student Bill of Rights” struck the right balance between advocacy and impermissible conduct.<sup>13</sup> Student organizations were free to discuss any question that interested them, but they could not keep others from speaking or being heard, invade the privacy of others, damage the property of others, “disrupt the regular and essential operation of the college,” or interfere with others’ rights.<sup>14</sup> However, the record did not show that the denial of recognition for the student group, Students for a Democratic Society, was based upon a legitimate concern that the group would be disruptive; and thus, the reason for nonrecognition “constituted little more than the sort of ‘undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression.’”<sup>15</sup> Finally, the Court said that a college could require student organizations to adhere to reasonable regulations regarding time, place, and the manner in which to conduct their activities, and to affirm that they will adhere to reasonable campus rules as a condition of gaining recognition.<sup>16</sup>

Therefore, boards of visitors would have the authority, subject to recognized constitutional parameters, to establish policies applying standards of conduct and reasonable rules and regulations to student organizations. Adopting such a policy provides guidance to student organizations and safeguards the college against allegations that it denied recognition on constitutionally suspect grounds. The policy could indicate that the college reserves the right to refuse to recognize any organization whose purpose is to incite violence, materially and substantially disrupt the institution’s mission, or whose activities likely will interfere with the educational rights of other students.

#### B. ACCESS TO FACILITIES

The United States Supreme Court has recognized the general principle that “[t]he necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.”<sup>17</sup>

The Supreme Court decision in *Widmar* sets forth the law regarding student organization’s access to facilities.<sup>18</sup> In *Widmar*, a university prevented a religious student organization from using its facilities for worship services contrary to its policy to encourage the activities of student organizations.<sup>19</sup> “[T]he campus of a public university, at least for its students, possesses many of the characteristics of a public forum.”<sup>20</sup> The Court continued:

At the same time, however, our cases have recognized that First Amendment rights must be analyzed “in light of the special characteristics of the school environment.”... A university’s mission is education, and decisions of this Court have never denied a

university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities.<sup>[21]</sup>

Further, relying on *Healy*, the Court noted that the “denial [to particular groups] of use of campus facilities for meetings and other appropriate purposes’ must be subjected to the level of scrutiny appropriate to any form of prior restraint.”<sup>22</sup>

The university's defense and justification for denial of access was its belief that permitting a religious group to use the space for worship would violate the Establishment Clause.<sup>23</sup> The *Widmar* Court used the *Lemon* test<sup>24</sup> to determine whether the government violated the Establishment Clause<sup>25</sup> and determined that although an open forum may advance a religious purpose, it does not foster government entanglement with religion.<sup>26</sup> Further, because the forum was open to all groups, not just religious ones, the Court was not concerned that the primary effect of allowing such use by a religious student organization would be an impermissible advancement of religion.<sup>27</sup> Accordingly, the university was not able to show a compelling state interest to limit access of its facilities, and the Court held in favor of the student religious organization.<sup>28</sup>

Thus, when a college generally allows recognized student organizations access to its facilities, it may not deny access to any student group unless it has a viewpoint-neutral reason for doing so. Absent a showing that the particular group was not contemplated to be within the class of speakers or topics for whom the forum was created, the college likely would need a compelling state interest to impose a narrowly tailored restriction.

### III. STUDENT ACTIVITY FEES

The United States Supreme Court has said that an institution's creation of student activity funding “is a forum more in a metaphysical than in a spatial or geographic sense, but the same principles are applicable.”<sup>29</sup> Thus, if a college accepts student activity fees from its students to disburse to student organizations, thereby creating a forum, it follows that it must distribute the money in a viewpoint-neutral manner.

To illustrate, University of Virginia students who published *Wide Awake*, a Christian student newspaper, sued the University for denying the group a printing subsidy because of the newspaper's religious views.<sup>30</sup> The University already subsidized a variety of other student publications and journalistic activities according to its purpose of supporting “a broad range of extracurricular student activities that ‘are related to the educational purpose of the University.’”<sup>31</sup> The University denied funding to *Wide Awake* due to concern that providing such funding would violate the Establishment Clause.<sup>32</sup> The Court held that the University would not violate the Establishment Clause by funding this group and that failure to fund the group, while simultaneously funding other publishing groups, was viewpoint discrimination.<sup>33</sup> Echoing its facilities access jurisprudence, the Court noted:

[I]n determining whether the State is acting to preserve the limits of the forum it has created so that the exclusion of a class of speech is legitimate, we have observed a distinction between, on the one hand,

content discrimination, which may be permissible if it preserves the purposes of that limited forum, and, on the other hand, viewpoint discrimination, which is presumed impermissible when directed against speech otherwise within the forum's limitations.<sup>[34]</sup>

While the Court noted the risk when a public university provides direct payments to sectarian organizations, it held that the Establishment Clause did not prohibit the University from funding *Wide Awake* when its neutral student activity fee program included non-sectarian recipients and money did not directly flow to the religious group's coffers.<sup>35</sup> The Court specifically found that: (1) the religious organization was independent of the state;<sup>36</sup> (2) the incidental benefit to religion would come from a program of secular services for secular purposes;<sup>37</sup> (3) funding would be based on religion-neutral criteria;<sup>38</sup> (4) any benefit to religion would be indirect, not the result of public funds flowing directly to sectarian coffers;<sup>39</sup> (5) people would not perceive the aid to be a government endorsement of a religious message or of a religion;<sup>40</sup> and (6) the University would avoid entanglement with religion by funding all qualified student organizations, because it would obviate the need to monitor or supervise the messages in the publications printed by the student organization.<sup>41</sup> Moreover, the University may have violated the constitutional principle of government neutrality by, in effect, sending a message of hostility toward religion.<sup>42</sup>

The *Rosenberger* Court determined that the University had engaged in viewpoint discrimination and violated the free speech rights of the student journalists who authored *Wide Awake*.<sup>43</sup> Thus, whenever an institution collects student activity fees and distributes those fees to student groups, it must be careful not to treat or fund differently any group because of the group's ideas or views.

In *Southworth I*, the United States Supreme Court addressed whether it was permissible for the University of Wisconsin to collect student activity fees and distribute them to various student organizations when individual students voiced objections to funding certain of those organizations.<sup>44</sup> The Court determined the University could collect such fees, provided the proceeds were distributed in a viewpoint-neutral manner.<sup>45</sup> The Court found that the collection of activity fees is permissible where supporting student organizations are an extension of an institution's educational mission:

The University may determine that its mission is well served if students have the means to engage in dynamic discussions of philosophical, religious, scientific, social, and political subjects in their extracurricular campus life outside the lecture hall. If the University reaches this conclusion, it is entitled to impose a mandatory fee to sustain an open dialogue to these ends.<sup>[46]</sup>

Thus, a college is not compelled to impose and collect student activity fees. Indeed, colleges first must make a determination that their mission *is* served by such collection and distribution before they are entitled to impose a mandatory fee upon their students.<sup>47</sup> In *Southworth I*, the Court found that the University was entitled to impose such fees because a core element of its mission is to "facilitate a wide range of speech."<sup>48</sup>

In *Southworth I*, the Supreme Court took a dim view of a policy allowing a student body to vote to approve or disapprove an organization's continued funding through referenda,<sup>49</sup> since allocation decisions must be viewpoint neutral. In *Southworth II*, the Seventh Circuit specifically examined several criteria to determine whether the University's method of distributing funds was viewpoint neutral.<sup>50</sup> First, the Seventh Circuit determined that the United States Supreme Court's "prohibition against unbridled discretion is a component of the viewpoint-neutrality requirement."<sup>51</sup> Nevertheless, it found that the weight such University gave to the length of time that a particular organization had existed on campus and the amount of funding it had received in previous years was problematic, because current decisions would depend in part on viewpoint-discriminatory decisions made in the past and because providing less funding to a new group would potentially discriminate against less traditional viewpoints.<sup>52</sup> Further, the Court noted that the University could not use the popularity of an organization's views as the sole factor to determine funding.<sup>53</sup> However,

[t]hat does not mean that the University can never consider the number of students involved because some variable expenses will legitimately depend on this factor, such as the amount of money needed for refreshments or programs distributed to attendees. Or, ... the number of students interested in an event may necessitate the renting of a larger space, and in this circumstance it is legitimate to consider the size of the attending audience. ... [S]uch criteria are not facially invalid, but improper consideration of the popularity of the speech may justify an as-applied challenge.<sup>[54]</sup>

Therefore, as a general rule, if a college implements an allocation process with objective criteria where decision makers do not possess unbridled discretion to consider a group's "popularity," it is less likely to engage in viewpoint discrimination allocation.

#### IV. STUDENT ORGANIZATION-SPONSORED PERFORMANCES

Although there is little case law dealing with student organization sponsored-performances, the cases from other contexts are uniform in requiring – at a minimum – viewpoint neutrality. Under the Fourth Circuit's reasoning, the reasonableness of the exclusion from a forum will be judged by strict scrutiny rather than a viewpoint-discrimination standard if the group or speaker is deemed an insider and part of the class of speakers for whom the institution's forum was created.<sup>55</sup> Therefore, if a college only allows access to a forum of student organizations generally, and a student organization is denied access, then that denial will be scrutinized strictly in light of the forum's purpose.<sup>56</sup> Conversely, a college's denial of access to a member of the general public only would be reviewed to ensure it was viewpoint neutral since a member of the general public is not within the class of speakers for whom the forum was created.<sup>57</sup>

Provided an institution's restrictions are related reasonably to the purpose of the forum, the institution may establish other funding requirements that are unrelated to a student organization's views or topics. *Healy* and other Supreme Court cases addressing student

organizations mention time, place, and manner restrictions or reasonable regulations.<sup>58</sup> For instance, in *Southworth I* a university employed various restrictions for group funding that appeared to withstand constitutional scrutiny although the specific criteria were not challenged. The criteria for the restrictions required a student group to register with the university and “organize as a not-for-profit group, limit membership primarily to students, and agree to undertake activities related to student life on campus.”<sup>59</sup> The university agreed to reimburse the various groups for certain expenses, such as printing, postage, office supplies, and the like; however, gifts, donations, contributions, and the cost of legal services would not be covered.<sup>60</sup> In *Southworth II*, the Seventh Circuit determined that a university’s specific procedures and its appeals process guarded against unbridled discretion and helped ensure viewpoint neutrality.<sup>61</sup> However, the university was cautioned not to allow the size of a group to become a proxy for treating minority views differently.<sup>62</sup>

#### V. MISSION STATEMENT AND BOARD POLICY

Viewpoint neutrality in the funding process is the key to ensuring that an institution treats groups in accordance with the Constitution. Likewise, any disparate treatment between groups would have to be legitimate and reasonable in light of the purpose of the forum created. Consequently, it is important that boards of visitors adopt written policies or mission statements regarding student organizations. This especially is important because the reasonableness of a college’s restrictions will be judged by the forum’s purpose.<sup>63</sup> Lack of clarity may lead to an inability to prove reasonableness.

Applying these guidelines, a board of visitors should adopt a policy specifically addressing the ability to regulate the appearance of student organization-sponsored performances on campus. Such a policy may provide that the mission of performances is to foster: (1) students’ growth and excellence in intellectual and scholastic pursuits; (2) students’ cocurricular endeavors; (3) students’ governance; and (4) the cultural arts. Additionally, the policy may be crafted to provide that performances must promote social improvement and service through literature, speakers, debates, plays, performances, exhibits, events, and endeavors that likely will enable students to become more informed and effective citizens. To that end, a board of visitors could limit funding of student organizations and their programs and use of the college’s facilities to those that further the adopted mission statement. Additional limitations also could be articulated. For example, a board could prohibit use of the college’s facilities or any public monies, including student activity fees, to sponsor plays, motion pictures, exhibits, displays, performances, or other events, the content of which, taken as a whole, is sexually explicit, pervasively vulgar, or which incites or promotes imminent lawlessness.<sup>64</sup> Finally, a board could reserve final determinations regarding application of its policy to the president of the college.

#### CONCLUSION

Accordingly, it is my opinion that the board of visitors of a college has the authority to establish a policy applying standards of conduct and reasonable rules and regulations to student organizations. If a college allows student organizations to have access to its

facilities, it may deny access to a student group only for viewpoint-neutral reasons. Likewise, in both the collection and dissemination of student activity fees, it is my opinion that a college must be viewpoint neutral. Finally, it is my opinion that a board of visitors may adopt viewpoint-neutral policies regulating student organization-sponsored performances on campus, providing funding for such performances, and limiting use of the institution's facilities to performances that comply with the adopted policies.

<sup>1</sup> *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)).

<sup>2</sup> See e.g., VA. CODE ANN § 23-114 (2006) (providing that Board of Visitors of Virginia Tech “shall at all times be under the control of the General Assembly”); see also § 23-122 (2006) (providing that Board of Visitors of Virginia Tech “may make such regulations as they deem expedient, *not contrary to law*”) (emphasis added).

<sup>3</sup> See *Bd. of Regents v. Southworth*, 529 U.S. 217 (2000) (*Southworth I*); *Rosenberger v. Rector & Visitors*, 515 U.S. 819 (1995); *Widmar v. Vincent*, 454 U.S. 263 (1981); *Healy v. James*, 408 U.S. 169 (1972); *Christian Legal Soc’y v. Walker*, 453 F.3d 853 (7th Cir. 2006); *ACLU v. Mote*, 423 F.3d 438 (4th Cir. 2005); *Southworth v. Bd. of Regents*, 307 F.3d 566 (7th Cir. 2002) (*Southworth II*); *Gay Alliance of Students v. Matthews*, 544 F.2d 162 (4th Cir. 1976).

<sup>4</sup> See *Rosenberger*, 515 U.S. at 833 (“[w]e have permitted the government to regulate the content of what is or is not expressed when it is the speaker or when it enlists private entities to convey its own message.”); see also *Nat’l Endowment for the Arts v. Finley*, 524 U.S. 569, 584 (1998) (holding that government sponsored arts funding decisions may consider decency as legitimate funding factor); *Rust v. Sullivan*, 500 U.S. 173 (1991) (holding that federally subsidized family planning grants may constitutionally prohibit grantees from engaging in abortion counseling).

<sup>5</sup> The act of a college in retaining decision-making responsibility for events will not automatically mean it can assert that it has not created a limited public forum for private speech. In *Legal Services Corporation v. Velaquez*, 531 U.S. 533 (2001), the United States Supreme Court noted that “‘it does not follow ... that viewpoint-based restrictions are proper when the [government] does not itself speak or subsidize transmittal of a message it favors but instead expends funds to encourage a diversity of views from private speakers.’” *Id.* at 542 (alterations in original) (quoting *Rosenberger*, 515 U.S. at 834). The Fourth Circuit has said that in distinguishing between government speech and private speech it has: “borrowed a four-factor test from other circuits that examines: ‘(1) the central purpose of the program in which the speech in question occurs; (2) the degree of editorial control exercised by the government or private entities over the content of the speech; (3) the identity of the literal speaker; and (4) whether the government or the private entity bears the ultimate responsibility for the content of the speech.’” *Planned Parenthood of S.C., Inc. v. Rose*, 361 F.3d 786, 792-93 (4th Cir. 2004) (citation omitted). Thus, to meet this four-factor test and to show that it has not created a forum for public speech, a college must either: (1) have a purpose statement indicating that it will be the sponsor of the programs and events on campus, for instance, to facilitate learning, cultural insight, and recreational pursuits for students; or (2) indicate that it is not sponsoring such programs and events to encourage views from private speakers. See *United States v. Am. Library Ass’n*, 539 U.S. 194, 206-07 (2003).

<sup>6</sup> 408 U.S. 169.

<sup>7</sup> *Id.* at 187-88; see also *Matthews*, 544 F.2d at 164-65 (rejecting University’s concerns that recognizing homosexual organization would promote illegality and give impression that University sanctioned organization; such concerns were insufficient reasons to overcome group’s associational rights).

<sup>8</sup> *Id.*

<sup>9</sup> U.S. CONST. amend. I.

<sup>10</sup> *Healy*, 408 U.S. at 184.

<sup>11</sup> *Id.* at 188-89 (citations and footnote omitted).

<sup>12</sup>*Id.* at 192 (quoting *Esteban v. Cent. Miss. State Coll.*, 415 F. 2d 1077, 1089 (8th Cir. 1969)).

<sup>13</sup>*Id.* at 189.

<sup>14</sup>*Id.*

<sup>15</sup>*Id.* at 191 (alteration in original) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969)).

<sup>16</sup>*Id.* at 192-93.

<sup>17</sup>*Rosenberger*, 515 U.S. at 829.

<sup>18</sup>*See Widmar*, 454 U.S. 263.

<sup>19</sup>*Id.* at 265.

<sup>20</sup>*Id.* at 267 n.5.

<sup>21</sup>*Id.* at 268 n.5 (citation omitted).

<sup>22</sup>*Id.* at 268 n.5 (quoting *Healy*, 408 U.S. at 181, 184) (alteration in original).

<sup>23</sup>*Id.* at 270-71.

<sup>24</sup>*See Lemon v. Kurtzman*, 403 U.S. 602 (1971).

<sup>25</sup>*Widmar*, 454 U.S. at 271. After *Agostini v. Felton*, 521 U.S. 203 (1997), the Supreme Court essentially requires that entanglements between government and religion be excessive to find an Establishment Clause violation; thus, the entanglement prong has been folded into the primary effects prong. *Zelman v. Simmons-Harris*, 536 U.S. 639, 668-69 (2002) (O'Connor, J., concurring).

<sup>26</sup>*Widmar*, 454 U.S. at 272-74.

<sup>27</sup>*Id.* at 273.

<sup>28</sup>*Id.* at 277.

<sup>29</sup>*Rosenberger*, 515 U.S. at 830.

<sup>30</sup>*Id.* at 827

<sup>31</sup>*Id.* at 824 (citation omitted).

<sup>32</sup>*Id.* at 827-28.

<sup>33</sup>*Id.* at 844-46.

<sup>34</sup>*Id.* at 829-30.

<sup>35</sup>*Id.* at 842-43.

<sup>36</sup>*Id.* at 841, 850 (O'Connor, J., concurring).

<sup>37</sup>*Id.* at 843.

<sup>38</sup>*Id.*

<sup>39</sup>*Id.* at 842-43.

<sup>40</sup>*Id.*

<sup>41</sup>*Id.* at 843.

<sup>42</sup>*Id.* at 846 (O'Connor, J., concurring); *see also Zorach v. Clauson*, 343 U.S. 306, 314 (1952) (noting that Constitution prohibits government hostility to religion).

<sup>43</sup>*Rosenberger*, 515 U.S. at 837.

<sup>44</sup>*Southworth I*, 529 U.S. 217.

<sup>45</sup>*Id.* at 233.

<sup>46</sup>*Id.*

<sup>47</sup>*Id.*

<sup>48</sup> *Id.* at 231. The *Southworth I* outcome differs from the Supreme Court's decisions in union and bar association cases. See *Keller v. State Bar of Calif.*, 496 U.S. 1 (1990); *Abood v. Detroit Bd. of Ed.*, 431 U.S. 209 (1977). In such instances, the Court held that objecting members who disagreed with speech or political activities may not be forced to subsidize such activities over and above the cost of their actual membership. *Id.* In *Southworth I*, the Court held that allowing students to "opt-out" of funding organizations they are opposed to subsidizing is a permissible way of handling objectors, but it is not constitutionally required. *Southworth I*, 529 U.S. at 232 (noting also that such restriction would be disruptive, costly, and ineffective). The Court said the best way for an institution to ensure the protection of students' free speech rights was by operating a viewpoint-neutral program. *Id.* at 233. Such a program must not fund one particular viewpoint, as in the union and bar association cases, but a wide variety of viewpoints.

<sup>49</sup> *Id.* at 235.

<sup>50</sup> *Southworth II*, 307 F.3d at 566.

<sup>51</sup> *Id.* at 579.

<sup>52</sup> *Id.* at 593-94.

<sup>53</sup> *Id.* at 594-95.

<sup>54</sup> *Id.* at 595.

<sup>55</sup> See *Mote*, 423 F.3d at 444.

<sup>56</sup> *Id.* To further complicate matters, the distinction between viewpoint and content discrimination, while theoretically understandable, is difficult to apply. *Rosenberger*, 515 U.S. at 831-32. "[I]t must be acknowledged, the distinction is not a precise one." *Id.* at 831. Content-based decisions by necessity will require an institution to consider the purpose of its forum as well as those granted access to the forum. For example, the *Rosenberger* Court mentioned, as a contrast to the University of Virginia's denial of funding for religious activities, that the University prohibited the funding of lobbying activities while not discriminating against the political views of the groups. *Id.* at 825. Prohibiting lobbying, therefore, most likely is a content-based restriction and not viewpoint discriminatory. If an institution carefully crafts a well-defined purpose statement, by clearly identifying who the intended insiders to the forum are, and by considering any prohibitions in light of the speakers and topics already allowed access to the forum, the institution may be able to make content-based distinctions regarding which speech and activities are within the forum's purpose.

<sup>57</sup> See *Mote*, 423 F.3d at 444.

<sup>58</sup> See, e.g., *Southworth I*, 529 U.S. at 234; *Widmar*, 454 U.S. at 276-77.

<sup>59</sup> *Southworth I*, 529 U.S. at 223.

<sup>60</sup> *Id.* at 225.

<sup>61</sup> *Southworth II*, 307 F.3d at 595.

<sup>62</sup> *Id.* at 594-95.

<sup>63</sup> See *Cornelius*, 473 U.S. at 806. "The State may not exclude speech where its distinction is not 'reasonable in light of the purpose served by the forum.'" *Rosenberger*, 515 U.S. at 829 (quoting *Cornelius*, 473 U.S. at 806). For example, the Seventh Circuit said it was unable to evaluate the reasonableness of a university's policy in light of the purposes that the forum served because the purposes were unclear and the Court was unwilling to speculate what officials might have intended. *Walker*, 453 F.3d at 866-67.

<sup>64</sup> For instance, assume the mission of a student organization finance allocation process is to foster student growth and excellence in intellectual and scholastic pursuits, co-curricular endeavors, governance, and the cultural arts. Under those circumstances, a board of visitors could adopt a policy stating that funding through the student organization finance allocation process shall be provided, and the facilities of the college shall be used, only in furtherance of the mission statement. Further, the policy could provide that college facilities or public monies, including student activity fees, will not be used to sponsor performances or events, the content of which, taken as a whole, is sexually explicit, pervasively vulgar, or which incites or promotes imminent lawlessness, and that final determinations regarding application of the policy is reserved to the president of the college.

OP. NO. 08-088

ELECTIONS: ABSENTEE VOTING.

FEDERAL UNIFORMED AND OVERSEAS CITIZENS ABSENTEE VOTING ACT.

No requirement under Virginia law that overseas military voter submitting Virginia absentee ballot to include printed name and address of person who signs witness statement. Requirement under Virginia law that overseas military voter submitting Federal Post Card Application ('FPCA') and Federal Write-In Absentee Ballot ('FWAB') for November 4, 2008 federal election to include printed name and address of person who signs witness statement on FPCA return envelope. Section 24.2-702.1(B), interpreted to require overseas military voter submitting only FWAB to include printed name and address of person who signs witness statement is preempted by Uniformed and Overseas Citizens Absentee Voting Act. General registrars may not reject FWAB submitted by overseas military voters for November 4, 2008 federal election, that do not include printed name and address for person who signs witness statement, unless voter is unable to sign application due to physical disability or inability to read or write.

THE HONORABLE W.R. "BILL" JANIS  
MEMBER, HOUSE OF DELEGATES  
OCTOBER 27, 2008

#### ISSUES PRESENTED

You ask whether Virginia law requires an overseas military voter submitting a Virginia absentee ballot to include the printed name and address of the person who signs the witness statement. You also ask whether Virginia law requires an overseas military voter submitting a Federal Write-In Absentee Ballot to include the printed name and address of the person who signs the witness statement.<sup>1</sup> If the response to this last inquiry is in the affirmative, you then inquire whether Virginia law is preempted by the provisions of the Uniformed and Overseas Citizens Absentee Voting Act ("UOCAVA").<sup>2</sup> You next ask whether the absence of the printed name and address of the person who signs the witness statement is an immaterial omission under the provisions of § 24.2-706 and SBE Elections Policy 2008-0006. Finally, you ask whether general registrars may reject Federal Write-In Absentee Ballots or Virginia absentee ballots submitted for the November 4, 2008 federal election by overseas military voters that do not include a printed name and address for the person who signs the witness statement.

#### RESPONSE

It is my opinion that Virginia law does not require an overseas military voter submitting a Virginia absentee ballot pursuant to the procedure contained in § 24.2-707 to include the printed name and address of the person who signs the witness statement. It further is my opinion that Virginia law requires an overseas military voter submitting a Federal Post Card Application ("FPCA") and a Federal Write-In Absentee Ballot ("FWAB") for the November 4, 2008 federal election to include the printed name and address of the person who signs the witness statement on the FPCA return envelope.<sup>3</sup> It is also my opinion that the applicable provision of Virginia law, § 24.2-702.1(B), interpreted to require an overseas military voter submitting only a FWAB to include the printed name and address of the person who signs the witness statement is preempted by the provisions of the UOCAVA.<sup>4</sup> Finally, it is my opinion that general registrars may not reject a FWAB submitted by overseas military voters for the November 4, 2008 federal

election, that do not include a printed name and address for the person who signs the witness statement, unless the voter is unable to sign the application due to a physical disability or inability to read or write.

**BACKGROUND**

You advise that some general registrars in the Commonwealth are rejecting FWABs returned by overseas military voters without the witnesses’ printed names and addresses on the envelopes while accepting and counting absentee ballots without such information when submitted on the Virginia absentee ballot return envelope. You express the belief that by imposing this additional requirement on overseas military voters, general registrars effectively are disenfranchising members of the Armed Forces who are bravely serving in Iraq and elsewhere around the world.

You express the belief that an overseas military voter who is voting his or her ballot is likely to turn to a fellow service member, whose current address may be a tent in Iraq or Afghanistan, to sign as the witness. You observe that § 24.2-706(4) requires local electoral boards to provide absentee voters with “[p]rinted instructions for completing the ballot and statement on the envelope and returning the ballot.” Voters and witnesses are provided no instructions, however, mandating a printed name and address for the witnesses, much less instructions regarding whether the witnesses should provide their home addresses in the United States or temporary addresses on deployment. You also observe that the federal government similarly provides directions for military voters to complete federal ballots at the web site.<sup>5</sup> The federal directions do not advise absentee military voters that witnesses to the FWABs must provide printed names and addresses to be counted, and there is no space provided for such information.

**APPLICABLE LAW AND DISCUSSION**

Section 24.2-707 contains the following procedures by which a voter casts an absentee ballot: (1) a voter who applies for an absentee ballot by mail or in person receives his ballot by mail, and returns his marked ballot by mail or delivers it personally to the electoral board or the general registrar; and (2) a voter who applies for an absentee ballot in person casts his ballot at the time of application in the office of the general registrar or the secretary of the electoral board. Section 24.2-707 contains detailed requirements for marking the ballot, sealing the envelope, refolding the ballot, and signing the statement printed on the envelope in the presence of a witness, “who shall sign the same envelope.” Finally, § 24.2-706 requires the voter to complete the following statement that appears on the absentee ballot envelope:

“Statement of Voter.”

“I do hereby state, subject to felony penalties for making false statements pursuant to § 24.2-1016, that my **FULL NAME** is . . . .  
. . . . . (last, first, middle); that I am now or have been at some  
time since last November’s general election a legal resident of . .  
. . . . . (**STATE YOUR LEGAL RESIDENCE IN  
VIRGINIA** including the house number, street name or rural route

address, city, zip code); that I received the enclosed ballot(s) upon application to the registrar of such county or city; that I opened the envelope marked 'ballot within' and marked the ballot(s) in the presence of the witness, without assistance or knowledge on the part of anyone as to the manner in which I marked it (or I am returning the form required to report how I was assisted); that I then sealed the ballot(s) in this envelope; and that I have not voted and will not vote in this election at any other time or place.

Signature of Voter . . . . .

Date. . . . .

Signature of witness . . . . .”

Thus, Virginia law does not require an overseas military voter submitting a Virginia absentee ballot in a federal election to include the printed name and address of the person who signs the witness statement. All that is required is the signature of the witness.

Section 24.2-702.1 provides that

A. Notwithstanding any other provision of this title, a qualified absentee voter who is eligible for an absentee ballot under subdivision 2 of § 24.2-700 may use a federal write-in absentee ballot in general, special, and primary elections for federal office. Such ballot shall be submitted and processed in the manner provided by the Uniformed and Overseas Citizens Absentee Voting Act (42 U.S.C. § 1973ff et seq.) and [Chapter 7].

B. Notwithstanding any other provision of this title, a federal write-in absentee ballot submitted pursuant to subsection A shall be considered valid for purposes of simultaneously satisfying both an absentee ballot application and a completed absentee ballot for federal offices only, provided that the ballot is received not less than five days prior to the election in which the voter offers to vote, and the application on the envelope contains the following information: (i) the voter’s signature; however, if the voter is unable to sign, the person assisting the voter will note this fact in the voter signature box; (ii) the voter’s printed name; (iii) the county or city in which he is registered and offers to vote; (iv) the residence address at which he is registered to vote; and (v) his current military or overseas address. The envelope must be witnessed, and the witness shall provide his signature, printed name and address in the witness signature box.

Thus, in contrast, § 24.2-702.1(B) requires an overseas military voter submitting a FPCA and a FWAB to include the printed name and address of the person who signs the witness statement on the FPCA.

The United States Congress has the authority to regulate federal elections under the Constitution of the United States.<sup>6</sup> The conduct of federal elections is a federal function and states have no inherent or reserved powers over federal elections because federal elections only came into existence when the United States Constitution was ratified.<sup>7</sup> The states traditionally have been responsible for the conduct of all elections, with the United States Congress occasionally passing laws governing federal elections. The Supreme Court of the United States has confirmed “Congress’ broad powers to regulate federal elections and maintain a national government.”<sup>8</sup>

UOCAVA provides for registration and voting by absent overseas voters and by absent uniformed services voters in elections for federal office.<sup>9</sup> UOCAVA requires the states to comply with its provisions<sup>10</sup> and authorizes the Attorney General of the United States to enforce its provisions.<sup>11</sup> Any state requirement that conflicts with the mandatory provisions of UOCAVA is preempted and invalid.<sup>12</sup>

UOCAVA requires the President to designate the head of an executive department to effectuate the purposes of the Act.<sup>13</sup> The Presidential designee is required to compile and distribute information on state absentee voting procedures, design absentee registration and voting materials, work with state and local election officials in carrying out the act, and report to Congress and the President after each presidential election on the effectiveness of the program’s activities.<sup>14</sup> Each state is required to “permit absent uniformed services voters and overseas voters to use Federal write-in absentee ballots (in accordance with section 1973ff-2 of this title) in general elections for Federal office.”<sup>15</sup> UOCAVA also requires each state to accept the FPCA from uniformed services voters, their spouses and dependents, and overseas electors to allow for simultaneous voter registration application and absentee ballot application.<sup>16</sup> Balloting materials are defined in UOCAVA to include “official post card forms (prescribed under section 1973ff of this title), Federal write-in absentee ballots (prescribed under section 1973ff-2 of this title), and any State balloting materials that, as determined by the Presidential designee, are essential to the carrying out of this subchapter.”<sup>17</sup>

The Federal Voting Assistance Program (“FVAP”) administers UOCAVA for the Sec-retary of Defense. FVAP is responsible for educating U.S. citizens worldwide of their right to vote, increasing participation, and enhancing the electoral process at the federal, state, and local levels. FVAP also is responsible for administering the National Voter Registration Act of 1993 for U.S. citizens abroad. FAVP allows eligible citizens to register to vote at 6,000 Armed Forces Recruitment Offices nationwide.<sup>18</sup> Prior to the 2004 Presidential election, Congressional members raised concerns about the efforts of FVAP to facilitate absentee voting. The Government Accountability Office (“GAO”) initiated a review to address how FVAP’s assistance efforts differed between the 2000 and 2004 presidential elections, what actions DOD and DOS took in response to prior GAO recommendations on absentee voting, and what challenges remained to provide assistance to military personnel and overseas citizens.<sup>19</sup> A challenge identified by GAO was the need to simplify and standardize the time-consuming and multistep absentee voting process that included different requirements and time frames for each state.

An official post card form and absentee write-in ballot, and instructions for the completion of such balloting materials as required by UOCAVA to simplify the absentee voting process, have been prescribed by FVAP.<sup>20</sup> Instructions prepared by FVAP for completion of the balloting materials to be submitted to Virginia election officials take various forms on the FVAP web site.<sup>21</sup> The site instructs<sup>22</sup> that the absentee ballot request form must be signed and dated; however, “no notary/witness [is] required.”<sup>23</sup> The designee web site for Virginia absentee voting also has a link for “More Information on Virginia’s Absentee Voting Guidelines” under the “Resources” heading, that leads to a separate webpage containing Virginia’s FPCA form containing a heading immediately above the designed form that “[c]ircled letters on the form below correspond to the instructions on the following page. **You must complete all shaded areas.**” The instructions on the following web page are labeled “I. Application Instructions for FPCA,” and contain the following instructions for the circled letter “J,” Block 7, a shaded area on the form:

You must sign and date the FPCA. When signing, you are swearing or affirming that the information is true and correct. No notary or witness required except when a voter is unable to sign the application due to a physical disability or inability to read or write.

FVAP’s Virginia FPCA form has an area that is not shaded for the signature for a witness or notary and address “if required,” indicating that it is not an area that must be completed. As indicated in the instructions, a notary or witness is required only “when a voter is unable to sign the application due to a physical disability or inability to read or write.” Further, FVAP’s instructions contain a heading “II. Uniformed Services,” with the following introductory paragraph:

These procedures apply to persons who are U.S. citizens, residents of Virginia and members of the Uniformed Services and their family members. Uniformed Services are defined as the U.S. Armed Forces, merchant marine, commissioned corps of the Public Health Service and the national Oceanic and Atmospheric Administration.

Paragraph C, following this introductory paragraph is labeled “Notary/Witness Requirements” and contains the following statement:

**FPCA:** No notary or witness required except when a voter is unable to sign the application due to a physical disability or inability to read or write.

**Returning a Ballot:** The oath on the envelope must be witnessed and the address of the witness included.

Thus, pursuant to the mandate from the Congress to prescribe an official post card form containing both an absentee voter registration application and an absentee ballot, FVAP requires an overseas military voter submitting both a FPCA and a FWAB to include the signature, printed name, and address of a witness on the return envelope.

In contrast, however, if the FWAB is submitted by itself, the FWAB instructions provide only that the witness must sign and date the form.

The Supremacy Clause of the United States Constitution provides that federal laws and treaties “shall be the supreme law of the land.”<sup>24</sup> By virtue of this clause, federal law supersedes any conflicting state law.<sup>25</sup> The preemption of state law by federal law may occur by express statutory language or other clear indication that Congress intended to legislate exclusively in the area.<sup>26</sup> Even if Congress does not intend the enactment of a federal statutory scheme to preempt state law in the area completely, congressional enactments in the same field override state laws with which they conflict.<sup>27</sup> It is necessary “to determine whether, under the circumstances of this particular case, [the State’s] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”<sup>28</sup> This inquiry requires consideration of the relationship between state and federal laws as they are interpreted and applied, not merely as they are written.<sup>29</sup>

The expressed sense of Congress in enacting UOCAVA was that each state administrator of elections be “aware of the importance of the ability of each uniformed services voter to exercise the right to vote.”<sup>30</sup> Furthermore, Congress has encouraged elections administrators to perform their duties in federal elections “with the intent to ensure that each uniformed services voter receives the utmost consideration and cooperation when voting,” and that “each valid ballot cast by such a voter [be] duly counted.”<sup>31</sup> Moreover, UOCAVA requires that the states allow overseas voters “who make timely application for, and do not receive, States, absentee ballots” to use the federal write-in ballot.<sup>32</sup> It requires that the overseas citizen submit an application, not that the state election official receive it. I note that the primary purpose of Congress enacting UOCAVA was to remedy the unreliability of the overseas mail system.<sup>33</sup> UOCAVA was meant to provide a mechanism for overseas citizens and uniformed service members to vote in federal elections if they were unable to obtain a state absentee ballot.<sup>34</sup>

Therefore, it is my opinion that the provision of § 24.2-702.1(B) interpreted to require an overseas military voter submitting a FWAB to include the printed name and address of the person who signs the witness statement is preempted by UOCAVA. Thus, I also conclude that general registrars may not reject a FWAB submitted by overseas military voters that do not include a witness signature, and printed name and address of a witness, unless the voter is unable to sign the application due to a physical disability or inability to read or write.

#### CONCLUSION

Accordingly, it is my opinion that Virginia law does not require an overseas military voter submitting a Virginia absentee ballot pursuant to the procedure contained in § 24.2-707 to include the printed name and address of the person who signs the witness statement. It further is my opinion that Virginia law requires an overseas military voter submitting a Federal Post Card Application (“FPCA”) and a Federal Write-In

Absentee Ballot (“FWAB”) for the November 4, 2008 federal election to include the printed name and address of the person who signs the witness statement on the FPCA return envelope.<sup>35</sup> It is also my opinion that the applicable provision of Virginia law, § 24.2-702.1(B), interpreted to require an overseas military voter submitting only a FWAB to include the printed name and address of the person who signs the witness statement is preempted by the provisions of the UOCAVA.<sup>36</sup> Finally, it is my opinion that general registrars may not reject a FWAB submitted by overseas military voters for the November 4, 2008 federal election, that do not include a printed name and address for the person who signs the witness statement, unless the voter is unable to sign the application due to a physical disability or inability to read or write.

<sup>1</sup>The applicable provision of Virginia law is § 24.2-702.1(B).

<sup>2</sup>42 U.S.C.A. §§ 1973ff to 1973ff-6 (West 2003 & Supp. 2008).

<sup>3</sup>See VA. CODE ANN. § 24.2-702.1(B) (2006).

<sup>4</sup>Because I conclude that § 24.2-702.1(B), the applicable Virginia law is preempted by UOCAVA, I need not opine regarding whether the absence of the printed name and address of the person who signs a witness statement is an immaterial omission under the provisions of § 24.2-706 and SBE Elections Policy 2008-0006.

<sup>5</sup>See [www.fvap.gov](http://www.fvap.gov).

<sup>6</sup>See U.S. CONST. art. I, § 4 (providing that “[t]he Times, Places, and Manner of Holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Place of Choosing Senators.”); *id.* art. II (providing for states to choose electors for President and Vice President); *id.* amend. XII (providing that “Congress may determine the Time of choosing the Electors and the Day on which they shall give their Votes”).

<sup>7</sup>The National Commission on Federal Election Reform, To Assure Pride and Confidence in the Electoral Process 22 (Aug. 2001) (citing *Cook v. Gralike*, 531 U.S. 510 (2001)).

<sup>8</sup>*Prigmore v. Renfro*, 356 F. Supp. 427, 433 (N.D. Ala. 1972), *aff’d*, 410 U.S. 919 (1973) (citing *Oregon v. Mitchell*, 400 U.S. 112 (1970)).

<sup>9</sup>See *supra* note 2.

<sup>10</sup>42 U.S.C.A. § 1973ff-1(a) (West 2003 & Supp. 2008).

<sup>11</sup>42 U.S.C.A. § 1973ff-4 (West 2003).

<sup>12</sup>See *Bush v. Hillsborough County Canvassing Bd.*, 123 F. Supp. 2d 1305 (N.D. Fla. 2000) (voting absentee is not merely a privilege for those members of our military who do not have the freedom to choose their location). The Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973, also provides uniform national rules for absentee voting in presidential and vice-presidential elections, which are equally valid. See *Oregon*, 400 U.S. at 112. The provisions of the Voting Rights Act are applicable to Virginia. See 28 C.F.R. pt. 51 app. (2008) (noting that Virginia was designated as covered jurisdiction on November 1, 1964).

<sup>13</sup>42 U.S.C.A. § 1973ff(a) (West 2003); see also Exec. Order No. 12642, 53 Fed. Reg. 21975 (June 8, 1988), 3 C.F.R., 1988 Comp., p. 575 (designating Secretary of Defense as Presidential Designee to carry out federal functions under UOCAVA).

<sup>14</sup>42 U.S.C.A. § 1973ff(b)(2) (West 2003 & Supp. 2008).

<sup>15</sup>42 U.S.C.A. § 1973ff-1(a)(3) (West Supp. 2008).

<sup>16</sup>42 U.S.C.A. § 1973ff-1(a)(4) (West 2003).

<sup>17</sup>42 U.S.C.A. § 1973ff-6(2) (West 2003).

<sup>18</sup> See [http://en.wikipedia.org/wiki/Federal\\_Voting\\_Assistance\\_Program](http://en.wikipedia.org/wiki/Federal_Voting_Assistance_Program).

<sup>19</sup> GAO-06-521, Elections: Absentee Voting Assistance to Military and Overseas Citizens Increased for the 2004 General Election, but Challenges Remain (April 2006).

<sup>20</sup> See Virginia forms and instructions for use, at [www.fvap.gov/uniformed-service-members/request-registration-absentee-ballot/states/va/index.html](http://www.fvap.gov/uniformed-service-members/request-registration-absentee-ballot/states/va/index.html).

<sup>21</sup> See <http://www.fvap.gov/resources/media/vagVA.pdf>.

<sup>22</sup> The instruction is provided for the response to the question “What do I fill in?”

<sup>23</sup> See at [www.fvap.gov/uniformed-service-members/request-registration-absentee-ballot/states/va/index.html](http://www.fvap.gov/uniformed-service-members/request-registration-absentee-ballot/states/va/index.html) (Block 7).

<sup>24</sup> U.S. CONST. art. VI, cl. 2.

<sup>25</sup> See *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 210-11 (1824); see also *Savage v. Jones*, 225 U.S. 501, 533 (1912).

<sup>26</sup> See *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); *Op. Va. Att’y Gen.: 1984-1985* at 280, 282; *1973-1974* at 284, 285.

<sup>27</sup> See *Jones*, 430 U.S. at 525-26 (citing Article VI of the United States Constitution).

<sup>28</sup> *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); accord *De Canas v. Bica*, 424 U.S. 351, 363 (1976); *Perez v. Campbell*, 402 U.S. 637, 649 (1971).

<sup>29</sup> *De Canas*, 424 U.S. at 363-65; *Swift & Co. v. Wickham*, 230 F. Supp. 398, 408 (S.D.N.Y. 1964), *appeal dismissed*, 382 U.S. 111 (1965), *aff’d on further consideration*, 364 F.2d 241 (2d Cir. 1966), *cert. denied*, 385 U.S. 1036 (1967).

<sup>30</sup> Pub. L. No. 107-107, Div A, Title XVI, § 1601, 115 Stat. 1274.

<sup>31</sup> *Id.*

<sup>32</sup> 42 U.S.C.A. § 1973ff-2(a) (West Supp. 2008).

<sup>33</sup> H. R. Rep. No. 99-765 at 10, 1986 U.S.C.C.A.N. at 2014.

<sup>34</sup> See *id.* at 5, 1986 U.S.C.C.A.N. at 2009.

<sup>35</sup> See *supra* note 3.

<sup>36</sup> See *supra* note 4.

## OP. NO. 08-030

### ELECTIONS: THE ELECTION – VOTING EQUIPMENT AND SYSTEMS.

#### Local electoral boards may not purchase, borrow, or lease direct recording electronic machines.

MR. G. WILLIAM THOMAS JR.  
CHAIRMAN, ELECTORAL BOARD FOR THE CITY OF RICHMOND  
JUNE 16, 2008

#### ISSUE PRESENTED

You ask whether § 24.2-626 permits local electoral boards to borrow or lease direct recording electronic machines for use in elections either on a temporary or permanent basis. You also ask whether § 24.2-626 prohibits local boards from purchasing, borrowing, or leasing direct recording electronic machines that will not be used for voting, but would only be used at the polling place on election day to demonstrate to voters how to operate the equipment pursuant to § 24.2-647.

**RESPONSE**

It is my opinion that that § 24.2-626 prohibits local electoral boards from borrowing or leasing direct recording electronic machines. It further is my opinion that § 24.2-626 prohibits local boards from purchasing, borrowing, or leasing direct recording electronic machines for use at polling places on election day to demonstrate to voters how to operate the equipment pursuant to § 24.2-647.

**APPLICABLE LAW AND DISCUSSION**

Chapter 6 of Title 24.2, §§ 24.2-600 through 24.2-687, governs elections in Virginia. Article 3 of Chapter 6, §§ 24.2-625 through 24.2-642, governs voting equipment and systems related to elections. Section 24.2-626 provides that:

The governing body of each county and city shall provide for the use of electronic voting or counting systems, of a kind approved by the State Board [of Elections], at every precinct and for all elections held in the county, the city, or any part of the county or city.

Each county and city governing body shall purchase, lease, lease purchase, or otherwise acquire such systems and may provide for the payment therefor in the manner it deems proper. Systems of different kinds may be adopted for use and be used in different precincts of the same county or city, or within a precinct or precincts in a county or city, subject to the approval of the State Board.

On and after July 1, 2007, no county or city shall acquire any direct recording electronic machine (DRE) for use in elections in the county or city. DREs acquired prior to July 1, 2007, may be used in elections in the county or city for the remainder of their useful life.

When the language is plain and unambiguous, general rules of statutory construction require that the plain meaning of the language be applied.<sup>1</sup> Thus, when the General Assembly has used words of a plain and definite import, the rules of construction forbid assigning those words a construction that would amount to concluding that the General Assembly meant something other than that which it actually expressed.<sup>2</sup> Section 24.2-626 does not define the term “acquire.”<sup>3</sup> In the absence of a statutory definition, it is assumed that the General Assembly has intended the common, ordinary meaning of a word to apply. The term “acquire” means “[t]o gain possession or control of; to get or obtain.”<sup>4</sup>

You first inquire whether § 24.2-626 prohibits borrowing or leasing direct recording electronic machines by local electoral boards. The term “borrow” commonly means “[t]o take something for temporary use,”<sup>5</sup> and the term “lease” commonly means “[t]o grant the possession and use of (land, buildings, rooms, moveable property, etc.) to another in return for rent or other consideration.”<sup>6</sup> Both of these terms contemplate in their meaning the possession or control of an object or property. The General Assembly’s use of the term “acquire” in the prohibition language of § 24.2-626<sup>7</sup> clearly is intended

to have broad application. Therefore, since local electoral boards are prohibited from acquiring possession of any type of direct recording electronic machines after July 1, 2007, I must conclude that § 24.2-626 plainly and unambiguously prohibits local electoral boards from borrowing or leasing such machines.

You also ask whether § 24.2-626 prohibits local electoral boards from purchasing, borrowing, or leasing direct recording electronic machines to be used only at polling places on election day to demonstrate to voters how to operate the equipment pursuant to § 24.2-647. You indicate that such machines would not be used for voting.

Section 24.2-647 directs local electoral boards to provide instruction to voters at each polling place on election day regarding “the proper manner of voting.” Further, § 24.2-647 prescribes that “a model of, or materials displaying, a portion of its ballot face” be accessible to the voters. In § 24.2-647, the General Assembly does not describe the types of voting machines to be used at polling places and does not specifically address the use of direct recording electronic machines. Section 24.2-647 is general in nature. “[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.”<sup>8</sup>

Section 24.2-626 specifically prohibits local electoral boards from acquiring direct recording electronic machines, while § 24.2-647 generally requires boards to instruct voters on the proper manner of voting within a polling place. To the extent that the specific provisions of § 24.2-626 appear to conflict with the general provisions of § 24.2-647, § 24.2-626 prevails.<sup>9</sup> Thus, § 24.2-626 prohibits local electoral boards from purchasing, borrowing, or leasing direct recording electronic machines after July 1, 2007, whether they are used for purposes of voting or to demonstrate the proper manner of voting.<sup>10</sup>

#### CONCLUSION

Accordingly, it is my opinion that § 24.2-626 prohibits local electoral boards from borrowing or leasing direct recording electronic machines. It further is my opinion that § 24.2-626 prohibits local boards from purchasing, borrowing, or leasing direct recording electronic machines for use at polling places on election day to demonstrate to voters how to operate the equipment pursuant to § 24.2-647.

<sup>1</sup>*Vaughn, Inc. v. Beck*, 262 Va. 673, 677, 554 S.E.2d 88, 90 (2001); *Shelor Motor Co. v. Miller*, 261 Va. 473, 479, 544 S.E.2d 345, 348 (2001). The Commonwealth follows the “plain meaning” rule of statutory construction. *See Berry v. Klinger*, 225 Va. 201, 208, 300 S.E.2d 792, 796 (1983). Therefore, the plain and natural meaning of the words used in the statute is considered to determine the General Assembly’s intent. *See Britt Constr., Inc. v. Magazzine Clean, LLC*, 271 Va. 58, 62, 623 S.E.2d 886, 888 (2006); *W. Lewinsville Heights Citizens Ass’n v. Bd. of Supvrs.*, 270 Va. 259, 265, 618 S.E.2d 311, 314 (2005); *Mozley v. Prestwoud Bd. of Dirs.*, 264 Va. 549, 554, 570 S.E.2d 817, 820 (2002).

<sup>2</sup>*Britt Construction*, 271 Va. at 62-63, 623 S.E.2d at 888; *Alliance to Save the Mattaponi v. Commonwealth*, 270 Va. 423, 439, 621 S.E.2d 78, 87 (2005); *Williams v. Commonwealth*, 265 Va. 268, 271, 576 S.E.2d 468, 470 (2003).

<sup>3</sup>I note that you refer to a decision of the Supreme Court of Virginia that provided discussion regarding the difference between leasing and owning property. See *Shaia v. City of Richmond*, 207 Va. 885, 153 S.E.2d 257 (1967). In my opinion the decision in *Shaia* is not applicable to the situation you present. *Shaia* involved the valuation of a leasehold interest for purposes of taxation of real property. *Id.* Therefore, *Shaia* does not provide significant analysis regarding interpretation of the term “acquire” as used in § 24.2-626.

<sup>4</sup>BLACK’S LAW DICTIONARY 25 (8th ed. 2004). In common usage, “acquire” means “[t]o come into possession or control of often by unspecified means,” “to come to have as a new or added characteristic, attribute, trait, or ability (as by sustained effort or natural selection).” MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 10 (2001 10th ed.).

<sup>5</sup>BLACK’S LAW DICTIONARY, *supra* note 4, at 196.

<sup>6</sup>*Id.* at 909.

<sup>7</sup>“On and after July 1, 2007, no county or city shall acquire any direct recording electronic machine (DRE) for use in elections in the county or city.” VA. CODE ANN. § 24.2-626 (Supp. 2007).

<sup>8</sup>*Thomas 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)); *see also* *Peerless Ins. Co. v. County of Fairfax*, 274 Va. 236, 244, 645 S.E.2d 478, 483 (2007); *Mattaponi*, 270 Va. at 439-40, 621 S.E.2d at 87; *Capelle v. Orange County*, 269 Va. 60, 65, 607 S.E.2d 103, 105 (2005) (noting that specific statute prevails over general statute if statutes cannot be harmonized).

<sup>9</sup>*See id.*

<sup>10</sup>I note that it would not be necessary to use an actual direct recording machine to demonstrate the proper manner in which to vote. For example, a local electoral board could provide illustrations depicting the proper use of such machines, including the manner in which to vote.

#### OP. NO. 08-087

#### FISHERIES AND HABITAT OF THE TIDAL WATERS: WETLANDS – WETLANDS ZONING ORDINANCE AND WETLANDS BOARDS.

**Individuals holding public offices in town or serving on town’s board of historic review or board of building code appeals may be appointed to serve on that town’s wetlands board created pursuant to wetlands zoning ordinance.**

THE HONORABLE LYNWOOD W. LEWIS JR.  
MEMBER, HOUSE OF DELEGATES  
DECEMBER 8, 2008

#### ISSUES PRESENTED

You ask whether individuals holding public offices in a town may be appointed to serve on that town’s wetlands board created pursuant to a wetlands zoning ordinance under Chapter 13 of Title 28.1. You specifically ask whether an individual serving on a historic review board or board of building code appeals may be appointed to such wetlands board.

#### RESPONSE

It is my opinion that individuals holding public offices in a town may be appointed to serve on that town’s wetlands board, which was created pursuant to a wetlands zoning ordinance under Chapter 13 of Title 28.1. It further is my opinion that an individual serving on a town board of historic review or board of building code appeals may be appointed to the town’s wetlands board.

## APPLICABLE LAW AND DISCUSSION

You advise that the Town of Cape Charles has requested that you inquire about appointments of persons to the Cape Charles Wetlands Board. Specifically, you ask whether persons serving in public offices in the town and persons who serve on the town's historic review board or board of building code appeals may be appointed to the Wetlands Board.

Chapter 13 of Title 28.2, §§ 28.2-1300 through 28.2-1320 ("Chapter 13"), governs wetlands within the Commonwealth. Section 28.2-1303(A) provides, in part, that:

Every county, city, or town that enacts a wetlands zoning ordinance pursuant to [Chapter 13] shall create a wetlands board, consisting of five or seven residents of that jurisdiction appointed by the local governing body. All board members' terms shall be for five years, except that the term of at least one of the original appointments shall expire during each of the succeeding five years. The chairman of the board shall notify the local governing body at least 30 days prior to the expiration of any member's term and shall promptly notify the local governing body if any vacancy occurs. Vacancies shall be filled by the local governing body without delay upon receipt of such notice. Appointments to fill vacancies shall be for the unexpired portion of the term. Members may serve successive terms. A member whose term expires shall continue to serve until his successor is appointed and qualified. *Members of the board shall hold no public office in the county or city other than membership on the local planning or zoning commission, the local erosion commission, the local board of zoning appeals, a board established by a local government to hear cases regarding ordinances adopted pursuant to the Chesapeake Bay Preservation Act and regulations promulgated thereunder, or as director of a soil and water conservation board.*<sup>[1]</sup> When members of these local commissions or boards are appointed to a local wetlands board, their terms of appointment shall be coterminous with their membership on those boards or commissions. [Emphasis added.]

Legislative intent is determined from the plain meaning of the words used.<sup>2</sup> Furthermore, "when legislative intent is plain," One is required "to respect it and give it effect."<sup>3</sup> Language is only ambiguous if it admits of being understood in more than one way or refers to two or more things simultaneously.<sup>4</sup> "If language is clear and unambiguous, there is no need for construction ...; the plain meaning and intent of the [statute] will be given it."<sup>5</sup>

Section 28.2-1303(A) plainly directs that "[e]very county, city, or town that enacts a wetlands zoning ordinance pursuant to [Chapter 13] shall create a wetlands board." The portion of § 28.2-1303(A) about which you inquire clearly provides that members of the wetlands board "shall hold no public office in the county or city." The omission of towns from the prohibition contained in this sentence is significant

and demonstrates a legislative intent to exclude towns from the operation of this specific prohibition.<sup>6</sup> Accordingly, I conclude that individuals holding public offices in towns may be appointed to serve on a wetlands board enacted pursuant to Chapter 13. For the same reasons, I conclude that individuals who serve on a town board, such as the historic review board or the board of building code appeals, may be appointed to serve on a wetlands board.

#### CONCLUSION

Accordingly, it is my opinion that individuals holding public offices in a town may be appointed to serve on that town's wetlands board, which was created pursuant to a wetlands zoning ordinance under Chapter 13 of Title 28.1. It further is my opinion that an individual serving on a town board of historic review or board of building code appeals may be appointed to the town's wetlands board.

<sup>1</sup>You advise that your inquiries arise from this emphasized portion of § 28.2-1303(A).

<sup>2</sup>*Marsh v. City of Richmond*, 234 Va. 4, 11, 360 S.E.2d 163, 167 (1987); *Va. Dept. of Labor & Indus. v. Westmoreland Coal Co.*, 233 Va. 97, 99, 353 S.E.2d 758, 760-61 (1987); *Ambrogi v. Koontz*, 224 Va. 381, 386, 297 S.E.2d 660, 662 (1982).

<sup>3</sup>*Commonwealth v. County Bd.*, 217 Va. 558, 579, 232 S.E.2d 30, 43 (1977).

<sup>4</sup>*Lincoln Nat'l Life Ins. Co. v. Commonwealth Corrugated Container Corp.*, 229 Va. 132, 136-37, 327 S.E.2d 98, 101 (1985); *see also* *Brown v. Lukhard*, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985) ("An ambiguity exists when the language is difficult to comprehend, is of doubtful import, or lacks clearness and definiteness.").

<sup>5</sup>*Brown*, 229 Va. at 321, 330 S.E.2d at 87 (1985); *accord* *Gillespie v. Commonwealth*, 272 Va. 753, 757-58, 636 S.E.2d 430, 432 (2006); *Lynch v. Commonwealth Transp. Comm'r*, 255 Va. 227, 231, 495 S.E.2d 247, 249 (1998); *Sch. Bd. v. Sch. Bd.*, 219 Va. 244, 250, 247 S.E.2d 380, 384 (1978).

<sup>6</sup>*See, e.g.*, *Williams v. Matthews*, 248 Va. 277, 284, 448 S.E.2d 625, 629 (1994) (noting that when statute contains provision with reference to one subject, omission of such provision is significant to show different legislative intent); *Va. Beach v. Va. Rest. Ass'n*, 231 Va. 130, 134, 341 S.E.2d 198, 200 (1986) (finding that omission of word "tax" in statute prohibiting certain actions was significant when word "tax" was used in other parts of act).

#### OP. NO. 08-048

#### HEALTH: ENVIRONMENTAL HEALTH SERVICES – PRIVATE WELL CONSTRUCTION.

**Authority for Department of Health to require submission of survey plat with application for private well construction permit.**

THE HONORABLE LYNWOOD W. LEWIS JR.  
MEMBER, HOUSE OF DELEGATES  
JULY 28, 2008

#### ISSUE PRESENTED

You inquire whether 12 VAC §§ 5-610-460 and 5-630-230, the Onsite Sewage Quality Assurance Manual of the Department of Health, or any other provision of Virginia law authorizes the Department to require a "survey plat" in applications for construction permits for private wells.

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#### RESPONSE

It is my opinion that the Department of Health has the authority to require submission of a survey plat with an application for a private well construction permit.

#### BACKGROUND

The Department of Health (the “Department”) distributed its “Procedures Manual for the Onsite Sewage Program” (the “Manual”) on October 17, 2007.<sup>1</sup> The purpose of the Manual is to provide guidance to local Health Departments and to identify measurable standards for internal processes associated with the Sewage Program in an effort to raise the overall quality of the program.<sup>2</sup> The Manual combines the procedures for applying for permits for septic systems under the Sewage Handling and Disposal Regulations<sup>3</sup> (the “Sewage Regulations”) and private wells under the Private Well Regulations<sup>4</sup> (the “Well Regulations”) (collectively, the “Regulations”).<sup>5</sup> You state that local health departments throughout the Commonwealth have been implementing the processes outlined within the Manual. You indicate that the Eastern Shore Health District, relying upon the Manual and the Regulations, recently has required the submission of a survey plat as part of a complete application package for a private well construction permit. Therefore, you ask whether the Department’s policy in the Manual to require such survey plat is a reasonable interpretation of the Regulations.

#### APPLICABLE LAW AND DISCUSSION

The Sewage Regulations, adopted by the Board of Health (the “Board”) pursuant to § 32.1-164, specifically authorize the Department to require a survey plat. The Sewage Regulations require a “site plan (sketch) ... to evaluate the suitability of a subsurface soil absorption system for that site.”<sup>6</sup> “[A]s a minimum, prior to issuance of the construction permit the perimeter of the soil absorption area site or sites shall be shown on a copy of a surveyed plat of the property.”<sup>7</sup>

Pursuant to § 32.1-176.4(A), the Department enforces the Well Regulations adopted by the Board to govern the location and construction of private wells in the Commonwealth. The Well Regulations require a completed application to include “[a] site plan showing the proposed well site, property boundaries, accurate locations of actual or proposed sewage disposal systems, recorded easements, and other sources of contamination within 100 feet of the proposed well site.”<sup>8</sup> The Well Regulations do not define the term “site plan” and do not include a specific requirement for a survey plat.

The Manual includes a survey plat of the property as an element of a complete application for both a septic permit and a private well construction permit, thereby equating the requirement for a site plan or site sketch with a survey plat.<sup>9</sup> The Manual is in effect a guidance document.<sup>10</sup> Such documents, while not having the force and effect of law,<sup>11</sup> serve to advise the agency’s staff and the public of the agency’s interpretation of its regulations.<sup>12</sup> Courts generally give such “interpretative” rules persuasive effect:

[A]n agency “has incidental powers which are reasonably implied as a necessary incident to its expressly granted powers for accomplishing [its] purposes.” This includes the adoption of interpretative rules. Since such rules do not undergo the same scrutiny as do formally promulgated regulations, they “do not purport to be a substitute for the statute.” “[T]hey do not have the force of law.” In spite of this, interpretative rules carry persuasive effect. We give “great deference to an administrative agency’s interpretation of the regulations it is responsible for enforcing,” for “it is inappropriate for a court to second-guess the manner in which an agency responds to its responsibility of carrying out the Commonwealth’s policy when those means are not prohibited[.]”<sup>13</sup>

Determining the appropriate components to be included in an application for a private well permit falls within the area of the Department’s special area of expertise. The Department has determined that the requirement of a survey as part of such an application is necessary to accomplish the proper purpose of the Well Regulations.<sup>14</sup> I find no statutes or regulations that would prohibit the Department from adopting such a requirement.

The General Assembly considers the preparation of a plat for site plans to be part of the practice of surveying.<sup>15</sup> As previously noted, 12 VAC § 5-630-230 of the Well Regulations requires a “site plan” to show among other things the property boundaries, the accurate location of actual or proposed sewage disposal systems, the proposed well site, and any recorded easements. Such items would necessitate a properly prepared, reliable, and accurate survey or plat to provide the Department with the information to make a correct and informed decision regarding a well application. Thus, in my opinion, it is reasonable for the Department to require that a “site plan” under the Well Regulations include a survey.

#### CONCLUSION

Accordingly, it is my opinion that the Department of Health has the authority to require submission of a survey plat with an application for a private well construction permit.

<sup>1</sup> See Memorandum from Jeffrey Lake, M.S., Deputy Commissioner for Community Health Services, Department of Health (Oct. 17, 2007) (copy on file with author); see also Dep’t of Health, Procedures Manual for the Onsite Sewage Program (Oct. 17, 2007) (copy on file with author) [hereinafter “Manual”].

<sup>2</sup> See *id.*, Introduction, “Establishing a Quality Assurance Program.”

<sup>3</sup> 12 VA. ADMIN. CODE §§ 5-610-20 to 5-610-1170 (2002) (codified in scattered sections).

<sup>4</sup> 12 VA. ADMIN. CODE §§ 5-630-10 to 5-630-480 (2002) (codified in scattered sections).

<sup>5</sup> See Manual, *supra* note 1, Septic & Well Bare Application Process, app. 2, “Instructions for Well and Septic Permit Applications”; *id.* app. 3, “Check List for Septic or Septic and Well Applications.”

<sup>6</sup> 12 VA. ADMIN. CODE § 5-610-460.

<sup>7</sup> *Id.*

<sup>8</sup> 12 VA. ADMIN. CODE § 5-630-230.

<sup>9</sup> See Manual, *supra* note 1, Septic & Well Bare Application Process, app. 2, “Instructions for Well and Septic Permit Applications.”

<sup>10</sup> The Administrative Process Act, §§ 2.2-4000 to 2.2-4031, defines a “guidance document” as “any document developed by a state agency . . . that provides information or guidance of general applicability to the staff or public to interpret or implement statutes or the agency’s rules or regulations.” VA. CODE ANN. § 2.2-4001 (Supp. 2007).

<sup>11</sup> *NRV Real Estate, LLC v. Va. Dep’t of Health*, 51 Va. App. 514, 526-27, 659 S.E.2d 527, 533 (2008).

<sup>12</sup> The General Assembly has charged the Department, like all administrative agencies, with the interpretation and application of regulations adopted by the Board. See VA. CODE ANN. § 32.1-176.4(A) (2004) (mandating that Department enforce rules and regulations of Board regarding location and construction of private wells). Reviewing courts will afford varying degrees of deference to the decision of an administrative agency. *Johnston-Willis, Ltd. v. Kenley*, 6 Va. App. 231, 243-44, 369 S.E.2d 1, 8 (1988). If the issue to be resolved falls within the specialized competence of the agency, the latter’s decision is entitled to special weight. *Id.* at 244, 369 S.E.2d at 8. That interpretation will not be reversed unless it is arbitrary and capricious. *Va. Real Estate Bd. v. Clay*, 9 Va. App. 152, 159, 384 S.E.2d 622, 626 (1989). The Department’s interpretation of the Board’s regulations in the present situation to a given permit application would be such an issue.

<sup>13</sup> *NRV Real Estate, LLC v. Va. Dep’t of Health*, 51 Va. App. 514, 526-27, 659 S.E.2d 527, 533-34 (2008) (citations omitted) (first and second alterations in original).

<sup>14</sup> See *supra* note 9 and accompanying text.

<sup>15</sup> See VA. CODE ANN. § 54.1-408 (2005) (expanding statutory definition of “practice of land surveying” to provide that “[i]n addition to the work defined in § 54-400, a land surveyor may, for subdivisions, *site plans* and plans of development only, prepare plats, plans and profiles for roads, storm drainage systems, [and] sanitary sewer extensions.” (Emphasis added.)

#### OP. NO. 08-013

#### HIGHWAYS, BRIDGES AND FERRIES: OUTDOOR ADVERTISING IN SIGHT OF HIGHWAYS – GENERAL REGULATIONS.

**No prohibition against posting of political campaign signs within state rights-of-way. Fairfax County may enter into agreement with Commonwealth Transportation Commissioner to enforce prohibition. Signs and advertising supporting individual’s candidacy for elected public office or other ballot issues are not subject to such agreement, unless they remain in place more than three days after election to which they apply.**

DAVID P. BOBZIEN  
FAIRFAX COUNTY ATTORNEY  
JULY 28, 2008

#### ISSUE PRESENTED

You ask whether § 33.1-373 prohibits the posting of political campaign signs within state rights-of-way.

#### RESPONSE

It is my opinion that § 33.1-373 does not prohibit the posting of political campaign signs within state rights-of-way. Fairfax County may enter into an agreement with the Commonwealth Transportation Commissioner to enforce the provisions of § 33.1-373. It also is my opinion that signs and advertising supporting an individual’s candidacy for elected public office or other ballot issues are not subject to such an agreement, unless such signs and advertising remain in place more than three days after the election to which they apply.<sup>1</sup>

### BACKGROUND

You advise that Fairfax County is considering entering into an agreement with the Commonwealth Transportation Commissioner under § 33.1-375.1(A) that would allow the County to enforce the provisions of § 33.1-373. You advise further that in 1993 § 33.1-351 was amended by the General Assembly to delete from the definition of “advertisement” signs “for any political party or for the candidacy of any individual for any nomination or office.” You conclude that by amending § 33.1-351 in this manner, the General Assembly did not intend political signs to be prohibited in the state’s rights-of-way because it explicitly deleted such signs from the definition of “advertisements” which are prohibited in state rights-of-way and subject to prosecution under § 33.1-373.<sup>2</sup>

### APPLICABLE LAW AND DISCUSSION

The General Assembly has enacted Article 1, Chapter 7 of Title 33.1, §§ 33.1-351 through 33.1-378, a part of the Outdoor Advertising in Sight of Public Highways Act (“Act”), to govern outdoor advertising in and adjacent to the highway right-of-way. Section 33.1-351 defines the following terms used in Chapter 7:

“*Advertisement*” means any writing, printing, picture, painting, display, emblem, drawing, *sign*, or similar device which is posted or displayed outdoors on real property and is intended to invite or to draw the attention or to solicit the patronage or support of the public to any goods, merchandise, real or personal property, business, services, entertainment, or amusement manufactured, produced, bought, sold, conducted, furnished, or dealt in by any person; the term shall also include any part of an advertisement recognizable as such. [Second through sixth emphasis added].

....

“*Sign*” means any outdoor sign, display, device, figure, painting, drawing, message, placard, poster, billboard, or other thing which is designed, intended, or used to advertise or inform, any part of the advertising or informative contents of which is visible from any highway. [Second and third emphasis added].

Section 33.1-373 provides that anyone who places any advertisement within the limits of any highway shall be assessed a civil penalty of \$100 for each occurrence. “Advertisements placed within the limits of the highway are ... a public and private nuisance and may be ... removed ... by the Commonwealth Transportation Commissioner or his representatives without notice.”<sup>3</sup>

Prior to the 1993 Session of the General Assembly, § 33.1-351 defined the term “advertisement” to mean

any writing, printing, picture, painting, display, emblem, drawing, sign, or similar device which is posted or displayed outdoors on real property and is intended to invite or to draw the attention or to solicit the

patronage or support of the public to any goods, merchandise, property, real or personal, business, services, entertainment or amusement manufactured, produced, bought, sold, conducted, furnished or dealt in by any person or for any political party or for the candidacy of any individual for any nomination or office; the term shall also include any part of an advertisement recognizable as such[.]

However, the 1993 Session of the General Assembly struck the phrase “or for any political party or for the candidacy of any individual for any nomination or office” from the definition of advertisement.<sup>4</sup> The 1993 amendment clearly changed the applicable definition of an advertisement in the context of outdoor advertising in and adjacent to a highway right-of-way such that political party or candidacy posters or signs no longer are “advertisements” as defined in the Act. Therefore, following the 1993 amendment to § 33.1-351, signs, posters, and similar media of political parties or candidates for nomination or office no longer constitute “advertisements” within the meaning of the Act.

You note that Fairfax County is contemplating an agreement, pursuant to § 33.1-375.1(A), to act as an agent of the Commonwealth Transportation Commissioner to enforce the provisions of § 33.1-373 and to collect the penalties and costs provided therein. Section 33.1-375.1(C) provides that political campaign signs, among others, are not subject to any agreement pursuant to § 33.1-375.1(A) for the enforcement of § 33.1-373. Section 33.1-375.1(C) further provides that this “exception shall not include [such] signs and advertising in place more than three days after the election to which they apply.” Therefore, while signs and advertising supporting an individual’s candidacy for elected public office may be placed in state rights-of-way pursuant to § 33.1-373, such placement is not subject to enforcement pursuant to agreements entered into under § 33.1-375.1(A) unless such signs have been in place for more than three days after the applicable election.

#### CONCLUSION

Accordingly, it is my opinion that § 33.1-373 does not prohibit the posting of political campaign signs within state rights-of-way. Fairfax County may enter into an agreement with the Commonwealth Transportation Commissioner to enforce the provisions of § 33.1-373. It also is my opinion that signs and advertising supporting an individual’s candidacy for elected public office or other ballot issues are not subject to such an agreement, unless such signs and advertising remain in place more than three days after the election to which they apply.<sup>5</sup>

<sup>1</sup>A prior opinion of the Attorney General (the “2000 Opinion”) concludes that placing of political signs within the public highway rights-of-way violates §§ 33.1-19 and 33.1-375 and the Commonwealth Transportation Board rule governing the use of rights-of-way within the system of state highways. *See* 2000 Op. Va. Att’y Gen. 136. Further, the 2000 Opinion concludes that a Commonwealth’s attorney may prosecute candidates for local office who post campaign materials on state highway-owned rights-of-way. *Id.* at 138. To the extent that the 2000 Opinion concludes that the term “advertisement” includes political signs, it is expressly overruled.

<sup>2</sup>Section 2.2-505(B) requires that an opinion request from a county attorney “shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney’s legal conclusions.”

<sup>3</sup>Va. CODE ANN. § 33.1-373 (2005).

<sup>4</sup>1993 Va. Acts ch. 538, at 668, 668; *see also* 1983-1984 Op. Va. Att’y Gen. 190, 191 (concluding that “[b]ecause political speech is afforded the highest form of protection under the First Amendment,” political campaign poster posted in highway right-of-way could be found to be protected under First Amendment).

<sup>5</sup>*See supra* note 1.

**OP. NO. 07-095**

**IMMUNITY.**

**EDUCATION: GENERAL POWERS AND DUTIES OF SCHOOL BOARDS.**

**School board that employs janitors is pursuing governmental function for purposes of immunity from tort liability.**

THE HONORABLE DAVID ENGLIN  
MEMBER, HOUSE OF DELEGATES  
FEBRUARY 28, 2008

**ISSUE PRESENTED**

You ask whether a school board that employs janitors to clean public schools is pursuing a governmental or proprietary function for purposes of immunity from tort liability arising out of a janitor’s “misconduct.” Specifically, you ask whether a school board is liable for negligent injury to a member of the public or a third party resulting from a janitor’s “misconduct.”

**RESPONSE**

It is my opinion that a school board that employs janitors is pursuing a governmental function for purposes of immunity from tort liability.

**APPLICABLE LAW AND DISCUSSION**

A “governmental function” is one expressly or impliedly authorized by constitution, statute, or other law and carried out for the benefit of the general public. Generally, “[w]here a local government exercises powers delegated or imposed, it performs a governmental function.”<sup>1</sup> A function is governmental if it “directly [is] tied to the health, safety, and welfare of citizens.”<sup>2</sup> Conversely, a “proprietary function” is performed for the benefit of the municipality<sup>3</sup> rather than the general public. A function is proprietary if it primarily is performed for the “private” benefit of the municipality.<sup>4</sup> The doctrine of sovereign immunity extends to municipalities in the exercise of governmental, rather than proprietary, functions.

Article VIII, § 1 of the Constitution of Virginia imposes upon the General Assembly the obligation to “provide for a system of free public elementary and secondary schools” throughout the Commonwealth. Article VIII, § 7, provides that the “supervision of schools” “shall be vested in a school board, to be composed of members selected in the manner, for the term, possessing the qualifications, and to the number provided by law.”<sup>5</sup> Pursuant to these mandates, the General Assembly has established school

boards to act as agencies of the state to carry out these obligations.<sup>6</sup> Thus, school boards constitute public bodies “that exercise limited powers and functions of a public nature granted to them expressly or by necessary implication, and none other.”<sup>7</sup> School boards have specific functions, including a general duty to keep school property in reasonably good repair.<sup>8</sup>

Because a school board is considered a governmental agency or municipal corporation and acts in a governmental capacity, it ordinarily is immune from liability for negligent acts in the performance of its duties.<sup>9</sup> A school board operating a school is not, in the absence of a contrary statute, liable for personal injuries sustained on account of the condition of the school premises.<sup>10</sup> Further, a local ordinance providing that school boards “may sue and be sued” does not affect their governmental immunity for tortious personal injury, unless specified as such.<sup>11</sup>

I find no Virginia case law that addresses directly whether a school board that employs janitors is performing a governmental or proprietary function. A municipality by itself or through its corporate creations that embarks on an enterprise, which is commercial in character or usually performed by private individuals, could be considered to be engaged in a proprietary function.<sup>12</sup> However, the facts you present are more akin to a governmental function.<sup>13</sup> A school board that employs janitors to maintain its public schools is not extending its function beyond those anticipated by the General Assembly because janitorial services are not commercial in nature, and the school board does not derive a pecuniary profit.<sup>14</sup> You specifically note that early cases were in conflict regarding school board liability for the conduct of janitors where the job performed was in connection with nonschool activities. It now is clear that immunity also extends to that situation.<sup>15</sup>

#### CONCLUSION

Accordingly, it is my opinion that a school board that employs janitors is pursuing a governmental function for purposes of immunity from tort liability.

<sup>1</sup>Edwards v. Portsmouth, 237 Va. 167, 171, 375 S.E.2d 747, 750 (1989).

<sup>2</sup>*Id.*

<sup>3</sup>For purposes of this opinion, the term “municipality” also encompasses the corporate creations of a municipality, *e.g.*, a school board. *See* Kellam v. Sch. Bd., 202 Va. 252, 254-55, 117 S.E.2d 96, 97-98 (1960) (noting that school board is governmental agency and corporation).

<sup>4</sup>Hoggard v. City of Richmond, 172 Va. 145, 148-50, 200 S.E. 610, 611-12 (1939) (noting that test is whether act is for common good of all without element of special corporate benefit or pecuniary profit).

<sup>5</sup>“The power to operate, maintain and supervise public schools in Virginia is, and has always been, within the exclusive jurisdiction of the local school boards and not within the jurisdiction of the State Board of Education.” *Bradley v. Sch. Bd.*, 462 F.2d 1058, 1067 (4th Cir. 1972).

<sup>6</sup>*See* VA. CODE ANN. § 22.1-2 (2006) (providing that schools are administered by [State] Board of Education, Superintendent of Public Instruction, division superintendents, and [local] school boards); § 22.1-28 (2006) (providing that supervision of schools in each school division is vested in school board).

<sup>7</sup>*Kellam*, 202 Va. at 254, 117 S.E.2d at 98.

<sup>8</sup>*See* § 22.1-79(3) (2006).

<sup>9</sup> See *Kellam*, 202 Va. at 254, 117 S.E.2d at 97 (quoting *Boice v. Bd. of Educ.*, 111 W.Va. 95, 96, 160 S.E. 566, 566 (1931) (noting that “[a]s the board is purely a statutory creation, it has no authority to change in any way the mold in which it was fashioned by the legislature. It cannot alter the fact that it is a governmental agency; neither can it “step down from its pedestal of immunity,” for that immunity is incident to a governmental agency.”)).

<sup>10</sup> See *id.* at 254, 117 S.E.2d at 99 (noting doctrine that state and governmental agencies, such as school board, are immune from liability for tortious personal injury negligently inflicted when performing duties imposed by law).

<sup>11</sup> See *id.* at 256, 117 S.E.2d at 99 (noting that use of language “may sue and be sued” does not affect governmental immunity of school board for tortious personal injury regarding matters within scope of its statutory or imposed duties).

<sup>12</sup> See, e.g., *Rocky Mount v. Wenco of Danville, Inc.*, 256 Va. 316, 320, 506 S.E.2d 17, 20 (1998) (noting that proprietary functions may involve factors of corporate benefit and pecuniary profit); see also *Carter v. Chesterfield County Health Comm’r*, 259 Va. 588, 591, 527 S.E.2d 783, 785 (2000) (noting that proprietary function is ministerial in nature and involves no use of discretion).

<sup>13</sup> See, e.g., *Bingham v. Bd. of Educ.*, 118 Utah 582, 592, 223 P.2d 432, 438 (1950) (noting that “disposing of papers, rubbish and debris which collect daily on schoolgrounds and in classrooms is reasonably within the scope of the duties imposed upon boards of education by the legislature”). The *Bingham* court held that the acts complained of were committed in the performance of a governmental function and the rule of immunity applied. *Id.*; but see *Bennett v. Portland*, 124 Ore. 691, 265 P. 433 (1928) (holding that school auditorium was operated by city in its corporate or proprietary capacity; thus, it was liable to third parties in negligence).

<sup>14</sup> See *supra* note 4 and accompanying text. “Virginia has long recognized and applied the doctrine of sovereign immunity for the state and its governmental agencies that negligently cause personal injuries while acting in a governmental capacity.” *Croghan v. Fairfax County Sch. Bd.*, 59 Va. Cir. 120, 121 (2002); see also *B.M.H. v. Sch. Bd.*, 833 F. Supp. 560, 573 (E.D. Va. 1993) (dismissing claims of simple negligence and gross negligence alleged against school board based on doctrine of sovereign immunity); *ACM Constr. Mgmt. Corp. v. Chesterfield County Sch. Bd.*, 21 Va. Cir. 125, 127 (1990) (sustaining school board’s demurrer to intentional tort of interference of contract as barred by doctrine of sovereign immunity).

<sup>15</sup> See, e.g., *Kellam*, 202 Va. at 257-58, 117 S.E.2d at 99-100 (quoting 160 A.L.R. 7 at 220) (“Where those in charge of a public school have authority to permit the school premises to be used for other than strictly school purposes, it has been ruled that a board of education, in permitting a third person or organization to use school premises, when not otherwise needed for school purposes, for public lectures, concerts or other educational or social interests, is engaged in a purely governmental function, since such use is not out of harmony with the object for which schools are conducted.”).

#### OP. NO. 08-014

#### MENTAL HEALTH, SUBSTANCE ABUSE SERVICES, ETC.: EMERGENCY CUSTODY AND CIVIL ADMISSIONS – INVOLUNTARY ADMISSIONS – EMERGENCY CUSTODY AND INVOLUNTARY TEMPORARY CUSTODY.

**Concurrent jurisdiction for special justices serving cities of Norfolk and Virginia Beach to conduct hearings under § 37.2-820 for persons detained in Virginia Beach for whom subject matter and *in personam* jurisdiction have been obtained by Norfolk special justices from temporary detention order issued under § 37.2-809. Jurisdiction for special justices serving Virginia Beach to conduct commitment hearings for all persons located in Virginia Beach, including persons detained in Virginia Beach under temporary detention order issued in another jurisdiction.**

JUDITH DOCKERY  
SPECIAL JUSTICE, CITY OF VIRGINIA BEACH  
APRIL 1, 2008

**ISSUE PRESENTED**

You ask whether special justices appointed to serve the city of Norfolk have jurisdiction to conduct adult civil commitment hearings in the city of Virginia Beach for a person hospitalized from a locality other than Norfolk.

**RESPONSE**

It is my opinion that special justices serving the city of Norfolk have concurrent jurisdiction with special justices serving the city of Virginia Beach to conduct hearings under § 37.2-820 only for persons detained in Virginia Beach for whom subject matter and *in personam*<sup>1</sup> jurisdiction have been obtained by the Norfolk special justices from a temporary detention order issued under § 37.2-809. Further, it is my opinion that special justices serving Virginia Beach have jurisdiction to conduct commitment hearings for all persons located in Virginia Beach, including persons detained in Virginia Beach under a temporary detention order issued in another jurisdiction.

**BACKGROUND**

You indicate that both Virginia Beach and Norfolk special justices conduct all adult civil commitment hearings at the Virginia Beach Psychiatric Center. However, you relate that the Psychiatric Center assigns all patients who come into the hospital from outside the limits of Virginia Beach, such as the Eastern Shore, Hampton, Newport News, Western Tidewater, and Chesapeake, to the Norfolk special justices to conduct the hearings.<sup>2</sup>

**APPLICABLE LAW AND DISCUSSION**

Section 37.2-803 authorizes the chief judge of each judicial circuit to appoint one or more special justices to conduct adult civil commitment hearings pursuant to Chapter 8 of Title 37.2, §§ 37.2-800 through 37.2-847.<sup>3</sup> Each special justice has “all the powers and jurisdiction conferred upon a judge” and serves “under the supervision and at the pleasure of the chief judge making the appointment.”<sup>4</sup> Thus, a special justice is appointed to conduct civil commitment hearings in the judicial circuit in which he serves.<sup>5</sup> Section 37.2-820 provides that:

The hearing provided for pursuant to §§ 37.2-814 through 37.2-819 may be conducted by the district court judge or a special justice at the convenient facility or other place open to the public provided for in § 37.2-809, if he deems it advisable, even though the facility or place is located in a county or city other than his own. In conducting such hearings in a county or city other than his own, the judge or special justice shall have all of the authority and power that he would have in his own county or city. A district court judge or special justice of the county or city in which the facility or place is located may conduct the hearing provided for in §§ 37.2-814 through 37.2-819.

Therefore, special justices appointed to serve Virginia Beach have jurisdiction to conduct commitment hearings for any patient detained at the Virginia Beach Psychiatric Center regardless of his place of residence or location immediately prior to detention under § 37.2-809. However, special justices appointed to serve Norfolk would only

have jurisdiction to conduct such hearings for persons at the Virginia Beach Psychiatric Center over whom they would have had jurisdiction if the detention were initiated in Norfolk.

“In order for a court to have jurisdiction of the subject matter, the particular issue to be determined must be properly brought before it in the particular proceeding for determination.”<sup>6</sup> “Jurisdiction of a court over the subject matter of a case is commenced with the filing of a complaint, petition, or other pleading.”<sup>7</sup> The court must also acquire jurisdiction over the person through service of process or the prescribed legal or statutory notice.<sup>8</sup> Courts must stay within the limits of their jurisdiction and powers and must have basic jurisdiction over the parties and the controversy.<sup>9</sup> A commitment hearing is initiated upon the petition of any responsible person.<sup>10</sup> You inquire about a situation in which a person who resides in a city other than Norfolk temporarily is detained in a hospital located in Virginia Beach. Based on the facts you present, a special justice serving the Norfolk judicial circuit would not obtain either subject matter jurisdiction over a commitment proceeding or *in personam* jurisdiction over a person who was not located within Norfolk when the temporary detention order was issued.<sup>11</sup>

#### CONCLUSION

Accordingly, it is my opinion that special justices serving the city of Norfolk have concurrent jurisdiction with special justices serving the city of Virginia Beach to conduct hearings under § 37.2-820 only for persons detained in Virginia Beach for whom subject matter and *in personam*<sup>12</sup> jurisdiction have been obtained by the Norfolk special justices from a temporary detention order issued under § 37.2-809. Further, it is my opinion that special justices serving Virginia Beach have jurisdiction to conduct commitment hearings for all persons located in Virginia Beach, including persons detained in Virginia Beach under a temporary detention order issued in another jurisdiction.

<sup>1</sup>“*In personam*” means “[i]nvolving or determining the personal rights and obligations of the parties.” BLACK’S LAW DICTIONARY 807 (8th ed. 2004).

<sup>2</sup>See VA. CODE ANN. § 16.1-69.35 (Supp. 2007) (imposing responsibility upon chief district court judge to designate judges within district or judge of another district court within Commonwealth to hear and dispose of any actions coming before district court for disposition). It is my opinion that the Virginia Beach Psychiatric Center has no authority to assign cases to specific judges or special justices.

<sup>3</sup>“The chief judge of each judicial circuit may appoint one or more special justices, for the purpose of performing the duties required of a judge by [Chapter 8], Chapter 11 (§ 37.2-1100 et seq.), and §§ 16.1-69.28, 16.1-335 through 16.1-348, 19.2-169.6, 19.2-174.1, 19.2-177.1, 19.2-182.9, 53.1-40.1, 53.1-40.2 and 53.1-40.9. Each special justice shall be a person licensed to practice law in the Commonwealth or a retired or substitute judge in good standing and shall have all the powers and jurisdiction conferred upon a judge. The special justice shall serve under the supervision and at the pleasure of the chief judge making the appointment for a period of up to six years.” VA. CODE ANN. § 37.2-803 (Supp. 2007).

<sup>4</sup>*Id.*

<sup>5</sup>See 2002 Op. Va. Att’y Gen. 197, 197. Similarly, under § 16.1-69.28, a district court judge may exercise, concurrently with special justices appointed for the purpose, jurisdiction “in all matters in connection with the adjudication and commitment of incapacitated persons, . . . and the institution and conduct of such proceedings thereof. Such proceedings may be had at any place within the jurisdiction of the court over which such judge presides.”

<sup>6</sup>21 C.J.S. *Courts* § 77, at 85 (2006).

<sup>7</sup>*Id.*

<sup>8</sup>*Robertson v. R.R. Labor Bd.*, 268 U.S. 619, 622-23 (1925) (discussing jurisdiction of federal district court system).

<sup>9</sup>21 C.J.S., *supra* note 6, at § 88.

<sup>10</sup>Section 37.2-809(B) (Supp. 2007); *see also* § 37.2-814 (2005) (governing conduct of commitment hearings).

<sup>11</sup>*See supra* notes 5-7 and accompanying text.

<sup>12</sup>*See supra* note 1.

## OP. NO. 08-022

### NOTARIES AND OUT-OF-STATE COMMISSIONERS: VIRGINIA NOTARY ACT.

**No authority under Act for Secretary of the Commonwealth to prescribe equipment or technological requirements for electronic notaries public, to prescribe standards beyond that imposed by general law for third-party providers of electronic notary devices or technology, or to promulgate rules or regulations.**

THE HONORABLE KATHERINE K. HANLEY  
SECRETARY OF THE COMMONWEALTH  
APRIL 1, 2008

#### ISSUE PRESENTED

You request guidance concerning amendments to the Virginia Notary Act,<sup>1</sup> which will become effective on July 1, 2008,<sup>2</sup> (the “2007 Amendments”). Specifically, you ask whether the Secretary of the Commonwealth has the authority to prescribe equipment or technological requirements for “electronic notar[ies] public” and to prescribe standards for third-party providers of electronic notary devices or technology. If such authority exists, you further inquire whether the Secretary is obliged to promulgate formal regulations under the Administrative Process Act.

#### RESPONSE

It is my opinion that the Virginia Notary Act does not authorize the Secretary of the Commonwealth to prescribe equipment or technological requirements for electronic notaries public, to prescribe standards beyond that imposed by general law for third-party providers of electronic notary devices or technology, or to promulgate rules or regulations.

#### BACKGROUND

You inquire concerning the authority of the Secretary of the Commonwealth to register and commission electronic notaries public and the administration of a program to govern such notaries. You note that the 2007 Amendments<sup>3</sup> have amended the Virginia Notary Act pertaining to the commissioning and practice of electronic notaries public. You relate that the 2007 Amendments will affect your statutory responsibilities. You state that electronic notaries public will utilize a variety of hardware and software applications to notarize electronic documents. You note that the variety of such applications and various private licensing agencies within the industry may affect the reliability, safety, and security of the Commonwealth’s notary public system. You express concern about the extent of your authority to commission electronic notaries public and approve their use of various hardware or software applications.

## APPLICABLE LAW AND DISCUSSION

“Any person who acts as a notary in the Commonwealth shall register with and be commissioned by the Secretary of the Commonwealth” and must comply with all provisions of the Virginia Notary Act.<sup>4</sup> The General Assembly has established the general qualifications for appointment as a notary.<sup>5</sup> The 2007 Amendments amended the Act to provide for the commissioning of “electronic notar[ies] public”<sup>6</sup> and to govern their conduct. All notaries public, including electronic notaries public, are authorized to: “(i) take acknowledgements, (ii) administer oaths and affirmations, (iii) certify that a copy of any document, other than a document in the custody of a court, is a true copy thereof, (iv) certify affidavits or depositions of witnesses, and (v) perform such other acts as may be specifically permitted by law.”<sup>7</sup> However, electronic notaries perform these functions in the context of transactions involving electronic documents.

To be commissioned as a notary public,<sup>8</sup> an applicant must submit “registration forms along with the appropriate fee to the Secretary of the Commonwealth.”<sup>9</sup> The General Assembly has delegated the duty of assessing an applicant for appointment as a notary public and the granting of a commission to the Secretary.<sup>10</sup> The Secretary determines if the applicant meets the qualifications to be a notary public and the additional requirements for performing electronic notarial acts.<sup>11</sup> When an applicant meets all the requirements, the Secretary registers the applicant and forwards the commission to the clerk of the appropriate circuit court.<sup>12</sup> The Secretary also notifies the applicant that the commission has been granted.<sup>13</sup> Thereafter, the applicant must appear before the clerk of the appropriate circuit court within sixty days of his appointment, provide sufficient identification, and take the oath of office.<sup>14</sup>

Section 47.1-4 governs the basic qualifications for commission as a notary public and as an electronic notary public. Commission as an electronic notary requires additional information from the applicant, which shall include “[a] description of the technology or technologies the registrant will use to create an electronic signature in performing official acts.”<sup>15</sup> If the device used to create the electronic signature is issued or registered through a licensed authority, the applicant also must provide the name of that authority, the source of the license, and additional information necessary to identify the source of the device and its status, and other pertinent information.<sup>16</sup> The 2007 Amendments require an electronic notary’s electronic signature and seal to “conform to generally accepted standards for secure electronic notarization.”<sup>17</sup>

Section 47.1-3 of the Virginia Notary Act authorizes the Governor to appoint “as many notaries as to him shall seem proper.” A prior opinion of the Attorney General (the “1978 Opinion”) has recognized that the appointment of notaries is discretionary with the Governor.<sup>18</sup> The 1978 Opinion relied upon statutory authority that permitted the Governor to adopt regulations.<sup>19</sup> The current Act is distinguishable and does not authorize the Governor to adopt regulations governing the appointment and qualifications of notaries.<sup>20</sup> In the absence of a delegation of authority to promulgate regulations, such authority does not exist,<sup>21</sup> and the only controlling authority is the Virginia Notary Act itself.

The Virginia Notary Act and the 2007 Amendments provide to the Secretary of the Commonwealth the discretion to determine whether applicants meet the qualifications to be a notary.<sup>22</sup> However, such discretion does not permit imposition of additional requirements for qualification beyond what the General Assembly has prescribed in the Act. Such additional requirements would be beyond the scope of the Act and would constitute rules or regulations not approved or authorized by the General Assembly. Likewise, the General Assembly's allowance for the Secretary to exercise discretion in evaluating personal qualifications does not constitute a delegation of authority to prescribe equipment or technological requirements for electronic notaries beyond those enunciated in the Act.<sup>23</sup> Therefore, it likewise follows that such exercise of discretion does not extend to prescribing standards or requirements for third-party providers of electronic notary devices or technology. Although the Secretary is directed to prepare reference materials containing the provisions of the Act and "such other information as the Secretary shall deem useful,"<sup>24</sup> any information or instructions contained in such reference materials are not tantamount to those of a statutory requirement or regulation.<sup>25</sup> Since the Virginia Notary Act and the 2007 Amendments do not provide for the authority to promulgate regulations, I must conclude that such authority does not exist.<sup>26</sup>

#### CONCLUSION

Accordingly, it is my opinion that the Virginia Notary Act does not authorize the Secretary of the Commonwealth to prescribe equipment or technological requirements for electronic notaries public, to prescribe standards beyond that imposed by general law for third-party providers of electronic notary devices or technology, or to promulgate rules or regulations.

<sup>1</sup> See VA. CODE ANN. tit. 47.1, §§ 47.1-1 to 47.1-30 (2005 & Supp. 2007).

<sup>2</sup> See 2007 Va. Acts chs. 269, 590, cl. 3, at 369, 375, 800, 806, respectively.

<sup>3</sup> I note that certain statutory provisions amended by the 2007 Amendments currently are in effect while other provisions will not become effective until July 1, 2008. Citations to provisions that are not in effect until July 1, 2008, will include the notation, "(effective July 1, 2008)," will cite the 2007 Acts of Assembly, or both.

<sup>4</sup> Section § 47.1-3 (Supp. 2007).

<sup>5</sup> See § 47.1-4 (Supp. 2007).

<sup>6</sup> See § 47.1-2 (Supp. 2007) (effective July 1, 2008) (defining "electronic notary public" or "electronic notary" as "a notary public who has been commissioned by the Secretary of the Commonwealth with the capability of performing electronic notarial acts under § 47.1-7 and has been sworn in by the clerk of the circuit court under § 47.1-9."); see also 2007 Va. Acts chs. 269, 590, *supra* note 2, at 369-70, 801-02, respectively (amending § 47.1-2).

<sup>7</sup> Section 47.1-12 (Supp. 2007).

<sup>8</sup> For purposes of this opinion, references to notary[ies] public or notary[ies] shall include electronic notary[ies] public unless otherwise specified.

<sup>9</sup> See § 47.1-2 (effective July 1, 2008) (defining "commissioned notary public").

<sup>10</sup> See 1999 Op. Va. Att'y Gen. 140, 141 (interpreting § 47.1-8). It is my opinion that the 2007 Amendments to § 47.1-8 have not altered this delegation of duty.

<sup>11</sup> See § 47.1-4 (listing general notary qualification requirements); § 47.1-7 (Supp. 2007) (effective July 1, 2008) (listing additional requirements for electronic notary applicants); § 47.1-8 (Supp. 2007) (effective July 1, 2008) (delegating to Secretary duty to determine whether applicant is qualified to be notary public); see also § 47.1-2 (effective July 1, 2008) (defining “electronic notarial act” and “electronic notarization” as “an official act by a notary under § 47.1-12 of [Title 47.1] or as otherwise authorized by law that involves electronic documents.”).

<sup>12</sup> See § 47.1-8 (effective July 1, 2008); see also 2007 Va. Acts, *supra* note 2, at 371, 803, respectively (amending § 47.1-8).

<sup>13</sup> *Id.*

<sup>14</sup> See § 47.1-9 (Supp. 2007) (effective July 1, 2008); see also 2007 Va. Acts, *supra* note 2, at 371-72, 803, respectively (amending § 47.1-9).

<sup>15</sup> See § 47.1-7(A)(2) (effective July 1, 2008); see also 2007 Va. Acts, *supra* note 2, at 371, 802-03, respectively (amending § 47.1-7).

<sup>16</sup> See § 47.1-7(A)(3) (effective July 1, 2008).

<sup>17</sup> See § 47.1-16(E) (Supp. 2007) (effective July 1, 2008); see also 2007 Va. Acts, *supra* note 2, at 373, 805, respectively (adding § 47.1-16(E)).

<sup>18</sup> See 1977-1978 Op. Va. Att’y Gen. 279, 279 (interpreting § 47-2, predecessor to § 47.1-3).

<sup>19</sup> *Id.* (recognizing, however, that no regulations existed).

<sup>20</sup> Compare VA. CODE ANN. § 47-2 (1974) (authorizing Governor to appoint notaries who “shall be subject to the same restrictions and regulations as are prescribed by general law”) with § 47.1-3 (Supp. 2007) (“The Governor may appoint in and for the Commonwealth as many notaries as to him shall seem proper.”). See 2006 Op. Va. Att’y Gen. 36, for a discussion of the powers of the Governor by executive order.

<sup>21</sup> See 1977-1978 Op. Va. Att’y Gen. 5, 8.

<sup>22</sup> See *supra* notes 9-12 and accompanying text.

<sup>23</sup> See, e.g., §§ 47.1-7, 47.1-11.1, 47.1-16 (Supp. 2007) (effective July 1, 2008); 2007 Va. Acts, *supra* note 2, at 371-73, 802-05, respectively (adding § 47.1-11.1 and amending §§ 47.1-7, 47.1-16).

<sup>24</sup> See § 47.1-11 (effective July 1, 2008).

<sup>25</sup> See 2000 Op. Va. Att’y Gen. 161, 162.

<sup>26</sup> See *supra* note 21 and accompanying text.

## OP. NO. 08-075

### PENSIONS, BENEFITS, AND RETIREMENT: VIRGINIA LAW OFFICERS’ RETIREMENT SYSTEM.

#### Probation and parole officers described in § 16.1-237 are not ‘law-enforcement officers’ for purposes of Retirement System.

THE HONORABLE HARRY B. BLEVINS  
MEMBER, SENATE OF VIRGINIA  
OCTOBER 30, 2008

#### ISSUE PRESENTED

You ask whether juvenile probation and parole officers, as described § 16.1-237, are “law-enforcement officers” for purposes of the Virginia Law Officers’ Retirement System.

#### RESPONSE

It is my opinion that the probation and parole officers described in § 16.1-237 are not “law-enforcement officers” for purposes of the Virginia Law Officers’ Retirement System.

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**APPLICABLE LAW AND DISCUSSION**

Chapter 2.1 of Title 51.1, §§ 51.1-211 through 51.1-221, governs the Virginia Law Officers' Retirement System (the "Retirement System"). Section 51.1-213 mandates compulsory membership in the Retirement System "for all employees." Section 51.1-212 defines the term "employee," which governs the law-enforcement officers<sup>1</sup> eligible to participate in the Retirement System, as

any (i) member of the Capitol Police Force as described in § 30-34.2:1, (ii) campus police officer appointed under the provisions of Chapter 17 (§ 23-232 et seq.) of Title 23, (iii) conservation police officer in the Department of Game and Inland Fisheries appointed under the provisions of Chapter 2 (§ 29.1-200 et seq.) of Title 29.1, (iv) special agent of the Department of Alcoholic Beverage Control appointed under the provisions of Chapter 1 (§ 4.1-100 et seq.), (v) law-enforcement officer employed by the Virginia Marine Resources Commission as described in § 9.1-101, (vi) correctional officer as the term is defined in § 53.1-1, and including correctional officers employed at a juvenile correction facility as the term is defined in § 66-25.3, (vii) any parole officer appointed pursuant to § 53.1-143, and (viii) any commercial vehicle enforcement officer employed by the Department of State Police.

The juvenile probation and parole officers you describe are selected pursuant to § 16.1-235 and have the powers, duties, and functions set forth in § 16.1-237. You indicate that the Director of the Court Services Unit in one of the Juvenile and Domestic Relations Courts questions whether such probation and parole officers should be included in the Virginia Law Officers' Retirement System.

When a statute is clear and unambiguous, the rules of statutory construction dictate that the statute is interpreted according to its plain language.<sup>2</sup> When a statute creates a specific grant of authority, the authority exists only to the extent specifically granted in the statute.<sup>3</sup> Where a statute specifies certain things, the intention to exclude that which is not specified may be inferred.<sup>4</sup> Employees qualified to participate in the Retirement System specifically are defined in § 51.1-212. Because juvenile probation and parole officers are not included in the statutory definition of an "employee," I must conclude that the General Assembly did not intend for such officers to be included in the Retirement System.<sup>5</sup>

**CONCLUSION**

Accordingly, it is my opinion that the probation and parole officers described in § 16.1-237 are not "law-enforcement officers" for purposes of the Virginia Law Officers' Retirement System.

<sup>1</sup>I note that state police officers have a separate retirement fund. See VA. CODE ANN. §§ 51.1-200 to 51.1-210 (2005 & Supp. 2008).

<sup>2</sup>Va. Polytechnic Inst. & State Univ. v. Interactive Return Serv., Inc., 271 Va. 304, 309, 626 S.E.2d 436, 438 (2006).

<sup>3</sup>See 2A NORMAN J. SINGER & J.D. SHAMBLE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47:23 (7th ed. 2007) (explaining maxim of statutory construction, “*expressio unius est exclusio alterius*”); Op. Va. Att’y Gen.: 2002 at 117, 118; 1992 at 145, 146; 1989 at 252, 253; 1980-1981 at 209, 209-10.

<sup>4</sup>See *id.*; 1999 Op. Va. Att’y Gen. 215, 217-18.

<sup>5</sup>Had the General Assembly intended that juvenile probation and parole officers be included in the Retirement System, it could have so specified. See, e.g., 2005 Op. Va. Att’y Gen. 78, 79 n.6 and opinions cited therein (noting that when General Assembly intends statute to impose requirements, it knows how to express its intention).

**OP. NO. 08-039**

**PROFESSIONS AND OCCUPATIONS: GENERAL PROVISIONS.**

**Authority for health regulatory boards to restrict licenses. Authority to place licensee on probation and require that licensee inform all employers about restriction.**

THE HONORABLE JEFFREY M. FREDERICK  
MEMBER, HOUSE OF DELEGATES  
SEPTEMBER 15, 2008

**ISSUE PRESENTED**

In the context of state regulatory agency oversight of licensed professionals,<sup>1</sup> you ask whether a health regulatory board may require a Virginia licensee who is on probation for a violation that did not involve patient care to inform all employers, regardless of their location, of the restrictions on his Virginia license.<sup>2</sup>

**RESPONSE**

It is my opinion that health regulatory boards are authorized to restrict licenses. Further, it is my opinion that implicit within such authority is the right to place a licensee on probation and require that the licensee inform all employers, regardless of their location, of any restrictions on his Virginia license.

**APPLICABLE LAW AND DISCUSSION**

The Commonwealth may “safeguard and protect the public safety, health, morals and general welfare of its people.”<sup>3</sup> The general powers and duties of health regulatory boards, including the imposition of disciplinary sanctions, are consistent with this authority. Section 54.1-2400, provides that health regulatory boards have the authority:

1. To establish the qualifications for ... licensure ... in accordance with the applicable law which are necessary to ensure competence and integrity to engage in the regulated professions.

....

6. To promulgate regulations ... which are reasonable and necessary to administer effectively the regulatory system....

7. To revoke, suspend, *restrict*, or refuse to issue or renew a ... license ..., which such board has authority to issue for causes enumerated in applicable law and regulations.

....

9. To take appropriate disciplinary action for violations of applicable law and regulations. [Emphasis added.]

Section 54.1-2400 authorizes a health regulatory board to impose particular disciplinary sanctions upon a regulated health professional who violates statutory or regulatory provisions governing a health profession. Typical grounds for discipline include negligence or harm to patients, as well as such non-patient care issues as fraud, deceit, or misrepresentation in procuring a license and conviction of a felony or crime involving moral turpitude.<sup>4</sup>

When a health regulatory board is empowered to refuse to issue a certificate or license to any applicant, reprimand a licensee, place a licensee on probation for such time as it may designate, suspend any license for a stated period of time or indefinitely, or even revoke a license,<sup>5</sup> the authority to impose lesser sanctions, to remediate identified deficiencies with the goal of assuring future continuing competency, is necessary and reasonable in fulfilling the board's statutory responsibilities.<sup>6</sup> Thus, a health regulatory board may fashion individual disciplinary sanctions, including placement of a health professional on probation upon certain terms and conditions.<sup>7</sup> These conditions may include requiring disclosure of adverse action to out-of-state employers. Conditions need not be restricted to those actions taking place exclusively within the Commonwealth.<sup>8</sup> To do otherwise would foster a climate under which health professionals could move from state to state to avoid disclosure or discovery of adverse action history or make the enforcement of a condition impossible.<sup>9</sup>

Once a health professional is licensed by a Virginia health regulatory board, he is subject to regulation by the board and cannot assert that the standards of conduct pursuant to that license end at the state border.<sup>10</sup> It is important to note that a health regulatory board in Virginia may take adverse action against a licensed health professional for a violation of its order, but it only may restrict the professional's Virginia license. A board cannot enter a sanction and have it enforced through another state's licensing authority or require reciprocal action by the other state. However, a sanction or restriction imposed by a Virginia regulatory board may provide a basis for another state to restrict such health professional's license.<sup>11</sup>

#### CONCLUSION

Accordingly, it is my opinion that health regulatory boards are authorized to restrict licenses. Further, it is my opinion that implicit within such authority is the right to place a licensee on probation and require that the licensee inform all employers, regardless of their location, of any restrictions on his Virginia license.

<sup>1</sup>For purposes of this opinion, I will limit the analysis to persons regulated by boards within the Department of Health Professions.

<sup>2</sup>You ask that I assume such person was properly licensed to work in another state and was not acting under a Virginia license in that state.

<sup>3</sup>*Stickley v. Givens*, 176 Va. 548, 557, 11 S.E.2d 631, 636 (1940).

<sup>4</sup>See, e.g., VA. CODE ANN. § 54.1-2915 (2005) (Board of Medicine); § 54.1-3007 (2005) (Board of Nursing); 18 VA. ADMIN. CODE § 30-20-280 (2007) (Board of Audiology and Speech-Language Pathology), 18 VA. ADMIN. CODE § 90-20-300 (2007) (Board of Nursing).

<sup>5</sup>*Id.*

<sup>6</sup>See § 54.1-2400(7), (9)-(10) (2005).

<sup>7</sup>See § 54.1-2400(10) (2005) (authorizing special conference committee to place practitioner on probation with terms it deems appropriate); *Goad v. Va. Bd. of Medicine*, 40 Va. App. 621, 633, 580 S.E.2d 494, 500 (2003) (noting, without comment, that Board had placed *Goad* on “‘indefinite probation’ *until certain specified terms were met*” (emphasis added)). The *Goad* Court made no determination that such action was impermissible. *Id.*; see also § 54.1-110 (2005) (requiring that hearings in contested cases be conducted in accordance with “Administrative Process Act (§ 2.2-4000 et seq.)”); *Kabir v. Va. State Bd. of Med.*, 9 Va. Cir. 217, 217 (1987) (interpreting § 54-316, predecessor to § 54.1-2915, and noting that Board is authorized to place anyone coming before it for suspension or revocation on probation).

<sup>8</sup>See § 54.1-2400(7), (9)-(10) (authorizing health regulatory boards to revoke, suspend, or restrict license or multistate license privileges and to take appropriate disciplinary action); *Barsky v. Bd. of Regents*, 347 U.S. 442, 451 (1954).

<sup>9</sup>See § 54.1-2409(A) (Supp. 2008) (requiring mandatory suspension of license, without hearing, of any person licensed by Department of Health Professionals when license to practice same profession or occupation is revoked or suspended in another jurisdiction); see also *Ming Kow Hah v. Stackler*, 66 Ill. App. 3d 947, 955, 383 N.E.2d 1264, 1269 (1978) (holding that prevention of “state-hopping,” practice of physician disciplined in one state moving to another state to practice unhindered, is rational basis for exercise of state’s police power). An example of such a condition would be the requirement that an impaired health professional abstain from drugs and alcohol. Such a requirement necessarily would apply within and without the Commonwealth.

<sup>10</sup>*Va. Real Estate Bd. v. Clay*, 9 Va. App. 152, 158, 384 S.E.2d 622, 626 (1989) (holding that “once an individual is licensed as an agent or broker, that person is subject to regulation by the [Real Estate] Board in any real estate transaction in which he or she participates”).

<sup>11</sup>See, e.g., OHIO REV. CODE ANN. § 4753.10 (providing that Board of Speech-language Pathology and Audiology may revoke or suspend license of person disciplined in another state); S.C. CODE ANN. § 40-33-110(A)(4) (providing that suspension, revocation, or other disciplinary action of nurse’s license in another state creates rebuttable presumption that South Carolina license may be similarly acted upon); W. VA. CODE § 30-36-18 (providing that license of acupuncturist may be suspended or revoked when licensee is disciplined by any other state); accord § 54.1-2409(A) (requiring mandatory suspension of license licensee regulated by Department of Health Professionals when license to practice is revoked or suspended in another jurisdiction); § 54.1-2915(A)(5) (2005) (authorizing Board of Medicine to restrict license to practice healing arts based on action of another state); § 54.1-3007(7) (2005) (authorizing Board of Nursing to suspend, revoke, or restrict license to practice based on action of another state).

#### OP. NO. 07-104

#### PUBLIC SERVICE COMPANIES: THE PUBLIC-PRIVATE EDUCATION AND FACILITIES AND INFRASTRUCTURE ACT OF 2002.

#### PRISONS AND OTHER METHODS OF CORRECTION: STATE CORRECTIONAL FACILITIES – EMPLOYMENT AND TRAINING OF PRISONERS.

**Act is not exempt from mandatory language of § 53.1-47, but § 53.1-47 is not applicable to all procurements contemplated under Act.**

MR. GENE M. JOHNSON  
DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS  
FEBRUARY 27, 2008

**ISSUE PRESENTED**

You ask whether purchases under the Public-Private Education Facilities and Infrastructure Act of 2002<sup>1</sup> (“PPEA”) are exempt from § 53.1-47(1), which mandates that state agencies purchase products manufactured by persons confined in state correctional facilities.

**RESPONSE**

It is my opinion that PPEA is not exempt from the mandatory language of § 53.1-47, but that § 53.1-47 is not applicable to all procurements contemplated under PPEA.

**APPLICABLE LAW AND DISCUSSION**

Virginia Correctional Enterprises (“VCE”) employs inmates within the custody of the Department of Corrections in industrial prison jobs to produce goods and provide services, including upholstery, furniture, printing, and laundry, for sale to state agencies.<sup>2</sup> You relate that there is confusion among state agencies regarding the interplay between § 53.1-47(1) and PPEA.

The General Assembly enacted PPEA in 2002<sup>3</sup> to promote the “timely acquisition, design, construction, improvement, renovation, expansion, equipping, maintenance, operation, implementation, or installation of education facilities, technology infrastructure and other public infrastructure and government facilities within the Commonwealth that serve a public need and purpose,”<sup>4</sup> and that “[s]uch public need may not be wholly satisfied by existing methods of procurement in which qualifying projects are acquired, designed, constructed, improved, renovated, expanded, equipped, maintained, operated, implemented, or installed.”<sup>5</sup> Section 56-575.2(D) provides that “[C]hapter [22.1] shall be liberally construed in conformity with the purposes hereof.”

Section 53.1-47 provides that:

Articles and services produced or manufactured by persons confined in state correctional facilities:

1. Shall be purchased by all departments, institutions and agencies of the Commonwealth which are supported in whole or in part with funds from the state treasury for their use or the use of persons whom they assist financially. Except as provided in § 53.1-48, no such articles or services shall be purchased by any department, institution or agency of the Commonwealth from any other source[.]

Section 53.1-48 provides that the Director of the Division of Purchases and Supply may exempt an agency from the provisions of § 53.1-47 when the article produced by VCE<sup>6</sup> does not meet the reasonable requirements of such agency<sup>7</sup> or when VCE cannot accommodate the procurement request for other reasons.<sup>8</sup> The Director of the Division must provide written justification to the Director of the Department of Corrections for such an exemption.<sup>9</sup> State agencies cannot evade the requirements of § 53.1-47 merely by making slight variations to their procurement needs.<sup>10</sup>

PPEA provides alternative procurement procedures for qualifying projects. Section 56-575.1 of PPEA defines a “qualifying project” as:

(i) any education facility, including, but not limited to a school building, any functionally related and subordinate facility and land to a school building (including any stadium or other facility primarily used for school events), and any depreciable property provided for use in a school facility that is operated as part of the public school system or as an institution of higher education; (ii) any building or facility that meets a public purpose and is developed or operated by or for any public entity; (iii) any improvements, together with equipment, necessary to enhance public safety and security of buildings to be principally used by a public entity; (iv) utility and telecommunications and other communications infrastructure; (v) a recreational facility; (vi) technology infrastructure and services, including, but not limited to, telecommunications, automated data processing, word processing and management information systems, and related information, equipment, goods and services; (vii) any technology, equipment, or infrastructure designed to deploy wireless broadband services to schools, businesses, or residential areas; or (viii) any improvements necessary or desirable to any unimproved locally- or state-owned real estate.

These procedures are available only if the public entity “has the power to develop and operate the applicable qualifying project.”<sup>11</sup>

A practical statutory compliance problem arises when state agencies are authorized to procure new buildings and furnishings for those buildings, but the available funds are identified as bond proceeds secured by a capital lease of the facility. In such a case, the state agency may not have authorization to acquire needed furnishings for the new building without contracting for a so-called “turn key” facility in which the capital funds used to construct the project also pay for the furnishings as a part of the overall compensation paid to the project developer. A private entity is not authorized to use VCE as a source of furnishings, and an apparent conflict arises between the application of PPEA and § 53.1-47.<sup>12</sup>

The language of PPEA is sweeping and provides for liberal construction to effect its purposes.<sup>13</sup> PPEA does not address the procurement of specific items available from VCE, nor does it include language expressly limiting § 53.1-47. On the other hand, § 53.1-47 includes language which at least implies that it is only applicable to the procurement of goods and services and not to capital procurements like the ones about which you inquire. PPEA contains a list of the statutes and regulations from which it is exempt, and § 53.1-47 is not one of them.<sup>14</sup>

It is a well established rule of statutory construction that “when 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.”<sup>15</sup> In this case, PPEA and §53.1-47(1) can be read in harmony. State agencies must follow the specific mandate of § 53.1-47(1) and purchase products made by persons confined in state correctional facilities or request an exemption pursuant to § 53.1-48 when purchasing goods and services rather than capital projects. To the extent that VCE does not manufacture an appropriate product or cannot accommodate a procurement request, a state agency may obtain an exemption to allow the purchase of such product from another source. In capital projects, however, the provisions of § 53.1-47 do not apply. Thus, products manufactured by VCE that are procured properly as an integral part of a “turn key” capital project do not require an exemption from § 53.1-47(1).

### CONCLUSION

Accordingly, it is my opinion that PPEA is not exempt from the mandatory language of § 53.1-47, but that § 53.1-47 is not applicable to all procurements contemplated under PPEA.

<sup>1</sup>VA. CODE ANN. tit. 56, ch. 22.1, §§ 56-575.1 to 56-575.18 (2007).

<sup>2</sup>Virginia Department of Corrections, Virginia Correctional Enterprises, at <http://www.vadoc.virginia.gov/offenders/institutions/programs/vce.shtm> (last visited Feb. 11, 2008).

<sup>3</sup>See 2002 Va. Acts ch. 571, at 764, 764-76.

<sup>4</sup>Section 56-575.2(A)(1).

<sup>5</sup>Section 56-575.2(A)(2).

<sup>6</sup>See *supra* note 2 and accompanying text.

<sup>7</sup>For purposes of this opinion, I use the term state agency(ies) to mean state agencies, institutions, and departments.

<sup>8</sup>VA. CODE ANN. § 53.1-48 (2005).

<sup>9</sup>*Id.*

<sup>10</sup>Section 53.1-49 (2005).

<sup>11</sup>Section 56-575.1 (defining “responsible public entity”).

<sup>12</sup>Sections 53.1-47 and 53.1-48 mandate that state agencies purchase products made by persons confined in state correctional facilities to the extent that such products meet the agencies’ procurement needs. However, the avenue provided by § 53.1-48 to obtain an exemption from the Division of Purchases and Supply indicates that the contemplated procurement actions are not capital projects but the procurement of goods and services.

<sup>13</sup>See § 56-575.2(D).

<sup>14</sup>See § 56-575.16.

<sup>15</sup>Frederick County Sch. Bd. v. Hannah, 267 Va. 231, 236, 590 S.E.2d 567, 569 (2004) (quoting Va. Nat’l Bank v. Harris, 220 Va. 336, 340, 257 S.E.2d 867, 870 (1979)); *accord* County of Fairfax v. Century Concrete Servs., Inc., 254 Va. 423, 427, 492 S.E.2d 648, 650 (1997).

### OP. NO. 07-112

#### PUBLIC SERVICE COMPANIES: UTILITY TRANSFERS ACT.

**Act requires prior approval of State Corporation Commission only when (1) control or (2) all of assets of telephone company are being transferred.**

THE HONORABLE PHILLIP P. PUCKETT  
MEMBER, SENATE OF VIRGINIA  
JANUARY 22, 2008

#### ISSUE PRESENTED

You ask whether current law permits a telephone company to dispose of some, but less than all, of its assets without the prior approval of the State Corporation Commission under the Utility Transfers Act.<sup>1</sup>

#### RESPONSE

It is my opinion that the Utility Transfers Act requires prior approval of the State Corporation Commission only when (1) control or (2) all of the assets of a telephone company are being transferred.

#### APPLICABLE LAW AND DISCUSSION

Certain transfers of public utility assets require prior approval by the State Corporation Commission. This is governed by the Utilities Transfers Act. Section 56-88.1 of the Act provides that:

No person, whether acting alone or in concert with others, shall, directly or indirectly, acquire or dispose of control of (i) a public utility within the meaning of [Chapter 5 of Title 56] or (ii) a telephone company, or all of the assets thereof, without the prior approval of the Commission.

Additionally, § 56-89 of the Act provides, in part, that:

It shall be unlawful for any public utility, directly or indirectly, to acquire or dispose of any utility assets situated within the Commonwealth or any utility securities of any other company unless such acquisition or disposition shall have been authorized by the Commission.

For purposes of the Utility Transfers Act, the term “public utility” does not include telephone companies.<sup>2</sup> Consequently, the term “utility assets” would not include the assets of a telephone company.<sup>3</sup> Therefore, only the requirements of the Act specifically applying to “a telephone company” are applicable to the determination of whether prior State Corporation Commission approval is required for a transfer of control or assets. Section 56-88.1 specifically requires prior approval for transfer of control of a telephone company or for transfer of all its assets. Thus, transfers of less than all of a telephone company’s assets that would not constitute control of the telephone company do not require prior approval from the Commission.

The State Corporation Commission also recognizes this distinction. For example, a 2002 case before the Commission considered transfers of assets as part of a pro forma corporate restructuring involving Adelpia Business Solution of Virginia, LLC (“Adelpia”), and others.<sup>4</sup> Adelpia initially requested authority under the Utility Transfers Act to transfer all of its assets, but after amending the application to reflect a transfer of less than all of its assets, the Commission dismissed the application on the grounds that approval was no longer required under § 56-88.1.<sup>5</sup>

Your request does not set forth specific facts or circumstances. Depending on the particular facts of a transfer and related transactions, State Corporation Commission approval might be required under other *Code* provisions.<sup>6</sup> However, the opinions expressed herein are limited to the issue you present regarding application of the Utility Transfers Act.

#### CONCLUSION

Accordingly, it is my opinion that the Utility Transfers Act requires prior approval of the State Corporation Commission only when (1) control or (2) all of the assets of a telephone company are being transferred.

<sup>1</sup> See VA. CODE ANN. tit. 56, ch. 5, §§ 56-88 to 56-92 (2007).

<sup>2</sup> “‘Public utility’ means any company which owns or operates facilities within the Commonwealth for the generation, transmission or distribution of electric energy for sale; for the production, transmission or distribution, otherwise than in enclosed portable containers, of natural or manufactured gas for sale for heat, light or power, but excluding any company described in subdivision (b)(8) of § 56-265.1 [related to landfill gas]; or for the furnishing of sewerage facilities or water.” Section 56-88.

<sup>3</sup> “‘Utility assets’ means the facilities in place of any public utility or municipality for the production, transmission or distribution of electric energy or natural or manufactured gas, or for the furnishing of sewerage facilities or water.” *Id.*

<sup>4</sup> See *infra* note 5.

<sup>5</sup> See Adelpia Bus. Solutions of Va., LLC, State Corp. Comm’n Case No. PUA-2001-00080 (June 28, 2002) (dismissal order), available at [http://docket.scc.state.va.us:8080/CyberDocs/Libraries/Default\\_Library/Common/frameviewdsp.asp?doc=20982&lib=CASEWEBP%5FLIB&mimetype=application%2Fpdf&rendition=native](http://docket.scc.state.va.us:8080/CyberDocs/Libraries/Default_Library/Common/frameviewdsp.asp?doc=20982&lib=CASEWEBP%5FLIB&mimetype=application%2Fpdf&rendition=native).

<sup>6</sup> See, e.g., tit. 56, ch. 4, §§ 56-76 to 56-87 (2007) (governing transactions between entities with affiliated interests); ch. 10.1, §§ 56-265.1 to 56-265.9 (2007) (setting forth Utility Facilities Act governing, *inter alia*, certificates to operate as telephone utilities).

#### OP. NO. 08-056

#### RULES OF SUPREME COURT OF VIRGINIA: GENERAL RULES APPLICABLE TO ALL PROCEEDINGS.

**Where Commonwealth’s attorney has become ‘counsel of record’ by making appearance in particular court, whether in civil or criminal proceedings, Rules 1:5 and 1:13 apply. No requirement for Commonwealth’s attorney to seek leave from circuit court to withdraw from appeal of general district court misdemeanor conviction if no appearance is made in de novo proceeding. Rule 1:13 applies to Commonwealth’s attorneys; however, courts have broad discretion to dispense with endorsements.**

THE HONORABLE CHARLES E. DORSEY  
CHIEF JUDGE TWENTY-THIRD JUDICIAL CIRCUIT  
OCTOBER 21, 2008

#### ISSUES PRESENTED

You ask whether Rule 1:5 of Rules of the Supreme Court of Virginia (the “Rules”), regarding withdrawal of counsel, applies to a Commonwealth’s attorney in a civil or criminal proceeding. You also ask whether counsel of record must endorse an order to allow the Commonwealth’s attorney to withdraw and whether the Commonwealth’s attorney must give reasonable notice about the presentment of such order. Finally,

you ask whether a Commonwealth's attorney must obtain leave from the court to withdraw as counsel when he chooses not to prosecute a misdemeanor conviction that was appealed from general district court.<sup>1</sup>

#### RESPONSE

Where a Commonwealth's attorney has become "counsel of record" by making an appearance in a particular court, whether in civil or criminal proceedings, it is my opinion that Rules 1:5 and 1:13 of the Rules of the Supreme Court of Virginia apply. It is my opinion that a Commonwealth's attorney is not required to seek leave from the circuit court to withdraw from an appeal of a misdemeanor conviction from general district court, if he has not yet made an appearance in that *de novo* proceeding. Finally, it is my opinion that although Rule 1:13 applies to Commonwealth's attorneys regarding notice and endorsement of orders, courts have broad discretion to dispense with endorsements.

#### APPLICABLE LAW AND DISCUSSION

You indicate that your questions arise based on decisions of a Commonwealth's attorney in your circuit not to prosecute certain misdemeanor cases appealed from general district court to circuit court. You relate that it is the practice of your court to treat counsel of record in a general district court proceeding as *ipso facto* counsel of record in a circuit court proceeding. For example, when a defendant appeals his conviction from the general district court under §§ 16.1-132 and 16.1-136, you ask whether that attorney must seek leave to withdraw as counsel in accordance with Rules 1:5 and 1:13.

Part One of the Rules ("Part One") by its terms applies to "all proceedings," including those involving Commonwealth's attorneys. Rule 1:5 provides, in pertinent part, that:

When used in these Rules, the word "counsel" includes a partnership, a professional corporation or an association of members of the Virginia State Bar practicing under a firm name.

When such firm name is signed to a pleading, notice or brief, the name of at least one individual member or associate of such firm must be signed to it. Signatures to briefs and petitions for rehearing may be printed or typed and need not be in handwriting.

Service on one member or associate of such firm shall constitute service on the firm....

"Counsel of record" includes a counsel or party who has signed a pleading in the case or who has notified the other parties and the clerk in writing that he appears in the case. Counsel of record shall not withdraw from a case except by leave of court after notice to the client of the time and place of a motion for leave to withdraw.

Generally, Rule 1:5 appears to be directed primarily toward attorneys in private practice. Similarly, the term “counsel of record” contemplates attorneys who have “clients” that must be notified about an attorney’s withdrawal. There are no statements that describe the unique position of a Commonwealth’s attorney whose “client” is the Commonwealth. However, no part of Rule 1:5 specifically excludes Commonwealth’s attorneys. Court rules, like statutes, should be interpreted whenever possible in a manner that harmonizes the rules.<sup>2</sup> If a Commonwealth’s attorney is not considered as “counsel” or “counsel of record” under Rule 1:5, then it follows that none of the Rules would apply to him. Such an interpretation is contrary to precedent and reason.<sup>3</sup>

Additionally, Rule 1:4(I) provides that “[e]very pleading, motion or other paper served or filed shall contain at the foot the office address and telephone number of the counsel of record submitting it, along with any facsimile number regularly used for business purposes by such counsel of record.” Rule 1.4(I), which parallels Rule 1:5, envisions that every attorney filing a pleading or motion is “counsel of record.” Therefore, I cannot interpret Rule 1:5 to apply narrowly only to private attorneys.

Upon an appeal from the general district court for a trial *de novo*, the proceeding in circuit court is an entirely new case.<sup>4</sup> Indeed, the appeal wipes away the district court proceeding “as completely as if there had been no previous trial.”<sup>5</sup> Commonwealth’s attorneys have broad discretion regarding prosecution of misdemeanor appeals unless an appeal is mandated by statute or city ordinance.<sup>6</sup> Being “counsel of record” is a court-by-court matter; *i.e.*, being counsel of record in a lower court does not automatically make an attorney counsel of record in other courts.<sup>7</sup>

When an attorney files a notice of appeal, he makes an appearance before the appellate court.<sup>8</sup> After an appeal is noted, the appealing attorney must obtain leave from the appellate court to withdraw as counsel.<sup>9</sup> The attorney who does not appeal and does not enter an appearance before the appellate court does not need permission to withdraw from such court.

Rule 1:13 provides that:

Drafts of orders and decrees shall be endorsed by counsel of record, or reasonable notice of the time and place of presenting such drafts together with copies thereof shall be served pursuant to Rule 1:12 upon all counsel of record who have not endorsed them. Compliance with this Rule and with Rule 1:12 may be modified or dispensed with by the court in its discretion.

As with Rule 1:5, it is my opinion that the term “counsel of record” in Rule 1:13 would include Commonwealth’s attorneys in both civil and criminal cases. Virginia courts have, in fact, applied Rule 1:13 to situations involving Commonwealth’s attorneys.<sup>10</sup> When a Commonwealth’s attorney is counsel of record, he must comply with this rule. Of course, a court may dispense with endorsements in civil and criminal cases where, for example, a court provides notice of its ruling to all counsel from the bench.<sup>11</sup>

## CONCLUSION

Accordingly, where a Commonwealth's attorney has become "counsel of record" by making an appearance in a particular court, whether in civil or criminal proceedings, it is my opinion that Rules 1:5 and 1:13 of the Rules of the Supreme Court of Virginia apply. It is my opinion that a Commonwealth's attorney is not required to seek leave from the circuit court to withdraw from an appeal of a misdemeanor conviction from general district court, if he has not yet made an appearance in that *de novo* proceeding. Finally, it is my opinion that although Rule 1:13 applies to Commonwealth's attorneys regarding notice and endorsement of orders, courts have broad discretion to dispense with endorsements.

<sup>1</sup>You also seek guidance regarding contact between a probation officer and the court. It is my opinion that such question should be addressed by the Judicial Ethics Advisory Committee.

<sup>2</sup>The Supreme Court of Virginia interprets its own rules. *See* *Brown v. Black*, 260 Va. 305, 311, 534 S.E.2d 727, 730 (2000). In interpreting rules of court, "other canons of construction are commonly used." 3A NORMAN J. SINGER, *SUTHERLAND STATUTORY CONSTRUCTION* § 67:14, at 233 (6th ed. 2003). "Courts will liberally construe [court] rules to achieve their purposes." *Id.* at 236; *see also* *Linkenhoker's Heirs v. Detrick*, 81 Va. 44, 50 (1885) ("One primary canon of construction, whether of private instruments or of public statutes, is to look to every part, and to construe every part so as to lead to a harmonious interpretation of the whole").

<sup>3</sup>*See, e.g., Palmer v. Commonwealth*, Record No. 1263-05-4, 2006 Va. App. LEXIS 434, \*8-9 (Oct. 3, 2006) (applying Rule 1:13 in criminal case where court waived endorsements); *see also* VA. SUP. CT. R. 3A:8 (referring to "attorney for the Commonwealth" and "counsel"); VA. SUP. CT. R. 3A:21(a) (providing that written motions must be served on "counsel of record," which necessarily must include Commonwealth's attorneys).

<sup>4</sup>*See, e.g., Walker v. Dep't of Pub. Welfare*, 223 Va. 557, 563, 290 S.E.2d 887, 890 (1982); *Cregger v. Commonwealth*, 25 Va. App. 87, 91, 486 S.E.2d 554, 556 (1997).

<sup>5</sup>*Cregger*, 25 Va. App. at 91, 486 S.E.2d at 556 (quoting *Walker*, 223 Va. at 563, 290 S.E.2d at 890).

<sup>6</sup>Commonwealth's attorneys are granted broad discretion regarding the cases they choose to take or not take. *See* VA. CODE ANN. § 15.2-1627(B) (2008) (providing that Commonwealth's attorney "may in his discretion prosecute Class 1, 2 and 3 misdemeanors") (emphasis added); § 15.2-1627.3 (2008) (mandating fees that are paid to Commonwealth's attorneys for each person "which he is required by law to prosecute") (emphasis added); *Boyd v. County of Henrico*, 42 Va. App. 495, 521, 592 S.E.2d 768, 781 (2004) (discussing broad authority of prosecutors); *see also, e.g., Op. Va. Atty. Gen.*: 1994 at 9; 1990 at 141, 142 (discussing prosecutorial discretion in bringing misdemeanors before general district court, including for staffing reasons).

<sup>7</sup>*See, e.g., Green County Dep't of Soc. Servs. v. Green*, Record No. 2522-05-2, 2006 Va. App. LEXIS 452, \*4 (Oct. 10, 2006) (holding that removal of counsel in Juvenile and Domestic Relations court did not affect such attorney's position as counsel of record in circuit court).

<sup>8</sup>*Cregger*, 25 Va. App. at 91, 486 S.E.2d at 556 (noting that appeal of conviction to circuit court invokes jurisdiction of circuit court in that proceeding).

<sup>9</sup>*See, e.g., Francis v. Francis*, 30 Va. App. 584, 589, 518 S.E.2d 842, 845 (1999); *Kuzminski v. Commonwealth*, 8 Va. App. 106, 108, 378 S.E.2d 632, 633 (1989).

<sup>10</sup>*See, e.g., Palmer*, 2006 Va. App. LEXIS 434 at \*8-9 (applying Rule 1:13 in criminal case where court waived endorsements).

<sup>11</sup>*See* VA. SUP. CT. R. 1:13; *Smith v. Stanaway*, 242 Va. 286, 289, 410 S.E.2d 610, 612 (1991) (holding that "[n]otice or endorsement is unnecessary because, as here, counsel are present in court when the ruling is made orally and are fully aware of the court's decision").

OP. NO. 08-066

**TAXATION: REAL PROPERTY TAX – EXEMPTIONS FOR ELDERLY AND HANDICAPPED.**

**Distribution from retirement account deposited into another retirement account or investment account characterized as retirement account is not income for purposes of calculating income pursuant to tax relief program for elderly and disabled persons.**

THE HONORABLE ROBERT S. WERTZ JR.  
LOUDOUN COUNTY COMMISSIONER OF THE REVENUE  
DECEMBER 1, 2008

**ISSUE PRESENTED**

You ask whether a distribution from a retirement account that is deposited into another retirement account, or into another investment account that the taxpayer characterizes as a retirement account, would be income for purposes of calculating total combined income for the tax relief program for elderly and disabled persons under § 58.1-3211.

**RESPONSE**

It is my opinion that a distribution from a retirement account deposited into another retirement account, or into another investment account that the taxpayer characterizes as a retirement account, is not income for purposes of calculating total combined income for the tax relief program for elderly and disabled persons under § 58.1-3211.

**BACKGROUND**

You seek guidance concerning the treatment of retirement account distributions, commonly referred to as rollovers, for purposes of determining eligibility for the exemption or deferral of taxes on property of certain elderly and handicapped persons under § 58.1-3211.

You advise that there are substantial differences of opinion regarding what distributions from retirement accounts, if any, should be excluded from total combined income for purposes of elderly or disabled persons qualifying for tax relief. You relate that elderly or disabled property owners occasionally transfer monies between retirement accounts or other investment accounts, often referred to as a “rollover” for federal income tax purposes. You also advise that some Virginia localities disregard a rollover when determining total combined income. The reasoning is that such rollovers generally are placed into another retirement account within sixty days, thus satisfying the Internal Revenue Service requirement and avoiding payment of penalties and taxes on the distribution.

Finally, you advise that you are aware of a 2006 opinion regarding income from IRAs, 401Ks, and similar retirement plans.<sup>1</sup> You observe that the opinion concludes that distributions from retirement plans, including lump sum and periodic distributions, should be considered income.<sup>2</sup> However, you note that the opinion does not mention distributions from one retirement plan deposited into another plan or monies distributed from a retirement fund into another form of account with the intent to use such account as a retirement fund.

**APPLICABLE LAW AND DISCUSSION**

Section 58.1-3211(1)(a) requires that “the total combined income received from all sources during the preceding calendar year” be used to determine income. Further,

§ 58.1-3211(5) provides that “income shall mean total gross income from all sources, without regard to whether a tax return is actually filed. Income shall not include life insurance benefits or receipts from borrowing or other debt.”

A prior opinion of the Attorney General (the “1992 Opinion”) notes that “the exemption authorized by § 58.1-3210 is to provide relief to elderly or disabled individuals who bear a tax burden on their real estate that is extraordinary in relation to their income.”<sup>3</sup> The 1992 Opinion concludes that in deciding whether income is part of the “total combined income” contemplated by § 58.1-3211, “the focus of the inquiry is whether the income is available to meet expenses.”<sup>4</sup> Another opinion of the Attorney General notes that the term “income” generally has no accepted meaning in income tax law and concludes that the General Assembly did not intend to refer to income tax principles when using the term “income” in § 58.1-3211.<sup>5</sup> Income is “the amount of money received on a regular basis and thus available to meet expenses.”<sup>6</sup>

Generally, under the Internal Revenue Code, “any amount paid or distributed *out of* an individual retirement plan shall be included in gross income by the payee or distributee, as the case may be, in the manner provided under section 72.”<sup>7</sup> However, § 72 permits certain tax-free rollovers.<sup>8</sup> Any amount paid or distributed to an individual for whose benefit the account or annuity was established is not taxed if the entire amount received is paid into an individual retirement account or annuity, other than an endowment contract, not later than the sixtieth day after the day on which he receives the payment or distribution.<sup>9</sup> However, this rule does not apply to any amount received by an individual “if at any time during the [one] year period ending on the day of such receipt such individual received any other amount . . . from an individual retirement account or an individual retirement annuity,” which was permitted to be received tax-free under such rule or any other rules permitting tax-free rollovers.<sup>10</sup>

Tax-free rollovers do not constitute income because such rollovers do not represent an amount of money received on a regular basis that is available to meet expenses. Therefore, distributions from one retirement account deposited into another retirement account or an investment account to be used as a retirement account, which are not readily available to meet expenses, cannot be counted as income for purposes of total income under § 58.1-3211.

#### CONCLUSION

Accordingly, it is my opinion that a distribution from a retirement account deposited into another retirement account, or into another investment account that the taxpayer characterizes as a retirement account, is not income for purposes of calculating total combined income for the tax relief program for elderly and disabled persons under § 58.1-3211.

<sup>1</sup>2006 Op. Va. Att’y Gen. 199.

<sup>2</sup>*Id.*

<sup>3</sup>1992 Op. Va. Att’y Gen. 175, 176.

<sup>4</sup>*Id.* at 177. Prior Opinions of this Office interpreting § 58.1-3211 consistently have applied this rule. *See* Op. Va. Att’y Gen.: 1987-1988 at 527, 528; 1985-1986 at 304, 304; *see also* 1981-1982 at 354, 356; 1976-1977

at 294, 294-95; 1973-1974 at 401, 401 (interpreting § 58-760.1, predecessor to § 58.1-3211, and noting that income is compensation paid on regular basis and intended for daily expenses).

<sup>5</sup>1987-1988 Op. Va. Att’y Gen., *supra* note 4, at 528 (concluding that term “income” must be given its ordinary meaning in context of statute).

<sup>6</sup>1985-1986 Op. Va. Att’y Gen., *supra* note 4, at 304; *see also* 1976-1977 Op. Va. Att’y Gen., *supra* note 4, at 295 (defining “income” as “amount of money coming in on regular basis and thus available to meet expenses”).

<sup>7</sup>26 U.S.C.A. § 408(d)(1) (West Supp. 2008).

<sup>8</sup>*Id.* § 408(d)(3)(A) (West Supp. 2008).

<sup>9</sup>*Id.* § 408(d)(3)(A)(i) (West Supp. 2008).

<sup>10</sup>*Id.* § 408(d)(3)(B) (West Supp. 2008).

## OP. NO. 08-045

### TAXATION: REAL PROPERTY TAX – SPECIAL ASSESSMENT OF LAND PRESERVATION.

**Real property rezoned to more intensive use at request of owner must be removed from land use program and roll-back taxes assessed. Agricultural real property, which has been (1) rezoned at owner’s request to more intensive use, (2) removed from land use program, and (3) assessed roll-back taxes subsequently must be rezoned to less intensive use before it can be eligible to receive land use taxation again. Real property with intensive zoning may qualify for land use assessment and taxation if local assessing official determines that it meets criteria.**

THE HONORABLE DEBORAH F. WILLIAMS  
 COMMISSIONER OF THE REVENUE FOR SPOTSYLVANIA COUNTY  
 AUGUST 5, 2008

#### ISSUES PRESENTED

You ask whether a parcel must be removed from the land use taxation program and assessed roll-back taxes when the parcel is rezoned at the owner’s request to industrial use, and the owner fails to report a change in the actual use to the commissioner of the revenue. You also ask whether agricultural real property that was rezoned to a more intensive use, but which has been returned to use as a commercial farm for a period of three years, must be rezoned to a less intensive use before it is eligible for use taxation and assessment. Finally, you ask whether real property with intensive zoning may qualify for land use taxation and assessment if its zoning has not changed, but is being commercially farmed or used as forest and has never received land use taxation.

#### RESPONSE

It is my opinion that real property must be removed from the land use program and roll-back taxes assessed when such property is rezoned to a more intensive use at the owner’s request. I also am of the opinion that agricultural real property, which has been (1) rezoned at the owner’s request to a more intensive use, (2) removed from the land use program, and (3) assessed roll-back taxes subsequently must be rezoned to a less intensive use before it can be eligible to receive land use taxation again. Finally, it is my opinion that real property with intensive zoning may qualify for land use assessment and taxation if the local assessing official determines that it meets the criteria set forth in § 58.1-3230.

### BACKGROUND

You advise that an owner has requested that his commercial farm in Spotsylvania County be rezoned to permit industrial use. You advise further that the property owner has a mining contract and currently is mining the majority of the property for sand and gravel. You note that the owner eventually intends to mine the entire parcel. Finally, you state that the owner has not reported the rezoning or the change in use to the Spotsylvania County Commissioner of the Revenue.

### APPLICABLE LAW AND DISCUSSION

In accord with the rule of statutory construction, *in pari materia*,<sup>1</sup> statutory provisions are not to be considered as isolated fragments of law.<sup>2</sup> Such provisions are to be considered as a whole, or as parts of a greater connected, homogeneous system of laws, or a single and complete statutory compilation.<sup>3</sup> Statutes *in pari materia* are considered as if they constituted but one act, so that sections of one act may be considered as though they were parts of the other act.<sup>4</sup>

“[A]s a general rule, where legislation dealing with a particular subject consists of a system of related general provisions indicative of a settled policy, new enactments of a fragmentary nature on that subject are to be taken as intended to fit into the existing system and to be carried into effect conformably to it, and they should be so construed as to harmonize the general tenor or purport of the system and make the scheme consistent in all its parts and uniform in its operation, unless a different purpose is shown plainly or with irresistible clearness. It will be assumed or presumed, in the absence of words specifically indicating the contrary, that the legislature did not intend to innovate on, unsettle, disregard, alter or violate a general statute or system of statutory provisions the entire subject matter of which is not directly or necessarily involved in the act.”<sup>5]</sup>

Section 58.1-3237(A) provides that real property qualifying for land use assessment and taxation becomes subject to roll-back taxes when the use qualifying the property “changes to a nonqualifying use” or the zoning changes “to a more intensive use at the request of the owner or his agent.” Liability for roll-back taxes attaches either at the time such change in use or rezoning occurs.<sup>6</sup> Because liability for the roll-back tax attaches at the time of a change to a nonqualifying use or a change in zoning, the failure by an owner to report such change does not impact his liability for the roll-back tax. Section 58.1-3238 clearly and unambiguously provides that failure to report a change in use relating to property for which an application for use value taxation was filed does not relieve such person from the liability for the roll-back taxes. In fact, such person is liable for the roll-back taxes and any penalties and interest that may be due.<sup>7</sup> Section 58.1-3237(D) imposes a notice requirement that serves to facilitate the assessment of roll-back taxes.<sup>8</sup> Therefore, a property owner becomes liable for roll-back taxes when the property is rezoned to a more intensive use at his or his agent’s request, or the use of the property changes from a qualifying to a nonqualifying use.<sup>9</sup>

Section 58.1-3237(E) addresses the future eligibility for land use taxation and assessment of real property and provides that property rezoned to a more intensive use at the request of an owner or his agent is not eligible for land use taxation and assessment. An exception occurs when the rezoning to a more intensive use is required to establish, continue, or expand a qualifying use.<sup>10</sup> Real property does not become eligible for reconsideration for land use taxation and assessment unless and until the property is rezoned to agricultural, horticultural, or open space use and three years have passed since the subsequent rezoning was effective.<sup>11</sup>

Participation in the land use taxation and assessment program begins when a property owner submits an application to the local assessing officer.<sup>12</sup> Before the local assessing officer assesses real property under a land use taxation and assessment program adopted pursuant to § 58.1-3231, he must first determine whether such property satisfies the criteria specified in § 58.1-3230.<sup>13</sup> Furthermore, § 58.1-3233(1) authorizes the local assessing officer to seek an opinion regarding such determination from the Director of the Department of Conservation and Recreation, the State Forester, or the Commissioner of Agriculture and Consumer Services. Whether the parcel in question meets § 58.1-3230 criteria is a factual determination to be made by the local assessing officer.<sup>14</sup> Should a commissioner of the revenue make a factual determination that the parcel in question meets the criteria set forth in § 58.1-3230, it is my opinion that such parcel may qualify for use taxation and assessment.

#### CONCLUSION

Accordingly, it is my opinion that real property must be removed from the land use program and roll-back taxes assessed when such property is rezoned to a more intensive use at the owner's request. I also am of the opinion that agricultural real property, which has been (1) rezoned at the owner's request to a more intensive use, (2) removed from the land use program, and (3) assessed roll-back taxes subsequently must be rezoned to a less intensive use before it can be eligible to receive land use taxation again. Finally, it is my opinion that real property with intensive zoning may qualify for land use assessment and taxation if the local assessing official determines that it meets the criteria set forth in § 58.1-3230.

<sup>1</sup>*In pari materia*” is the Latin phrase meaning “[o]n the same subject; relating to the same matter.” BLACK’S LAW DICTIONARY 807 (8th ed. 2004).

<sup>2</sup>See *Moreno v. Moreno*, 24 Va. App. 190, 198, 480 S.E.2d 792, 796 (1997).

<sup>3</sup>*Id.*

<sup>4</sup>*Id.* at 197-98, 480 S.E.2d at 796.

<sup>5</sup>*Prillaman v. Commonwealth*, 199 Va. 401, 405-06, 100 S.E.2d 4, 7 (1957) (quoting 50 AM. JUR., *Statutes*, § 349, at 345-47, *quoted in* *Washington v. Commonwealth*, 46 Va. App. 276, 298, 616 S.E.2d 774, 785 (2005) (Benton, J. & Fitzpatrick, C.J., dissenting)); *see also* *Smith v. Kelley*, 162 Va. 645, 651, 174 S.E. 842, 845 (1934) (noting that in absence of words to contrary, legislature did not intend to alter or repeal general statute or system).

<sup>6</sup>See VA. CODE ANN. § 58.1-3237(D) (2004); *Chesterfield County v. Stigall*, 262 Va. 697, 702-03, 554 S.E.2d 59, 52 (2001).

<sup>7</sup> Section 58.1-3238 (2004). Section 58.1-3238 imposes a further penalty when a material misstatement regarding taxes is made with the intent to defraud a locality.

<sup>8</sup> See 1980-1981 Op. Va. Att’y Gen. 355, 357 (interpreting § 58-769.10, predecessor to § 58.1-3237).

<sup>9</sup> Continued participation in the land use taxation and assessment program depends “on continuance of the real estate in a qualifying use, continued payment of taxes as referred to in § 58.1-3235, and compliance with the other requirements of [Article 4, Chapter 32 of Title 58.1] and the ordinance.” Section 58.1-3234 (2004).

<sup>10</sup> See § 58.1-3237(E).

<sup>11</sup> *Id.*

<sup>12</sup> See § 58.1-3234.

<sup>13</sup> See § 58.1-3233(1) (2004).

<sup>14</sup> Attorneys General historically have declined to render official opinions when the request involves a question of fact rather than one of law. See, e.g., Op. Va. Att’y Gen.: 1997 at 195, 196; 1996 at 207, 208.

#### OP. NO. 07-102

#### WILLS AND DECEDENTS’ ESTATES: PERSONAL REPRESENTATIVES AND ADMINISTRATION OF ESTATES – PAYMENTS, SETTLEMENTS OR ADMINISTRATION WITHOUT APPOINTMENT OF REPRESENTATIVE.

**Personal property of nonresident decedent may be transferred to decedent’s personal representative or other appropriate recipient provided any requirements of Virginia law have been satisfied by comparable legal requirement of another state.**

THE HONORABLE PATRICIA S. TICER  
MEMBER, SENATE OF VIRGINIA  
JANUARY 10, 2008

#### ISSUE PRESENTED

You ask whether compliance with the law of another state may satisfy the requirements of § 64.1-130, which governs certain transfers of money and personal property belonging to nonresident decedents.

#### RESPONSE

It is my opinion that personal property of a nonresident decedent may be transferred to the decedent’s personal representative or other appropriate recipient provided the requirements of Virginia law have been satisfied by comparable legal requirements of another state.

#### APPLICABLE LAW AND DISCUSSION

Section 64.1-130 provides that:

When any person, at the time of his death domiciled outside of this Commonwealth, owned stocks, bonds, securities, money or tangible personal property located in this Commonwealth or was entitled to any debts, choses in action or tangible personal property in this Commonwealth, such stocks, bonds, other securities, money, debts, tangible personal property and choses in action shall, for ninety days from the death of such decedent, be retained in the possession of the person, firm or corporation holding or owing the same. After the

ninety-day period such portion thereof as to which the person, firm or corporation has not received legal notice of any lien or encumbrance, shall be paid over or delivered on demand to an executor or an administrator or other personal representative, qualified according to the laws of the decedent's domicile if the value of such stocks, bonds, securities, money, debts, tangible personal property and choses in action in this Commonwealth, to the knowledge of the person holding or owing the same, is less than \$15,000. When the value of such stocks, bonds, securities, moneys, debts, tangible personal property and choses in action is \$15,000 or more, such payment or delivery of such stocks, bonds, securities, money, debts, tangible personal property and choses in action may be made upon the expiration of such ninety-day period after the transferor has given public notice of his intention to make such transfer by publication thereof once a week for four successive weeks in a newspaper of general circulation in the city, town or county wherein the transferor resides or has its principal place of business, and after the lapse of thirty days from the completion of such publication, and provided, in either case, that at the time of such payment or delivery, the transferor has no actual notice of the appointment, within this Commonwealth, of a personal representative for such decedent.

*This section shall be construed as providing, as to the payment of money and the delivery of personal property belonging to nonresident decedents or their estates, optional methods of procedure in addition to those otherwise permitted or provided by law, and shall not as to such matters add any limitations or restrictions to existing law.* [Emphasis added.]

This is one of several provisions “designed to facilitate the transfer of specific kinds of property from the dead to the living without requiring the recipients to go through the probate process.”<sup>1</sup> The purpose of § 64.1-130, about which you inquire, is to permit the transfer of personal property belonging to a nonresident decedent.<sup>2</sup> The statute is permissive in nature, and a beneficiary cannot force any abbreviated probate process.<sup>3</sup> However, § 64.1-130 provides protection for a transferor who elects to transfer property on behalf of a nonresident decedent by complying with the legal probate and notice requirements of such decedent's state of domicile.<sup>4</sup>

#### CONCLUSION

Accordingly, it is my opinion that personal property of a nonresident decedent may be transferred to the decedent's personal representative or other appropriate recipient provided any requirements of Virginia law have been satisfied by a comparable legal requirement of another state.

<sup>1</sup>J. Rodney Johnson, *Wills, Trusts, and Estates*, 35 U. RICH. L. REV. 845, 855 (2001).

<sup>2</sup>*Id.*

<sup>3</sup>*Id.* The statutory language related to nonresident decedents is somewhat confusing. In interpreting the provisions, I rely on general rules of statutory construction. “The plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction.” *Commonwealth v. Zamani*, 256 Va. 391, 395, 507 S.E.2d 608, 609 (1998). Further, “a statute should never be construed in a way that leads to absurd results.” *Meeks v. Commonwealth*, 274 Va. 798, 802, 651 S.E.2d 637, 639 (2007). In the case of nonresident decedents where other states govern probate, it seems logical to permit compliance with those laws to protect transferors in Virginia.

<sup>4</sup>*Johnson*, *supra* note 1, at 855.



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