

**OPINIONS
OF THE
ATTORNEY GENERAL
AND
REPORT
TO THE
GOVERNOR OF VIRGINIA
2012**



**COMMONWEALTH OF VIRGINIA
OFFICE OF THE ATTORNEY GENERAL
RICHMOND**

CONTENTS

LETTER OF TRANSMITTAL iii

PERSONNEL OF THE OFFICExliii

ATTORNEYS GENERAL OF VIRGINIAliii

CASES liv

 DECIDED IN THE SUPREME COURT OF VIRGINIA lv

 PENDING IN THE SUPREME COURT OF VIRGINIAlvii

 REFUSED BY THE SUPREME COURT OF VIRGINIAlix

 CASES IN THE SUPREME COURT OF THE UNITED STATESlix

OPINIONS 3

NAME INDEX 153

SUBJECT INDEX 155

LETTER OF TRANSMITTAL

May 1, 2013

The Honorable Robert F. McDonnell
Governor of Virginia

Dear Governor McDonnell:

I am pleased to present to you the *Annual Report of the Attorney General* for 2012. The citizens of the Commonwealth of Virginia may be proud of the dedicated public servants who work for the Office of the Attorney General. I continue to enjoy working with the talented lawyers and staff who ensure the Commonwealth has the finest Department of Law representing the interests of the citizens of Virginia. It is with great pride that I present to you a small portion of the accomplishments of this Office from the past year.

STATE SOLICITOR GENERAL

The State Solicitor General bears the responsibility of representing the Commonwealth in litigation before the Supreme Court of the United States and in all lower court appeals, except capital cases, calling into question the constitutionality of a state statute or touching on sensitive policies of the Commonwealth. In addition, the Solicitor General assists all Divisions of the Office with constitutional and appellate issues.

With regard to Virginia's challenge to the Affordable Care Act, *Virginia v. Sebelius*, the United States Supreme Court decided *National Federation of Independent Business v. Sebelius*, a companion case to Virginia's challenge. Although adopting the Office's interpretation of Congress' powers under the Commerce Clause, a divided Court upheld the constitutionality of the individual mandate as within Congress' power to tax. Significantly, it struck as unconstitutional the conditions offered the States to obtain their implementation of the Act's Medicaid expansion. With regard to the Office's challenge to the Environmental Protection Agency's endangerment finding for greenhouse gases, *Virginia v. EPA*, the United States Court of Appeals for the District of Columbia Circuit rejected Virginia's petition seeking reconsideration of that finding. Virginia's petition for writ of certiorari to the Supreme Court is presently pending.

Also in 2012, the Supreme Court of the United States granted a petition for writ of certiorari to consider a challenge to Virginia's citizenship limitation on state Freedom of Information request rights, a limitation the United States Court of Appeals for the Fourth Circuit affirmed in *McBurney v. Young*. The Fourth Circuit also rejected a constitutional challenge to the process by which Virginia considers inmates for parole, *Burnette v. Fahey*, and a constitutional challenge to Virginia's prohibition on impersonating officers, *United States v. Chappell*.

In 2012, the Supreme Court of Virginia decided two appeals that the Solicitor General argued. In the first, the Court affirmed the State Water Control Board's issuance of a permit to the North Anna Nuclear Power Plant in *Blue Ridge Environmental Defense League, Inc. v. Commonwealth*. In the second, *Livingston v.*

Virginia Department of Transportation, the Court reversed and remanded, holding that a number of property owners who had suffered flooding that was allegedly exacerbated by VDOT's placement of a highway some fifty years earlier had stated a claim for a damaging under Virginia's Constitution.

The year also saw the Solicitor General involved in many election law matters. The United States District Court for the Eastern District of Virginia rejected as moot a challenge to Virginia's residency limitation for petition circulation on behalf of would-be presidential candidates in the case of *Perry v. Judd*, and the Fourth Circuit affirmed. Two other challenges to aspects of Virginia's residency limitation for petition circulation were held unconstitutional by the Eastern District, in *Lux v. Judd* (district-residency circulator requirement for congressional candidates), and *Libertarian Party of Virginia v. Judd* (state-residency circulator requirement for presidential candidates). The latter is on appeal to the Fourth Circuit. The Eastern District Court upheld the General Assembly's authority to reapportion the Virginia Senate and House of Delegates in 2012 in *LaMarca v. Virginia State Board of Elections*.

The Solicitor General argued additional cases in the Fourth Circuit and filed a number of amicus briefs in matters pending before the Supreme Court of the United States, the Supreme Court of Virginia, the Fourth Circuit, and the Eastern District of Virginia. Finally, the Solicitor General assisted in obtaining pre-clearance under the Voting Rights Act of 1965 of the General Assembly's 2012 redistricting of Virginia's two legislative houses.

CIVIL LITIGATION DIVISION

The Civil Litigation Division ("Division") defends the interests of the Commonwealth, its agencies, institutions, and officials in civil law suits, including civil actions involving tort, construction, employment, workers' compensation, Birth Injury Fund claims, debt collection matters, and civil rights claims, as well as constitutional challenges to statutes. The Division also handles cases involving the commitment or conditional release of sexually violent predators. The Division also contains the Division of Debt Collection, which is responsible for providing all legal services and advice related to the collection of funds owed to the Commonwealth. In addition, the Division pursues civil enforcement actions pursuant to Virginia's consumer protection and antitrust laws, represents the interests of the citizens of the Commonwealth with regard to the conduct of charities, and serves as Consumer Counsel in matters involving regulated utilities, including cases pending before the State Corporation Commission. Finally, the Division provides legal advice to the agencies and institutions of state government on risk management, employment, insurance, utilities, and construction issues and serves as counsel to Virginia's judiciary and the Virginia State Bar.

Trial Section

The Trial Section of the Civil Litigation Division handles most of the civil litigation filed against the Commonwealth. The cases defended include tort claims, civil rights issues, contract issues, denial of due process claims, defamation claims, employment law matters, election law issues, Birth Injury Fund claims, Freedom of

Information Act challenges, contested workers' compensation claims, and constitutional challenges to state statutes. The Section also represents the Commonwealth in matters involving Uninsured Motorists/Under Insured Motorists and the Birth-Related Neurological Injury Compensation Program. The Section also provides support to the Solicitor General's office on major litigation. The Trial Section consists of three Units: General Civil Unit, Employment Law Unit, and Workers' Compensation Unit.

General Civil Unit

The General Civil Unit provides legal advice to the Virginia State Bar, the Virginia Board of Bar Examiners, the Birth Injury Fund Board, and the Commonwealth Health Research Board. It also advises state courts and judges, which includes participation in the annual training of newly appointed district and circuit court judges. In 2012, the Unit represented the Virginia State Bar in 30 matters, including 10 attorney disciplinary appeals before the Supreme Court of Virginia, and prosecuted 9 persons for the unauthorized practice of law. The Unit represents the Commonwealth in matters involving Uninsured Motorists/Under Insured Motorists matters. In addition to the matters continued from prior years, in 2012, the Unit received 352 new suits.

Significant cases that the Unit worked on during 2012 include the wrongful death suits filed by two families as a result of the April 16, 2007, shootings at Virginia Tech. In *Peterson v. Commonwealth* and *Pryde v. Commonwealth*, all of the State defendants except the Commonwealth were dismissed. The matter is currently on appeal to the Virginia Supreme Court. In a related matter, Unit attorneys represent Virginia Tech before the United States Department of Education in appealing a fine imposed upon Virginia Tech for allegedly failing to issue a timely warning about the first murders on campus.

Educational Media v. Swecker is a suit brought by the University of Virginia and Virginia Tech student newspapers challenging the constitutionality of ABC regulations that restrict the advertisement of alcohol in college student publications. The district court found the regulations to be facially unconstitutional and issued a permanent injunction. On appeal, the Fourth Circuit reversed and remanded this matter for further proceedings on those issues not decided by the district court. The newspapers' petition for rehearing and rehearing en banc was denied, and the newspapers' petition for writ of certiorari was denied. On remand, the district court granted defendants' motion for summary judgment and dismissed the case with prejudice. The student newspapers appealed to the Fourth Circuit, and oral argument is tentatively calendared for May 2013.

The Unit defended four significant cases involving the State Board of Elections ("SBE"). *Lux v. Palmer* presented a challenge Virginia's requirement that witnesses to petitions to add a candidate to a ballot must reside in district where the election in question is held. The district court granted the Board's motion to dismiss. Plaintiff appealed and the Fourth Circuit remanded the case, holding that the grounds relied upon by the district court were no longer valid because the case relied upon is no longer good law. The district court heard arguments on cross-motions for summary judgment and ruled that the plaintiff had standing. The court later held that the residency requirement violated the First and Fourteenth Amendments and

permanently enjoined the SBE from enforcing the district residency requirement. *Lux v. Judd* concerned the constitutionality of the district-residency requirement for petition circulators contained in Virginia Code § 24.2-506. The federal district court held that the district residency requirement poses an undue restriction on Lux's First Amendment rights. Several weeks after the court's ruling, the Virginia General Assembly amended § 24.2-506 to repeal the district-residency requirement. In *Project Vote v. Palmer*, plaintiff alleged that the SBE's refusal to permit the inspection of voter registration applications violates the National Voter Registration Act of 1993. The court ruled for the plaintiff, finding that the public disclosure section of the Act compels disclosure of completed voter registration applications. The ruling was only prospective and required only the disclosure of applications completed following the date of the filing. Upon appeal by the SBE, the Fourth Circuit affirmed the holding of the district court that the applications are subject to disclosure. *Osborne v. Boyles* concerned whether an independent candidate may question the method used by a party chairman to certify a party candidate and, thus, disqualify the party candidate from appearing on the ballot in the November 2011 election. The Court found that Plaintiff did not have standing to assert the claims against Secretary Palmer because he did not articulate a justifiable interest in the Verified Complaint. Plaintiff did not allege that the SBE prevented him from qualifying as an independent candidate or that the Board's actions affected the election results. The Court ruled that the SBE Secretary is entitled to sovereign immunity and to quasi-judicial immunity from any claims of negligence.

Other notable cases handled by the Unit include *ASWAN v. Commonwealth*, in which plaintiffs alleged that defendants, in violation of the Americans With Disabilities Act, the Fair Housing Act, and plaintiffs' civil rights, conspired to have moved a facility that serves food to the homeless and others. The facility, which is operated by a nonparty, had been relocated to location two miles away, onto land owned by VCU. Plaintiff appealed the district court's dismissal of their claims to the Fourth Circuit, which the Fourth Circuit affirmed; a petition for writ of certiorari was denied by the Supreme Court of the United States. Another case, *Stevenson v. Circuit Court for the City of Roanoke*, involved a petition for writ of mandamus concerning a circuit court's alleged duty to consult with local law enforcement and to process the petitioner's application to renew his concealed handgun permit. The Supreme Court issued an Order dismissing the petition for writ of mandamus and held that mandamus does not lie to compel a discretionary act. *Henley ex rel. Strickland v. Woodford* arose from the drowning of a 12-year-old boy at Smith Mountain Lake State Park. The mother of the child filed a \$15,000,000 wrongful death and negligence action against three Commonwealth of Virginia lifeguards and the decedent's private chaperones. The circuit court granted the lifeguards' Pleas of the Good Samaritan Statute, § 8.01-225, dismissing the action and all claims against the lifeguards in their entirety. Finally, a medical malpractice complaint, *Baird ex rel. Barnes v. Stokes*, involving several doctors and the Eastern Virginia Medical School was amended to add the Commonwealth as a defendant. The Unit's attorney's filed a demurrer stating that EVMS is not an agency of the Commonwealth. Finding that EVMS is not a state agency, the trial court issued an order dismissing the Commonwealth. Plaintiff's motion to reconsider was denied. After the court later dismissed the remaining defendants, plaintiff appealed to the Supreme Court of Virginia.

In representing the Birth-Related Neurological Injury Compensation Program, the Unit provides legal advice to the Board and its Executive Director, defends appeals of Board decisions regarding specific claims for benefits to the Workers' Compensation Commission, and represents the Program in eligibility determination cases from the Workers' Compensation Commission through the Virginia Court of Appeals. In 2012, the Unit handled 12 new eligibility petitions in addition to the 17 matters continued from prior years. The Unit also defended a significant lawsuit on behalf of the Program, *Kavanaugh v. Va. Birth-Related Neurological Injury Compensation Program*, which concerned whether the Program had the authority to promulgate a guideline for the reimbursement of pre-admission expenses. The Court of Appeals held that the promulgation of this guideline was inconsistent with the Program's enabling legislation, because that legislation requires the Workers' Compensation Commission to decide both "whether" and "how much" compensation is due.

Employment Law Unit

In 2012, the Unit provided employment law advice to many different state entities, including the Department of Human Resource Management, the Human Rights Council, the Virginia Indigent Defense Commission, the Department of Taxation, the Department of Conservation and Recreation, the State Board of Elections, the Department of Corrections, the Department of Transportation, the Department of State Police, the Department of Health, the Department of Behavioral Health and Developmental Services, the Department of Social Services, the Department of Veterans Services, the State Corporation Commission, the State Council of Higher Education, Virginia Commonwealth University, Virginia State University, Longwood University, Norfolk State University, the Department of Criminal Justice Services, the Virginia State Bar, and the Supreme Court of Virginia. In addition, attorneys in the Unit trained and advised management and human resources personnel from state agencies (for example, training was given to management employees on the Commonwealth's self-insurance plan).

In 2012, the Unit successfully defended First Amendment challenges to employment decisions made by agency management. For example, in *Brooks v. Arthur*, the Court of Appeals for the Fourth Circuit affirmed the decision by the District Court that a personal grievance by a lieutenant employed by the Department of Corrections would not be protected under the First Amendment as it was not speech involving a matter of "public concern." The employee's dismissal thus was not retaliatory in violation of the Constitution of the United States. Similarly, in *Williams v. State Board of Elections*, the U.S. District Court for the Eastern District of Virginia (Richmond Division) granted summary judgment to defendants when a former employee of the Board could not demonstrate a First Amendment violation. The employee alleged she had been laid-off for filing an informal "hotline" complaint, but the District Court found that the employee had not demonstrated that the Board was aware of her "hotline" complaint when the lay-off decision was made.

Workers' Compensation Unit

The Workers' Compensation Unit defends workers' compensation cases filed by employees of State agencies. Because cases are heard throughout the Commonwealth,

cases are assigned to field attorneys in Abingdon, as well as those in Richmond. One new attorney was added to the Richmond office in 2012. The Unit handles claims brought by injured workers and employer's applications from initial hearing before a Deputy Commissioner, through review by the Full Commission, and to appeal to the Virginia Court of Appeals and the Virginia Supreme Court. In calendar year 2012, the Unit handled 374 new cases.

The Unit also pursues subrogation claims in order to recover funds for the Department of Human Resource Management's Office of Workers' Compensation in instances where an injured worker who was injured by a third-party claimant receives monies in litigation involving the accident in which he was injured. In calendar year 2012, the Unit assisted the Office of Workers' Compensation and its third-party administrator with subrogation recoveries exceeding \$828,000.

Construction Litigation Section

The Construction Litigation Section is responsible for all litigation concerning construction of roads, bridges, and buildings for the Commonwealth's agencies and institutions. The Section defends, makes claims, or files lawsuits against construction and design professionals or surety companies in the context of construction disputes. Further, the Section provides ongoing advice to the Department of Transportation and other state agencies and institutions during the administration of well over \$3 billion in building, road and bridge contracts. These efforts support effective partnerships between the Commonwealth, general contractors and the road builders and facilitate timely and efficient completion of construction projects across the Commonwealth.

In 2012, the Section opened 66 new claim and litigation files. Eight matters seeking a total of nearly \$42 million were resolved for a collective total payment of approximately \$5.5 million. In addition, the work of this Section resulted in payments to the Commonwealth, its departments and Universities of approximately \$1.75 million during this period.

Antitrust and Consumer Litigation Section

Effective July 1, 2012, the complaint clearinghouse, dispute resolution and general consumer protection investigative functions previously performed by the Office of Consumer Affairs ("OCA"), within the Virginia Department of Agriculture and Consumer Services ("VDACS"), were transferred to the Attorney General's Consumer Protection Section.

The Section's Counseling, Intake and Referral Unit ("CIRU") now serves as the central clearinghouse in Virginia for the receipt, evaluation, and referral of consumer complaints. Complaints received are handled within the CIRU, referred to the Section's Dispute Resolution and Investigations Unit ("DRIU"), or referred to another local, state or federal agency having specific jurisdiction. The DRIU offers alternative dispute resolution services for those who file complaints that do not allege or demonstrate on their face a violation of consumer protection law. Where a complaint alleges or demonstrates on its face a violation of law, the DRIU will investigate and either attempt to resolve the complaint or, where a pattern or practice of violations is found, work with Section attorneys to prepare a law enforcement action.

For the period from July 1, 2012, through December 31, 2012, the CIRU received and handled 15,964 telephone calls through our Consumer Hotline and received 2,487

written consumer complaints. During the same period, the CIRU, together with the DRIU, resolved or closed 2,010 complaints. Consumer recoveries from closed complaints totaled \$301,255.

The Section's Antitrust and Consumer Enforcement Unit ("ACEU") filed several new actions and obtained beneficial results for consumers in 2012. In the antitrust area, we, along with the attorneys general of 32 other states and territories, sued five e-book publishers and Apple, Inc. for alleged price-fixing to raise the price of ebooks. The Antitrust Division of the U.S. Department of Justice ("DOJ") also sued the companies. Four of the five publishers have settled or are in the process of settling with the States, and all five have settled with DOJ for injunctive relief. The Court has given final approval to the State settlements with Hachette Book Group, Inc. (\$32.25 million in restitution and \$2.5 million in attorney's fees and costs); Simon & Schuster, Inc. (\$18.1 million in restitution and \$2.5 million in attorney's fees and costs); and HarperCollins Publishers LLC (\$19.3 million in restitution and \$2.5 million in attorney's fees and costs). Virginia's share of the consumer restitution from these settlements totaled approximately \$2.4 million. Details of the State settlement with Holtzbrink Publishers, LLC d/b/a Macmillan Publishers, Inc. are still being finalized. A trial on liability issues for the remaining defendants is scheduled for June 2013.

In March 2012, we, along with the attorneys general for 32 other states, settled claims for alleged anticompetitive practices by pharmaceutical manufacturers, Ferring B.V. ("Ferring") and Aventis Pharmaceuticals ("Aventis") for \$3.45 million. Ferring developed the drug DDAVP, the brand name for desmopressin, an anti-diuretic used in the treatment of diabetes and bedwetting, and licensed the drug to Adventis, which manufactures and distributes it in the United States. Although the Federal Circuit found Ferring's patent on the drug unenforceable because of misrepresentations made before the Patent Office, the States alleged that the two companies conspired to keep a generic drug off of the market, forcing consumers to continue paying higher prices for the drug. Virginia's share of the settlement was \$93,744.42.

On the consumer protection front, the ACEU resolved six Virginia-specific enforcement actions. Two matters involved alleged violations of the Virginia Solicitation of Contributions ("VSOC") law. In January, we entered into a Consent Decree with Associated Community Services, Inc. ("ACS") concerning its solicitations on behalf of the United States Navy Veterans Association ("USNVA") and other charitable organizations. The Consent Decree provided for injunctive relief and required ACS to make the following payments: \$16,780 to 812 Virginians to return contributions made to USNVA in response to calls placed after ACS was notified by USNVA to stop soliciting Virginians; \$9,052.50 to 485 Virginians to return contributions made to Circle of Friends for American Veterans d/b/a American Homeless Veterans when ACS had not filed a Solicitation Notice with the Commissioner of VDACS; \$25,000 for civil penalties; and \$15,000 for expenses and attorney's fees.

In February, we entered into a Consent Judgment with Fauquier County-based Journey for the Cure Foundation ("JCF"), and its Chairman, Tareq Salahi ("Salahi"). Our Complaint alleged that JCF used misleading statements in connection with solicitations for donations, made false statements in a registration statement filed with OCA, solicited charitable contributions without being registered, failed to keep true

fiscal records, and failed to provide required financial statements when it ceased soliciting. It also alleged that Salahi made false certifications in documents filed with OCA. The Consent Judgment enjoins JCF and Salahi from further violations of the VSOC law, and includes judgments against JCF in the amounts of \$25,000 for civil penalties and \$7,500 for reimbursement of our costs and attorney's fees, and a judgment against Salahi in the amount of \$2,500 for civil penalties.

Two other matters involved alleged violations of Virginia laws applicable to consumer finance companies, motor vehicle title lenders, and the Virginia Consumer Protection Act ("VCPA"). In January, we entered into a Consent Judgment with Dominion Management Services, Inc. d/b/a CashPoint for violations that occurred when it operated without a license and made closed-end loans secured by motor vehicles to 913 consumers. The Consent Judgment provided for injunctive relief and required CashPoint to make refunds totaling more than \$592,000 to more than 850 borrowers representing amounts those consumers paid in addition to the principal amounts of their loans, and to pay the Commonwealth \$25,000 for reimbursement of our expenses and attorney's fees and \$10,000 for a civil penalty. In June, we entered into a Consent Judgment with Brar, Inc. for similar conduct involving loans to 29 consumers. The Consent Judgment provided for injunctive relief and required Brar to make refunds totaling more than \$9,800 to 25 borrowers and to pay the Commonwealth \$3,000 for reimbursement of our expenses and attorney's fees.

An additional matter involved violations of the Virginia Health Spa Act ("VHSA"). In February, we sued SportsQuest, LLC ("SportsQuest"), alleging that the company violated the VHSA by failing to disclose the projected opening date of a planned facility in its pre-sale contracts and by misrepresenting the opening date in other contracts. The suit also named Western Surety Company as a defendant and sought payment from the company's bond, which we alleged applied to the planned facility. We later amended the suit to add a claim against SportsQuest for its failure to provide refunds to consumers after the closure of a separate facility. In November, we entered into a Consent Judgment with SportsQuest that provided for injunctive relief and included judgments in the amounts of \$900,214 for consumer restitution, \$45,000 for reimbursement of our expenses and attorney's fees, and \$50,000 for civil penalties. We have collected \$95,000 from Western Surety and \$10,000 from Hartford Fire Insurance on the two bonds applicable to the company's facilities. VDACS' Office of Charitable and Regulatory Programs used these funds to make partial refunds to affected consumers. SportsQuest is in bankruptcy and no determination has been made on whether there will be assets available for distribution to judgment creditors.

The final state-specific matter related to a suit we filed in 2011 against a Chesapeake-based loan modification company, R.L. Brad Street, LLC. The complaint alleged that the company violated the Virginia foreclosure rescue law by charging advance fees to consumers for services to avoid or prevent foreclosure. We amended the suit in May to add the company's owner, Rhonda L. Wyland, as a defendant. In August, we entered into a Consent Judgment that provides for injunctive relief and judgments against the defendants in the amounts of \$32,900 for consumer restitution, \$25,000 for civil penalties, and \$5,000 for reimbursement of our expenses and attorney's fees.

In addition to these Virginia-specific actions, the ACEU entered into four multi-state consumer protection settlements that are providing significant benefits to Virginians. First, in February, along with federal officials and the attorneys general of 48 other states and the District of Columbia, we joined a \$25 billion settlement with the nation's five largest mortgage servicers -- Bank of America, Wells Fargo, CitiGroup, J.P. Morgan Chase, and Ally Financial/GMAC. The settlement requires the settling servicers to abide by new servicing standards, including, among others, standards that prohibit robo-signing and restrict the practice of dual tracking; meet specific commitment levels for loan modifications, refinancing loans of underwater but current borrowers, and other forms of mortgage relief; and to make direct payments after a claim form process to borrowers who were foreclosed upon in the period from 2008 through 2011. For the period from March 1, 2012, through December 31, 2012, the servicers reported that they had provided relief to 11,151 Virginians totaling more than \$809.9 million in the aggregate. Finally, the settlement requires the servicers to make a direct payment to the Commonwealth in the amount of \$66.5 million.

Second, in May, along with the attorneys general of 44 other states and territories, we entered into a settlement with Skechers USA, Inc. ("Skechers") related to advertising claims that its rocker-bottom shoes caused weight loss, improved circulation, reduced cellulite, and firmed, toned, or strengthened leg and back muscles. The settlement provided for injunctive relief forbidding similar claims without adequate substantiation and a \$5 million payment to participating states and territories. Virginia's share of this payment was over \$114,000. In addition, through a related settlement with the Federal Trade Commission, Skechers agreed to pay up to \$40 million in consumer restitution.

Third, also in May, along with the attorneys general of 44 other states and territories, we entered into a settlement with Abbott Laboratories ("Abbott") relating to its marketing of Depakote, a drug approved for the treatment of seizure disorders, mania associated with bi-polar disorder, and prophylaxis of migraines. The settling states alleged that Abbott marketed the drug for use in treatment of unapproved conditions, including schizophrenia, agitated dementia, and autism. The settlement provided for injunctive relief preventing Abbott from promoting Depakote for off-label uses and a \$100 million payment to participating states and territories. Virginia's share of the payment was just over \$2.2 million.

Lastly, in December, along with the attorneys general of 32 other states and territories, we entered into a settlement with Pfizer Inc. ("Pfizer") relating to its marketing of an anti-biotic, Zyvox, and an anti-convulsant, Lyrica. The states alleged that Pfizer had promoted both drugs for unapproved uses and made unsubstantiated superiority claims about Zyvox. The settlement provided for injunctive relief preventing Pfizer from promoting the drugs for unapproved uses and a \$42.9 million payment to participating states and territories. Virginia's share of the payment was over \$1.2 million.

Insurance and Utilities Regulatory Section

The Division's Insurance and Utilities Regulatory Section serves as the Division of Consumer Counsel of the Office of the Attorney General in matters involving public utilities and insurance companies before the State Corporation Commission

(SCC), and federal agencies such as the Federal Energy Regulatory Commission (FERC). In this capacity, the Section represents the interests of Virginia citizens as consumers in the regulation of services and products of insurance companies and regulated utilities including electric, natural gas, water, and telecommunications companies. The Section also appears before General Assembly legislative committees to address issues that implicate consumer interests in the regulation of these industries.

Matters involving electric utilities dominated Consumer Counsel's work in 2012. The Office undertook a study of the costs and benefits of certain ratepayer-funded financial awards to electric utilities mandated by the 2007 Electric Utility Regulation Act. The Act required the SCC to increase the allowed Return-on-Equity (ROE), or profit, for Virginia's two largest electric utilities as a reward for their meeting the goals of a Renewable Portfolio Standard (RPS) related to renewable energy as a percentage of electricity sales, and for the construction of new electric generation facilities. Our report, released in November 2012, concluded that these ROE "adders" have not significantly advanced key goals of the 2007 legislation in light of the substantial costs they impose on consumers. The RPS adder was projected to cost Virginia ratepayers \$740 million over the 16-year life of the RPS program, and the utilities would be meeting the goals, not through investments in new renewable generation resources, but largely through the purchase of Renewable Energy Certificates (RECs) from existing renewable facilities, including hydroelectric plants that have been in service for more than 80 years. The generation adders for approved projects were projected to cost ratepayers an additional \$284 million over the term of the adders. While the adders for new generation were found to have done more to advance some of the 2007 Act's goals than the RPS adder, there was little indication these projects would not have been undertaken absent the bonuses. Accordingly, five years of data and experience strongly suggested that the RPS and generation ROE adders be eliminated or significantly changed, as they were not meaningfully advancing the goals of protecting customers from price volatility and unnecessary rate increases, promoting reliable electricity, promoting fuel diversity, providing environmental benefits, nor stimulating economic development. The report formed the basis for proposed legislative changes in the 2013 General Assembly.

Consumer Counsel joined the SCC as co-appellees in two appeals by electric utilities before the Supreme Court of Virginia in 2012. Dominion Virginia Power appealed the SCC's order in the utility's 2011 biennial review proceeding, challenging the Commission's finding that the approved rate of return of 10.9% established in the 2011 case would be used in the review of the company's earnings for all of 2011 and 2012 in the 2013 biennial review case. The company argued that this constituted impermissible "retroactive ratemaking," and that in the 2013 biennial review the SCC must apply a previously approved rate of return of 11.9% for January 2011 through November 2011, resulting in a blended rate of return of 11.36% instead of the 10.9% return for the full two-year review period. The difference in the two returns represented \$70 million. Consumer Counsel argued that the law did not prescribe a specific effective date on which a new rate of return must become effective for earnings review purposes, and that the company had not been denied its constitutional right to earn a "fair" return on its investment. The Court rejected the company's arguments and relied heavily on Consumer Counsel's position that the

company had conflated the terms “rates” and “rate of return” by arguing that using the rate of return determined in the 2011 biennial review to measure past earnings constituted “retroactive ratemaking.”

In the other appeal, Appalachian Power Company argued that a 2011 decision by the SCC unlawfully denied the company the ability to recover through a rate adjustment clause approximately \$33 million in costs it had incurred to comply with environmental regulations. The Court agreed with the SCC and Consumer Counsel that Appalachian could not recover \$27 million of costs claimed to be embedded in payments the company made to purchase additional capacity from AEP affiliate utilities. However, the Court reversed the SCC’s decision on the recovery of \$6 million of costs that were to be included in Appalachian’s base rates, finding that the Commission’s decision prevented the utility from recovering its “actual costs” of compliance with environmental laws as provided for under Virginia law.

In cases at the SCC, Consumer Counsel successfully advocated for limits on a Dominion-proposed energy efficiency and demand-side management program. The SCC denied two of nine proposed programs and adopted Consumer Counsel’s position against the company’s requested recovery of “lost revenues,” which could have cost customers more than \$300 million over the five-year life of the programs. The SCC approved a revenue requirement of only \$17 million for the approved programs compared to the company’s requested \$72 million. In another Dominion case, Consumer Counsel opposed an application to convert three small coal-fired power plants to burn biomass fuel at a cost of approximately \$166 million (excluding financing costs). Consumer Counsel contended the company’s forecasted benefits were highly speculative and unlikely to occur. The SCC agreed with our concerns regarding the speculative nature of claimed benefits associated with avoided carbon taxes and RECs sales; however, it determined that federal tax incentives were significant enough to support approval of the project. The Commission agreed with our legal arguments that the cost of the facilities should not be treated as expenses incurred for the purpose of the company’s RPS program, and thus rejected a claimed exemption for large industrial customers that would have required residential and commercial customers to pay a larger share of the costs. Similarly, in a Dominion application to undertake a distributed solar generation program, the Commission again agreed with Consumer Counsel that the project was not needed in order for the company to meet its RPS goals, and therefore the costs of the program could not be characterized as costs of the RPS program. This ruling prevented all costs from being borne by the residential and commercial customer classes. Consumer Counsel did not oppose the application but expressed concern with the emphasis on company-owned solar generation as opposed to more customer-owned facilities. Consistent with our position, the SCC limited the company’s \$111 million proposal to \$80 million. In Dominion’s Integrated Resource Plan (IRP) case, the SCC endorsed Consumer Counsel’s position that third-party market alternatives are appropriate for consideration in future company applications to build new generation facilities.

For Appalachian Power, Consumer Counsel supported the company’s acquisition of the 580 megawatt natural gas-fired Dresden generation facility. Although the plant would cost customers \$26 million annually, it brought net benefits due to offsetting reductions in “capacity equalization” payments made by Appalachian to other AEP utilities, and it also brought much needed fuel diversity to the company’s

predominately coal-fired generation fleet. Later in 2012, Consumer Counsel disagreed with a SCC Staff position that rates for the Dresden plant should be increased in the next year. The Commission adopted our position and found that rates for cost recovery on the facility should remain unchanged in 2013. In Appalachian's 2012 fuel factor case, the SCC approved an increase necessary for the recovery of "non-incremental" costs from purchased wind power contracts. (Non-incremental costs exclude the higher cost of wind power compared to non-renewable alternatives.) The Commission agreed with Consumer Counsel in rejecting the industrial customers' proposal that would have the effect of shifting a portion of the costs from large customers to residential and commercial customers.

Consumer Counsel intervened in an application of Rappahannock Electric Cooperative in which the cooperative sought to implement a "prepaid metering" tariff for its residential customers. This was the first such application under a 2010 law, which authorized pre-paid service if found by the SCC to be not contrary to the public interest. Our advocacy in the hearing highlighted several consumer protection concerns related to the proposal, and we sought additional protections to ensure that residential customers would not have their electric service terminated without proper notice, especially during extreme weather conditions. The SCC agreed with many of Consumer Counsel's recommendations and required the cooperative to offer additional consumer safeguards in approving the prepaid tariff.

At the federal level, the Office intervened in a proceeding at FERC related to the distribution of settlement funds. The settlement was the result of an investigation by FERC's Office of Enforcement into certain wholesale power market transactions by Constellation Energy Commodities Group that violated FERC's Anti-Manipulation Rule. As part of the settlement, Constellation agreed to disgorge unjust profits of \$110,000,000. The disgorgement included \$6 million to be allocated among state agencies within the PJM regional transmission organization. Working in cooperation with the SCC, Consumer Counsel secured approximately \$760,000 of the settlement funds to be used to support consumer litigation for the benefit of electric utility consumers in the Commonwealth. We also joined other state attorneys general and consumer advocate offices in the PJM region to secure funding to support a new entity, Consumer Advocates of PJM States (CAPS), which will provide a consistent presence and participation in the PJM stakeholder processes for the benefit of state consumer advocate offices.

Also at FERC, we intervened in the case of Potomac-Appalachian Transmission Highline (PATH) requesting the recovery of alleged prudently-incurred abandoned plant costs associated with the PATH project. This project was proposed in 2007 to be a 275-mile 765 kV transmission line extending from West Virginia, through Virginia, and into Maryland. In 2012, PJM found that the underlying need for the project no longer existed and it was abandoned, but not until after PATH had incurred approximately \$121 million in costs. PATH seeks to recover all of these costs with a 10.9% ROE that includes a 0.5% incentive adder for being a member of PJM. Consumer Counsel's arguments have lead to FERC's elimination of the 0.5% adder, and FERC has set other issues for hearing and settlement procedures where the prudence of the costs incurred will be contested.

In a water utility case, Consumer Counsel was part of a settlement in a Virginia-American Water Company rate case where the company sought a revenue increase of

\$5.7 million based on an 11.3% ROE. We sponsored the testimony of a cost-of-capital expert witness recommending an ROE range of 9.0-10.0%. The parties reached a settlement that reduced the rate increase to \$2.3 million based on a 9.75% ROE in line with our litigation position.

Also in 2012, we again participated in the annual workers' compensation rate proceeding before the SCC to establish the "loss cost" component of rates for the Voluntary Market and the "assigned risk" rates for the Assigned Risk Market. Our work in this matter includes having an actuarial consultant participate in a work group among the industry, Bureau of Insurance actuarial consultants, and other interested stakeholders to identify and address actuarial issues in between the rate cases each year. The focus has typically been on rates for coal mining operation. In the 2012 case, the SCC approved changes that increase premiums for the surface mine classifications and decrease premiums for the underground coal mines classifications.

Division of Debt Collection

The mission of the Division of Debt Collection is to provide all appropriate and cost effective debt collection services on behalf of every State agency. The Division has six attorneys and fifteen staff members dedicated to protecting the taxpayers of Virginia by ensuring fiscal accountability for the Commonwealth's receivables. Division attorneys also provide advice on collection, bankruptcy, and legislative issues to client agencies and to other divisions within the Office of the Attorney General, and one attorney serves as general counsel to the Unclaimed Property Division of the Department of Treasury.

The Division is self-funded by contingency fees earned from its recoveries on behalf of State agencies. During the 12 months from July 1, 2011, through June 30, 2012, gross recoveries for 39 agencies totaled more than \$10.5 million, up by \$1.2 million from the previous fiscal year. During fiscal year 2012, the Division recognized fees of almost \$2.4 million, up \$.3 million from the previous year. Fiscal year 2012 fees were nearly \$500,000 in excess of Division expenditures. Out of the excess fees, \$495,000 was returned to the agencies, resulting in a 21.9% reduction of the base contingency rate paid by agencies. The remainder of the excess fees were turned over to the General Fund at fiscal year end.

Sexually Violent Predators Civil Commitment Section

Since the SVP Act became effective in April of 2003, the Commitment Review Committee and the courts have referred 1,023 cases to the SVP Section. The Section has filed 560 petitions for civil commitment or conditional release and reviewed another 444 cases where it was determined that offenders did not meet the statutory criteria, so no petition was filed.

In 2012, the Section filed 52 petitions, made 431 court appearances and travelled approximately 72,350 miles. Approximately 330 persons have been determined to be a sexually violent predator and ordered civilly committed to the Department of Behavioral Health and Developmental Services. The majority of these offenders are at the Virginia Center for Behavioral Rehabilitation. Approximately 88 offenders determined to be sexually violent predators have been placed on conditional release.

HEALTH, EDUCATION, AND SOCIAL SERVICES DIVISION

The advice, counsel, and guidance provided by the Health, Education, and Social Services Division significantly affects many of the programs and benefits the Commonwealth offers to her citizens. Our client agencies often face challenging legal issues that affect the interests of mental health clients, health practitioners and their patients, social service providers and their clients, school pupils, college students, and Medicaid providers and recipients. The attorneys in this division are thus diligent in their efforts to construe the state and federal constitutions and statues and applicable case law appropriately, in order to protect individual liberty interests. Recent changes in federal law and regulations, not the least of which has been the Patient Protection and Affordable Care Act, have made our advice and counsel to our client agencies vital.

Child Support Enforcement Section

In 2012, the Child Support Enforcement Section continued to handle an enormous number of child support cases efficiently—appearing at a total of 142,755 child support hearings. The Section established new child support orders totaling in excess of \$1.6 million, enforced existing orders by securing lump sum payments of nearly \$13 million, and obtained sentences totaling 821,308 days in jail. The Section also reviewed and handled two Virginia Supreme Court cases and six Virginia Court of Appeals cases.

The Section also completed its decennial comprehensive review of all 74 sections of the Virginia Administrative Code that pertain to child support regulation. Based on this review, it was recommended that 55 of the 74 sections (74%) be repealed, that 18 sections be amended, and that one section remain as it is. We recommended only one substantive change—providing a direct appeal to circuit court for passport denial cases. The State Board of Social Services approved the proposed child support regulation in February.

The Section also assisted with the Child Support Guidelines Review Panel, which is charged with reviewing the child support guidelines every four years. The Panel held two meetings in 2012 where it reviewed results of a survey of stakeholders concerning the adequacy of Virginia’s child support guidelines and received a report from an economist proposing changes to the guideline based on the cost of raising children. Finally, the Section also completed a comprehensive revision of the Child Support Legal Services Benchmarks publication, an important resource covering court, interstate, bankruptcy and administrative issues that child support attorneys use every day.

Education Section

The Education Section provides advice, counsel and guidance to public schools and institutions of higher education. For K-12, this guidance often directly influences 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.

In 2012, Education Section attorneys continued their work stemming from the tragic shootings at Virginia Tech and its aftermath, including litigation related to the event, and advising on issues related to Family Education Rights Privacy Act, mental health, and disaster planning, and relating to campus safety generally.

The Section successfully handled several litigated cases in 2012. For example, in *George Mason University v. Veng* and *Shuo Cheng Su v. Virginia Commonwealth University*, the Supreme Court of Virginia upheld the universities' initial denials of in-state tuition benefits, finding that the students did not meet the applicable domicile requirements. In addition, in *Virginia Polytechnic Institute and State University v. Prosper Financial, Inc.*, the Supreme Court reversed the trial court's ruling to set aside a previously entered default judgment; the Supreme Court held that service of process by the Secretary of the Commonwealth on a nonresident defendant was valid.

In another notable case, *Equity in Athletics v. U.S. Department of Education, James Madison University, et al.*, Section attorneys defended JMU in federal court after the University cut 10 sports from its intercollegiate athletics program in 2007. Initially, the U.S. Department of Education was sued by a group of athletes, parents and fans, alleging that the University improperly adopted the Office of Civil Rights' three-pronged test for compliance with Title IX; the University subsequently also was sued when it refused to stop the cuts. The plaintiffs appealed the trial court's judgment for the defendants to the Fourth Circuit Court of Appeals, which affirmed the trial court. The U.S. Supreme Court denied the petitioners' writ of certiorari.

Health Services Section

In 2012, the Health Services Section continued its representation of the Commonwealth and the Department of Behavioral Health and Developmental Services in the federal investigation of the Central Virginia Training Center in Lynchburg. The investigation was conducted pursuant to the Civil Rights of Institutionalized Persons Act and was expanded to include inquiries into the Commonwealth's developmental disabilities services system under the Americans with Disabilities Act. The U.S. Department of Justice issued its findings letter in February 2011, and the Health Services Section attorneys represented the Commonwealth in negotiations to avoid costly and lengthy litigation. In August 2012, after a court hearing in which the parties and several intervenors participated, a settlement agreement was entered by the United States District Court for the Eastern District of Virginia. The Health Services Section attorneys continue to represent the Commonwealth as implementation of the settlement agreement progresses.

The Section's attorneys also defended successfully the Department of Behavioral Health and Developmental Services in a federal lawsuit filed by a resident of the Virginia Center for Behavioral Rehabilitation, who alleged violations of his civil rights. Upon appeal, the United States Court of Appeals for the Fourth Circuit dismissed the matter. The Section also successfully defended a petition for a writ of habeas corpus filed in the Supreme Court of Virginia by an insanity acquittee in the custody of the Department of Behavioral Health and Developmental Services.

The Section continued to assist the Department of Health Professions and its fourteen health regulatory boards with numerous disciplinary proceedings under the Administrative Process Act. Many disciplined professionals appealed their cases to state courts, including the Virginia Court of Appeals, where the Section's attorneys successfully represented the Boards. In addition, the Section successfully represented the Board of Medicine in a suit brought by a disciplined physician alleging fraud on the court and appealed to the Virginia Court of Appeals.

The Section's attorneys continued to provide legal advice to the State Board of Health as it adopted regulations governing abortion facilities. In addition, these attorneys represented the Department of Health in multiple cases filed in state courts challenging the Commissioner's decisions regarding issuance of certificates of public need. The attorneys also provided advice to the Department of Health on a variety of issues including isolation of TB patients, reporting of child abuse and neglect, vital records, exchange of health information, emergency medical services, employee grievances, and emergency preparedness.

Medicaid & Social Services Section

The Medicaid and Social Services Section provided counsel to the Department of Medical Assistance Services (DMAS) and the Department of Social Services (DSS) on a number of noteworthy matters this past year, including changes arising from the U.S. Supreme Court's ruling related to the Patient Protection and Affordable Care Act. The Section's efforts furthered the safety of children and other vulnerable citizens and saved the expenditure of millions of public dollars.

As part of its representation of DMAS, the Section's attorney's successfully defended provider reimbursement appeals filed against DMAS for its overpayment claims. One such case is *Sam Baxter v. DMAS*, an appeal in the Circuit Court for the City of Norfolk. Baxter appealed DMAS' Final Agency Decision affirming the agency's determination that a retraction was due from Baxter to the Department for overpayment made to the Provider in the amount of \$234,916.17. Following briefing, a hearing was held and the court rejected all of the Provider's arguments and upheld the agency's decision. The Section's attorneys also mitigated DMAS' losses and saved thousands of dollars for the Commonwealth in a number of provider reimbursement cases by negotiating and settling such cases with opposing counsel.

The Section additionally counseled DMAS as the agency issued an RFP for a behavioral health service administrator. In reviewing the responsive proposals, DMAS determined a conflict existed with one of the offerors (CHPVA) and disqualified the offeror from the procurement, pursuant to § 2.2-4357 of the Virginia Public Procurement Act. CHPVA filed an injunction against DMAS and appealed to the Circuit Court for the City of Richmond, alleging the determination was arbitrary and capricious. The procurement process was stalled pending the lawsuit. The Section's attorneys worked with DMAS and the Secretary of Health and Human Resources to successfully arrive at a settlement resolving the lawsuit and allowing the procurement process to move forward.

The Section further assisted DMAS in resolving investigations by the Office of Civil Rights with respect to two Medicaid recipients involving the AIDS waiver and the Elderly and Disabled Consumer Directed waiver. By working with OCR and

DMAS, the Commonwealth was able to provide these recipients with additional hours of care, enabling them to continue to reside in the community. These resolutions averted lengthy investigations by OCR and potential federal lawsuits.

In its representation of DSS, the Section's attorneys successfully defended a number of founded dispositions of child abuse throughout the Commonwealth, including *West v. DSS*, a Founded - Level One sex abuse case involving a four-year-old girl abused by her father. Section attorneys also defended a number of licensing decisions made by DSS, including revocations on substandard day care centers, and took affirmative action against illegal operations, including *Martin D. Brown, Commissioner VDSS v. Ellison*, where the court granted our Petition for Injunction to enjoin Ellison's unlicensed operation of a family day home in her home in Virginia Beach.

The Section's representation of DSS also included critical agency advice, including issues related to significant IT projects. The child care subsidy program is becoming fully automated: an on-line application for benefits process is being implemented statewide and the various public assistance eligibility computer programs and databases are being replaced. This project, the Enterprise Delivery System Program (EDSP)-Eligibility Modernization RFP, is primarily the eligibility systems replacement project, but includes elements of others projects, including the potential development of a Health Benefits Exchange. Federal funds are paying for the project, which have an estimated cost of \$70 million. The Section's attorneys provided advice and counsel to DSS with respect to the issuance of the EDSP RFP, changes that were necessary for the RFP, and assisted in negotiations with the successful bidder. The contract negotiations extended over several weeks, with DSS finally signing the contract in December 2012. In addition, the Section provided advice and counsel to DSS regarding its discussions with the DMV and VITA about the creation of a Customer Authentication System, which is envisioned as a single internet access point for citizens to conduct business with the Commonwealth and is related to a separate technology project called the Enterprise Data Management system.

In addition, DSS submitted the Title IV-E state plan for foster care and adoption for approval by the federal government. The Administration for Child and Families determined that there were several areas in which Virginia was not in compliance with federal law or regulation, with approximately \$87 million in IV-E funding at stake if the plan were not approved. Compliance with the federal requirements necessitated the introduction of two bills in the 2013 session of the General Assembly. The Section's attorneys worked with DSS and the Court Improvement Program of the Virginia Supreme Court in drafting the proposed legislation.

Finally, the Section's attorneys provided agency advice and defense on a variety of programs administered by DSS, including the Food Stamp program, TANF, adoption, foster care, the child care subsidy program, and many other programs providing for the health and welfare of the citizens of the Commonwealth. These attorneys also successfully defended many cases appealed to circuit court regarding DSS's decisions pursuant to these programs.

PUBLIC SAFETY AND ENFORCEMENT DIVISION

The Public Safety and Enforcement Division comprises the following Sections: Computer Crimes, Correctional Litigation, Criminal Litigation, Medicaid Fraud and Elder Abuse, and Special Prosecutions and Organized Crime. 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 child pornography, 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, with the exception of TRIAD, the Division is responsible for the Attorney General's anti-crime initiatives. These programs include the nationally recognized Gang Reduction and Intervention Program, and the work of the statewide facilitator for victims of domestic violence.

Computer Crime Section

In 1998, the General Assembly authorized and funded the creation of a Computer Crime Section within the Office of the Attorney General (OAG). The long-term vision for the Section was to spearhead Virginia's computer-related criminal law enforcement in the 21st Century. In accordance with § 2.2-511, the OAG has concurrent and original jurisdiction to investigate and prosecute crimes within Virginia's Computer Crimes Act, crimes that implicate the exploitation of children, and crimes involving identity theft. During 2012, the Computer Crime Section continued to travel extensively throughout the Commonwealth to investigate and prosecute such crimes. Jurisdictions in which the Section has handled cases this year include the counties of Chesterfield, Fairfax, Frederick, Henrico, Patrick, Prince George, Spotsylvania, and Suffolk, and the cities of Richmond and Roanoke, among others. The Section's attorneys are cross-designated as Special Assistant United States Attorneys and prosecute cases in federal as well as state courts.

In 2012, the OAG's newly-created Computer Forensic Unit within the Computer Crime Section began its operations in full and made extensive progress towards alleviating Virginia law enforcement's computer forensic backlog. In its first 12 months of operation, the Unit handled 48 total cases in 23 separate jurisdictions across the Commonwealth. As part of those cases, the Unit forensically examined 90 pieces of evidence including computer hard drives, cell phones, and various USB devices. There are currently three computer forensic examiners / investigators assigned to the Unit and the office will look to expand this number in the coming years. The establishment of the Unit was made possible, in part, with grant funding from the Department of Criminal Justice Services.

On the prosecution front, the Computer Crime Section's three attorneys obtained 23 convictions during 2012 for crimes of production of child pornography, distribution of child pornography, receipt of child pornography, online solicitation of children, and computer fraud. Among the notable cases is *United States v. May*. The defendant May came to the attention of law enforcement after a family friend reported to Powhatan County sheriff deputies that May possessed a sexually explicit picture of himself and a 4-year-old girl on his cell phone. A subsequent investigation revealed that May in fact had taken several sexually explicit photos of his two step-daughters,

a 4-year-old and a 7-year-old, with whom he resided. Forensic examination of May's cell phone revealed that he had received one of the images of the above victims via text message from an out-of-state individual, indicating that he previously had distributed it. Additionally, May sought out and downloaded 1,666 images and 298 movies of child pornography from the Internet. After pleading guilty to production of child pornography, May received a 30-year term of imprisonment, the maximum sentence permitted by statute. In another case, *Commonwealth v. Dennis*, the defendant pled guilty to one count of object sexual penetration of a minor and eight counts of distribution of child pornography, and was sentenced to 80 years imprisonment with 45 years suspended, for an active term of 35-years' imprisonment. Dennis was identified through an investigation into the trading of child pornography over peer-to-peer networks on the Internet. Dennis ultimately admitted to officers to distributing child pornography over the Internet and to regularly molesting his 10-year-old step-daughter over the course of two years. *United States v. Richardson* involved the arrest by the Powhatan Sheriff's Office of Richardson in 2010 after a minor victim came forward to report that the 39-year-old defendant was engaging in sexual acts with both her and a minor relative of Richardson. A 51-year-old friend of the defendant also participated. During the sexual activities, the defendant took digital photos of his friend engaged in sexual conduct with one of the minor victims. The defendant was arrested and convicted in state court of incest and indecent liberties and received 2-years' imprisonment. The Computer Crime Section charged Richardson in federal court and ultimately he was sentenced to 15-years' imprisonment following his guilty plea to production of child pornography. Finally, *United States v. Victor Mandeville* arose from an investigation conducted by undercover agents into the trading of child pornography over peer-to-peer networks on the Internet. Mandeville admitted to agents to receiving child pornography and to convincing a minor female in the Philippines to perform nude for him via webcam. He also admitted to sending the minor female money via wire transfers. Mandeville was sentenced to 17 1/2 years in prison for his conviction for receipt of child pornography.

The Section continues to be an active member of the Richmond-based Virginia Cyber Crime Strike Force, dedicating a part-time investigator and providing three prosecutors to pursue 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 and Internet-related extortion, cyber-stalking, phishing, and identity theft.

The Section's team of prosecutors and investigators also continue to educate and train prosecutors and law enforcement statewide. Throughout 2012, the Section's members trained law enforcement, as well as school resource officers and prosecutors, at various conferences and police training academies in Hampton, Richmond, Roanoke, and Weyers Cave. This training focused on computer crime law, obtaining search warrants for digital evidence, and the use of procedural tools in the investigation of computer crimes and identity theft.

In addition to investigating and prosecuting computer crimes, the Section continues to serve as a clearinghouse for information concerning criminal and civil misuses of computers and the Internet. In 2012, the Section's investigators handled 1,345 investigatory leads and citizen complaints funneled through the Section's email inbox and the Internet Crime Complaint Center, which is the primary resource nationwide for computer crime complaints. The Section also reviewed over 250 notifications from companies experiencing database breaches for compliance with the database breach notification law contained in Virginia Code § 18.2-186.6.

During 2012, as in past years, members of the Computer Crime Section were called upon to give presentations or to make media appearances to inform the public about issues such as identity theft and the use of the technology by sexual predators to make contact with children. More specifically, Section personnel traveled frequently throughout Virginia to speak to students and parents to deliver the office's "Safety Net" presentation. "Safety Net" is an interactive presentation that addresses issues of "cyber-bullying" and "sexting," and 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. The presentation, which is frequently updated continues to be in high demand among middle schools, high schools, and parent groups across the Commonwealth; this past year, the presentation was delivered over 30 times to schools in Chesterfield, Henrico, King William, Norfolk, Orange, Prince William, Richmond, and many other locations throughout the Commonwealth.

Correctional Litigation

The Correctional Litigation Section represents 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 2012, the Section was handled 113 Section 1983 cases, 10 employee grievances, 144 habeas corpus cases, 224 mandamus petitions, 48 inmate tort claims, 6 warrants in debts, and 447 advice matters. The Section also handled several significant matters in the federal district courts, the Fourth Circuit Court of Appeals and the circuit courts of the Commonwealth, including 4 trials, 5 jury trials, 17 hearings, 30 videoconferences and 2 oral arguments.

Significant cases handled in 2012 include several filed in the United States District Court for the Western District of Virginia. In *De'lonta v. Johnson*, Ophelia De'lonta, alleged that the Department of Corrections violated his Eighth Amendment rights by refusing to evaluate him for sex reassignment surgery. The district court dismissed De'lonta's complaint and De'lonta appealed to the Fourth Circuit Court of Appeals. The Fourth Circuit reversed the court's ruling. The case has been remanded to the district court, and we are waiting to be served with the complaint. *Scott v. Clarke* involves five offenders housed at the Fluvanna Correctional Center for Women who claimed that they and all similarly-situated offenders are being denied adequate medical care in violation of their Eighth Amendment rights. The plaintiffs seek declaratory and injunctive relief and certification as a class action. Outside counsel represent the medical care provider, and the Office of the Attorney General represents the Department of Corrections defendants. A trial has been set in this matter. The plaintiff in *White v. Owens* brought an Eighth Amendment claim and a

state law assault and battery claim alleging that the defendant assaulted him after returning him to his cell from the shower. White also claimed that the Warden and other officials failed to protect him from the assault. A jury trial jury resulted in a verdict in favor of the defendant.

Additionally, in *Muhammad v. Prison Officials*, a jury trial was held in April 2012, in Big Stone Gap, Virginia. This case concerned an allegation that the defendants failed to protect the plaintiff. The jury found in favor of three defendants and in favor of the plaintiff against one defendant. The jury awarded \$2,000 in damages. The court denied the defendants' Motion to Set Aside a Verdict, and awarded the plaintiff \$2,000 in damages. *Couch v. Jabe*, filed by counsel, was on remand from the Fourth Circuit of Appeals. It concerned plaintiff's religious belief that he must have a beard, and the Department of Corrections' policy that all inmates must be clean-shaven was a violation of his religious rights. The case was remanded to the district court on the issue of whether the Department's policy is the least restrictive means of achieving their security and health interests. The matter was settled in September. *Carty v. Wright* involved a § 1983 claim alleging that officers sexually assaulted the plaintiff, and violated his right to be free from unreasonable searches and seizures. At the bench trial, we moved for dismissal for failure to prosecute the matter due to plaintiff's refusal to be sworn to testify. The district Judge accepted the Magistrate's recommendation and dismissed the case.

Notable state courts cases include *Dorr v. Clarke*, which involved a habeas corpus petition on appeal to the Supreme Court of Virginia. Counsel argued that the court should not have let the respondent construe his writ of mandamus as a habeas corpus petition, and the court should have ordered the Director of the Department of Corrections to grant petitioner credit for all of the time spent incarcerated. After oral argument, the Supreme Court of Virginia found that the lower court erred in recharacterizing the petition, but found that it was harmless error and affirmed the circuit court's dismissal of the appeal. In *Bass, Administratrix v. Commonwealth*, an action filed against Department of Corrections' officials based on allegations of wrongful death, simple negligence, gross negligence and a civil rights violation under the federal Civil Rights Act, the plaintiff claims that her son died at Red Onion State Prison, and seeks damages in the amount of \$3,500,000. In October, we filed a Motion to Dismiss the Amended Complaint; thus the matter is still pending in the circuit court. Lastly, *Shapiro v. Virginia Department of Corrections* involved a challenge to the execution process brought pursuant to a Writ of Quo Warranto. The plaintiff's attorneys argued that the administration of chemicals to death sentenced-inmates is the practice of medicine and, therefore, to be performed only by licensed doctors. We were successful in having the trial court dismiss the case.

Criminal Litigation Section

The Criminal Litigation Section handles an array of post-conviction litigation filed by state prisoners challenging their convictions, including criminal appeals, state and federal habeas corpus proceedings, petitions for writs of actual 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 2012, the Section defended against 960 petitions for writs of habeas corpus and represented the Commonwealth in 355 appeals in state and federal courts. The Section received 42 petitions for writs of actual innocence, an ever-increasing area of responsibility.

The Section had several significant decisions from the Supreme Court of Virginia this past year. In *Foltz v. Commonwealth*, the Court affirmed an Arlington County conviction for abduction with intent to defile subsequent offense. Police attached a tracking device to a vehicle used by a person suspected of several sexual assaults in order to track his movements. While tracking the suspect, the police apprehended him in the act of assaulting a woman. On appeal, the defendant claimed the officer's testimony should have been suppressed because it resulted from an illegal warrantless search. The defendant relied on a case from the United States Supreme Court that was decided while his appeal was pending, which held police need to obtain a warrant prior to attaching a tracking device to a suspect's vehicle. The Virginia Supreme Court, assuming without deciding that officers' testimony was inadmissible, found any error harmless beyond a reasonable doubt.

In *Baker v. Commonwealth*, the Virginia Supreme Court affirmed the Court of Appeals decision rejecting a challenge based on the Double Jeopardy Clause to three convictions for possession of a firearm where the firearm in each instance was the same. The defendant stole the firearm one day, displayed it in an attempt to sell it a few weeks later, and then arranged to and did sell it the following day. The Court reasoned that each act of possessing the firearm placed "the public in a heightened level of danger" and the language of Code § 18.2-308.2(A), which, along with possession of a firearm, includes specific prohibitions against the distinct acts of transporting a firearm and "carry[ing] about [the felon's] person, hidden from common observation, any weapon" named in the statute. The Court concluded that each possession occurred on a different location, on a different day and that each possession constituted a danger to the public.

The Section's Capital Unit defended on appeal and collateral attack the convictions of persons sentenced to death under Virginia law. In *Porter v. Warden*, the Virginia Supreme Court dismissed Porter's petition for a writ of habeas corpus challenging his capital murder conviction and death sentence from Norfolk. In *Prieto v. Commonwealth* and *Gleason v. Commonwealth*, the Court affirmed on direct appeal the death sentences imposed for capital murder in Fairfax County and Wise County.

Special Prosecutions and Organized Crime Section

In addition to serving as counsel to many state agencies, the Special Prosecutions/Organized Crime Section (SPOCS) is the primary prosecutorial section of the Office of the Attorney General. The Section is responsible for 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; and implementing public safety initiatives set forth by the Attorney General. In 2012, the Section continued its efforts to promote the safety of the citizens of the Commonwealth through multiple initiatives, to include engaging in prevention, intervention, and suppression of criminal street gang activity; educating law enforcement partners and the public about the dangers of human trafficking; the prosecution and prevention of identity theft

offenses; administrative prosecutions against medical professionals who have violated Virginia's Health Professions regulations; enforcement of Virginia's fair housing laws through mediation and civil actions; and targeting and bringing down violators of the Virginia RICO and tobacco statutes.

Criminal Prosecutions and Enforcement Unit

The Criminal Prosecutions and Enforcement Unit (CPEU or "Unit") comprises a Director who reports directly to the Chief of the Special Prosecutions and Organized Crime Section in the Public Safety and Enforcement Division and eight Assistant Attorneys General, seven of whom are sworn as Special Assistant United States Attorneys (SAUSA). Funded through federal grants, three Assistant Attorney Generals from CPEU work at US Attorney's offices in Richmond, Norfolk, and Alexandria and three are in federally funded grant positions assigned to prosecute federal Project Safe Neighborhood cases in those areas. One of the eight Assistant Attorneys General serves as special counsel to the Shenandoah Valley Multi-Jurisdiction Grand Jury investigating gang-related activity in that region, and also serves as special counsel to the Multi-Jurisdiction Grand Jury in the Tidewater area.

Assisting Virginia's Commonwealth's Attorneys is a priority of the Unit's mission. In 2012, the Unit assisted Commonwealth's Attorneys in prosecutions all over Virginia, resulting in significant periods of incarceration. Attorneys from CPEU investigated and prosecuted cases in Middlesex, Lunenburg, Portsmouth, Richmond, Virginia Beach, and all throughout the Shenandoah Valley. Crimes included theft and embezzlement of state property, election fraud, theft of state records, gang participation and solicitation to commit murder.

The relationship between the Unit and the United States Attorney's office provides a valuable collaboration. In particular, in 2012, the Alexandria AAG/SAUSA prosecuted four gang members for conspiracy to commit extortion; five gang members for sex trafficking of children, use of a firearm during a crime of violence and possession of a firearm by a convicted felon, and conspiracy to transport individuals for prostitution; two gang members for immigration crimes; two defendants for robbery, bank robbery, kidnapping, and use of a firearm during a crime of violence; two defendants for conspiracy to distribute cocaine base and use of a firearm during a drug trafficking offense; and three defendants for possession of a firearm by a convicted felons, dealing in counterfeit currency and related firearms offenses. The Alexandria AAG/ SAUSA was recognized for these efforts by being named "Gang Prosecutor of the Year" by the Virginia Gang Investigator's Association, marking the second time in three years that an Assistant Attorney General has received the prestigious award.

One notable case prosecuted by the Richmond AAG/SAUSA involved three co-defendants who committed a number of robberies in Virginia and North Carolina during a four year period. In 2005 the men planned and executed a robbery of a convenience store. One man received a 20 year sentence, the second received a 40 year sentence, and the third received a 15 year sentence. The same Richmond prosecutor indicted two brothers for multiple business robberies and firearms crimes. Evidence adduced at the jury trial revealed that in the first robbery one brother pretended to apply for a job, while the other brandished a firearm and ordered the store clerk to open a safe. In the other robbery, the brothers brandished a gun and

ordered the employees to lie on the floor, then took more than \$600 from the pocket of an employee. Another employee gave up an additional \$600, but because he refused to lie on the floor, was struck on the head numerous times with a gun. The employees then fought with the brothers until the brothers left the scene. The brothers netted approximately \$1700 from both robberies.

In 2012, the three SAUSAs convicted a total of 23 gang members who, collectively, received 168 years in prison (active time to serve). Some sentences are yet to be imposed, and some investigations carry over into 2013. Moreover, a member of the CPEU prosecuted a significant gang case involving a Department of Corrections inmate who was the leader of the Valentine Bloods gang in Virginia. The inmate attempted to have several fellow gang members killed for acts he considered to be insubordination and treason. He was sentenced to serve 9 additional years in the penitentiary for soliciting murder and felony gang participation.

Attorneys in the Unit also handled a few cases involving identity theft last year. For example, one of the SAUSAs prosecuted a former Richmond area attorney, Bradley D. Wein, for mail fraud and aggravated identity theft as a result of his alleged misuse of various credit cards issued in one of his elderly client's name. At trial, Wein maintained that he had permission to use the cards and had disclosed this use to his client. Wein gave his defense attorneys fabricated letters in which he claimed to have disclosed his personal purchases on the victim's card. His attorneys subsequently filed those letters as attachments to court pleadings, which led to Wein's indictment for obstructing an official proceeding. Ultimately, the jury acquitted Wein of the mail fraud and aggravated identity theft charges, but convicted him for the obstruction of justice. Wein was sentenced to 45 months in prison and two years of supervised release for providing forged documents to his defense attorneys.

CPEU also houses the Division of Securities Counsel (DSC), which is dedicated to providing legal and technical assistance to attorneys for the Commonwealth in the prosecution of securities fraud cases. In 2012, the State Corporation Commission referred three cases from its Division of Securities and Retail Franchising to the Unit for investigation and prosecution. Those cases are still under investigation and indictments are expected in 2013.

Additionally, upon request by the state police for permission to conduct an investigation of criminal behavior by an elected official, it is the CPEU's responsibility to review the allegations to determine what, if any, criminal violations may have occurred if the allegations are proven. In 2012, attorneys from CPEU processed 27 of these requests and recommended authorization for 13 investigations. Once an elected official investigation is authorized, CPEU provides any necessary supervision and legal advice to the state police. Because local commonwealth's attorneys often recuse themselves from any resulting prosecution of an elected official from their jurisdiction, CPEU stands ready to handle any requests for criminal prosecutions. In 2012, attorneys were appointed as special prosecutors in four cases. Only one was tried in 2012; the other three were carried over into 2013. In August 2012, Guy Abbott, the former sheriff of Middlesex County, was indicted on 22 felony counts of misusing public funds and three counts bribery. After a weeklong bench trial, Abbott was found guilty of two counts of bribery; however, the judge subsequently reversed himself at sentencing and set aside his own verdicts.

The Unit also handled several appeals last year. One particular appeal concerned the restoration of firearms rights for previously convicted felons. In *Gallagher v. Commonwealth*, the Supreme Court of Virginia agreed with the Attorney General's position in holding that the decision to reinstate the right to ship, transport, possess or receive firearms is vested in the circuit court, not the Governor. The decision clarified the restoration process, as many circuit courts incorrectly denied restoration petitions based on the belief that the Governor needed to restore firearms rights before the circuit court could exercise jurisdiction.

In addition to its prosecutorial responsibilities, CPEU serves as agency counsel to the Department of Virginia State Police (VSP), the Department of Criminal Justice Services (DCJS), and the Department of Forensic Science (DFS). This legal representation includes, but is not limited to, the review of legislation proposed by the agencies, review of proposed regulations, representation in federal and state courts, advising on Freedom of Information Act requests, contracts, and a broad range of legal issues. Attorneys have represented VSP in various courts around the Commonwealth in cases involving motions to vacate improperly granted expungements to motions to quash subpoenas *duces tecum*. Attorneys from the Unit also represented VSP in several cases filed by registered sex offenders petitioning the court to be relieved of their registration requirements. The Unit is also responsible for representing DCJS in administrative hearings involving individuals licensed by the agency, such as bail bondsmen, bail enforcement agents, and private security guards.

In addition to serving as counsel to the above-noted agencies, members of CPEU also represent the Department of Alcoholic Beverage Control's (ABC) Bureau of Law Enforcement Operations at administrative hearings involving the suspension or revocation of ABC licenses, and routinely consult with Enforcement agents about their investigations. One case handled in 2012 involved Club Royale Blue, an ABC licensee charged with two license violations after escalating violence occurred on the premises, including assault, battery, robbery, and homicide. Through 19 witnesses, the Unit presented evidence showing 45 criminal incidents. The hearing officer recommended revocation of Club Royale Blue's licenses after finding that the licensed premises had become a threat to public safety and that violations of peace and good order had occurred.

The Unit also now provides legal advice to the Office of the State Inspector General (OSIG), which was created by the General Assembly in 2011. In July 2012, the OSIG officially began its operations, and expectedly has sought legal advice on issues such as the interpretation of applicable code sections, establishing FOIA policies, and the scope of their investigative power.

Finally, the Unit provides training related to public safety enforcement issues. In 2012, a member of the CPEU produced a week-long training to teach investigators and prosecutors from around the state how to successfully investigate and prosecute a gang case. The training, entitled "Gang Busters," was attended by 25 teams of investigators and prosecutors who learned about the latest investigative techniques and courtroom tactics. Another member of the Unit participated in four training sessions focused on trademark infringement crimes; the training was held throughout the state for law enforcement and prosecutors to attend.

Health Professions Unit

The Health Professions Unit (HPU) performs two primary functions for SPOCS. First, HPU provides a focused and effective administrative prosecution of cases against health care professionals charged with violations of health care-related laws and regulations before the various health care regulatory boards under the Virginia Department of Health Professions (DHP). Second, HPU reviews investigative files compiled by the Virginia Fair Housing Office and prepares consultation opinions to the Virginia Real Estate and Fair Housing Boards. When either Board determines that housing discrimination has occurred, HPU prosecutes the civil lawsuits and appeals.

The Unit's staff focuses on providing legal advice and representation of a prosecutorial nature to the Boards within DHP, including, Medicine, Nursing, Pharmacy, Veterinary Medicine, Dentistry, Funeral Directors and Embalmers, Counseling, Long-Term Care Administrators, Social Work, Psychology, Physical Therapy, Optometry, and Audiology and Speech-Language Pathology. In addition to prosecuting administrative actions against the licensees, HPU provides training to investigators, Board staff, and Board members. Many of the cases that HPU prosecutes involve standard of care violations, substance abuse, mental illness/incompetence, sexual touching, and patient abuse. Following formal hearings before the Boards, disciplinary sanctions, including suspension and revocation of licenses, are often imposed.

HPU handled several significant cases before the health regulatory boards in 2012. In the *Board of Medicine v. Robalino*, the Board summarily suspended Dr. Robalino's license for knowingly writing, for nonmedicinally accepted purposes, prescriptions for oxycodone to people he did not know whom he had met in bars and strip clubs. There also were several indicia that Dr. Robalino was impaired and/or incompetent to practice medicine with reasonable skill and safety due to a mental or physical illness. In February 2012, the Board received a signed Consent Order from Dr. Robalino that continued the suspension for a total period of not less than eighteen months. In addition, in April, the Board of Psychology summarily suspended Brian Wald's license for allegedly kissing, hugging, and fondling a patient while performing a custody evaluation. After a twelve hour hearing, the Board imposed an eighteen-month suspension of Mr. Wald's license to practice psychology.

In July, the Board of Nursing summarily suspended the certificate of Alusine Sankoh-Cole, C.N.A. to practice as a nurse aide in the Commonwealth. The evidence showed that Mr. Sankoh-Cole sexually abused two female residents in his care during the course of his employment at Commonwealth Health & Rehab Center, Fairfax, Virginia. Following a formal hearing in September, the Board revoked Mr. Sankoh-Cole's certificate and entered a finding of abuse against Mr. Sankoh-Cole in the Virginia Nurse Aide Registry. The finding prohibits Mr. Sankoh-Cole's employment as a certified nurse aide in any long-term care facility that receives Medicare or Medicaid reimbursement. In September, the Committee of the Joint Board of Nursing and Medicine summarily suspended the license of Ms. Joey Pascarella, L.N.P. to practice as a nurse practitioner in the Commonwealth. The evidence showed in one case that fetal demise occurred as a result of Ms. Pascarella's insistence that the mother continue with homebirth despite a declining fetal heart rate over several hours. The evidence further showed, in a second case where Ms. Pascarella insisted the mother continue with the homebirth, that the mother had to be admitted to a hospital

for an emergency caesarean section, and that, due to infections, the infant required eight days in the neonatal intensive care unit and the mother required multiple readmissions. The evidence further showed that Ms. Pascarella rendered care to three Virginia patients without the supervision of a duly licensed physician, as required by Virginia law and regulation.

The Fair Housing staff prosecutes alleged violations of the Virginia Fair Housing Law. The prosecutions are based on “reasonable cause” findings and the resulting “Charges of Discrimination” issued by the Virginia Real Estate Board and the Fair Housing Board. In addition, the Unit serves as counsel to the Real Estate Board for fair housing allegations brought against real estate licensees and/or their employees or agents and to the Fair Housing Board for allegations against non-licensees. In 2012, HPU handled *Fair Housing Board v. Cedarwood Condominium Association, Inc.*, a fair housing suit filed in Chesapeake against a condominium association after the Fair Housing Board determined there was reasonable cause to believe that the Association’s rules against “sports activities” in common areas was discriminatory because they targeted families with children. The Association agreed to settle this case for \$6,900 in relief to the family who filed the complaint. In addition, the Association’s board of directors agreed to modify the “sports activities” rule so that it would not have a discriminatory effect on families with children. The Association’s board of directors also agreed to undergo annual fair housing training for three years. In another case, *Fair Housing Board v. Saunders*, a civil action was brought against a landlord who allegedly discriminated against a tenant based on her race and familial status by making discriminatory statements. The complainant received \$13,000 in a settlement that also required the landlord to undergo fair housing training and to adopt and adhere to an anti-discrimination policy.

Division of Human Rights

On July 1, 2012, the Virginia Human Rights Council was eliminated by the General Assembly and its operations were merged into the Office of the Attorney General as the Division of Human Rights (DHR). The purpose of the DHR is to safeguard all individuals in the Commonwealth from unlawful discrimination in, among other areas, employment and public accommodation. DHR is responsible for investigating complaints brought under the Virginia Human Rights Act and determining whether there is reasonable cause to believe discrimination occurred. The DHR also participates in a work-share agreement with the federal Equal Employment Opportunity Commission (EEOC) to investigate and make determinations with regard to alleged violations of Title VII of the Civil Rights Act of 1964 and other civil rights laws. As part of the investigative process, the DHR also facilitates conciliation efforts among the parties to resolve their cases. Since July 1, 2012, the DHR has received 110 complaints and accepted 33 cases for investigation. Notably, the DHR was able to mediate a complaint in which it determined there was reasonable cause to believe a complainant was sexually harassed, resulting in a \$10,000 relief payment to the complainant by the respondent employer.

The Financial Crime Intelligence Center

The mission of the Financial Crime Intelligence Center (FCIC) is to identify, target, and disrupt the financial aspects of crime in the Commonwealth. The FCIC

accomplishes this by identifying, targeting, and disrupting the flow of criminal proceeds. The FCIC enables Commonwealth's Attorneys and other law-enforcement officials to better address and attack the financial aspects of crime in their area by identifying targets for investigations, providing "on-site" financial investigative support, sharing timely intelligence on money laundering, providing financial investigative training, and assisting in asset identification and forfeiture actions.

In 2012, FCIC's "Operation Tobacco Road," a multi-year effort in the Fredericksburg area that resulted in four felony convictions in federal court for conspiracy to violate the Contraband Cigarette Trafficking Act, obtained for the principal actors active federal sentences ranging from 9 to 46 months imprisonment. In addition, more than \$8 million was ordered in restitution and \$625,000 was forfeited to law enforcement authorities. In 2012, the FCIC also handled a matter in Alexandria Circuit Court. Working with the Alexandria Police Department's Vice/Narcotics Section, FCIC identified and targeted a complex criminal organization that distributed hundreds of pounds of marijuana in the Washington Metropolitan area and laundered the resulting proceeds. The ringleader of the operation, James Hutchings, was sentenced to a 4 year active term of incarceration upon being convicted of conspiring to violate RICO, conspiring to distribute marijuana, and conspiracy to launder money. During the course of the investigation, a total of 88 pounds of marijuana, with a street value in excess of \$220,000, were intercepted. Investigators were also able to identify over \$300,000 in laundered money.

The Gang Reduction and Intervention Program

The Gang Reduction and Intervention Program (GRIP) began in 2003 with a federal grant from the Office of Juvenile Justice and Delinquency Prevention (OJJDP). The Office of the Attorney General (OAG) and numerous federal, state, and local law enforcement entities partners with local agencies and organizations to provide programs and services to gang members who wished to leave gangs, as well as at-risk youth and their families. These programs, designed to prevent gang involvement and intervene with gang members, serve a wide variety of needs.

GRIP continues to sustain and expand programs and services in Richmond, as well as consulting with other localities across the Commonwealth about implementing the GRIP model in their communities. Throughout 2012, GRIP staff worked with DCJS' Statewide Anti-Gang Initiatives Coordinator to assist localities in developing and implementing local gang reduction strategies based on the GRIP model, traveling to those areas of the Commonwealth to provide technical support or consulting via email and telephone. By helping other jurisdictions examine local policies and practices to determine which are actually working, we can help them support local community-based initiatives that are likely to succeed in those jurisdictions.

In January, GRIP expanded into Richmond's East End communities of Mosby, Creighton, Fairfield, and Whitcomb Courts. Since that time, GRIP has helped spread the word about GRIP partner events in the area, issued a Request for Proposals, and awarded contracts to partner agencies and organizations for collaborative work in the target area. GRIP also participated in community events and matched VCU service learning students to projects in the East End, and participated in community meetings.

Each year, GRIP participates in a variety of community events, including National Night Out, the city-wide Imagine Festival (over 2,500 people attended in

2012), Safe Schools Month (coordinated by Richmond Public Schools' Safety Trainer), and the annual Back to School Rally (organized by the Northside Coalition for Children – this August, 855 back packs full of school supplies were distributed to children attending Richmond Public Schools). In addition, GRIP staff accompanies Richmond Police command staff on “Community Walks” through Richmond’s troubled neighborhoods.

GRIP continues to collaborate with private sector partners, such as the Cal Ripken, Sr. Foundation (Foundation). Since 2007, the Foundation, led by Major League Baseball Hall of Famer Cal Ripken, Jr., has provided over \$950,000 in cash and equipment awards to bring programs to communities across the Commonwealth of Virginia. Through a grant from the Virginia Department of Criminal Justice Services (DCJS), the Foundation brought its *Badges for Baseball* program to three Virginia sites in 2012: Lynchburg, Newport News, and Richmond. In June, the Attorney General spoke to young people about making healthy choices for a positive future at a celebration marking the end of the *Badges for Baseball* program season. In September, the Foundation and the OAG co-hosted a day-long college event for 75 at-risk youth at the University of Mary Washington. Youth from across Virginia had the opportunity to explore the campus and interact with current students during campus tours. Participating youth also played in a “Quickball” tournament with student athletes from the university baseball team.

Tobacco Enforcement Unit

The Tobacco Enforcement Unit administers and enforces the Tobacco Master Settlement Agreement (MSA), a 1998 agreement between 46 states and the leading cigarette manufacturers. In that effort, the Unit works with the Tobacco Project of the National Association of Attorneys General as well as other MSA states. During 2012, the Commonwealth received more than \$117 million in payments from the participating manufacturers. MSA settlement funds are used to fund medical treatment for low-income Virginians, to stimulate economic development in former tobacco growing areas, and to establish programs to deter youth smoking and prevent childhood obesity.

The Unit also maintains the Virginia Tobacco Directory, which lists tobacco product manufacturers that have been certified as compliant with Virginia law, and collects information on cigarette stamping activity throughout the Commonwealth. The Unit enforces the MSA’s implementing legislation through review, analysis and investigation of manufacturer applications to sell cigarettes in the Commonwealth, investigation of alleged violations of law, representation of the Commonwealth in actions under the Virginia Tobacco Escrow Statute, audits of Tax Stamping Agents, retail inspections, seizures of contraband products, and participation on law enforcement task forces with other federal, state, and local agencies. Specifically in 2012, the Unit investigated 62 persons or entities, conducted 145 retail inspections, conducted 38 audits, certified 32 cigarette manufacturers as compliant with Virginia law, and allowed 1 manufacturer to be voluntarily removed from the tobacco directory. Representatives from the Unit also worked with the Financial Crimes Intelligence Center as they sought to identify, investigate, and prosecute individuals engaged in the trafficking of contraband cigarettes. Members of the unit also followed tobacco legislation in the General Assembly and provided information to the Virginia

State Crime Commission for their study of cigarette trafficking in the Commonwealth. In addition, the Unit continued to represent the Commonwealth in a multi-million dollar MSA payment dispute.

Additional Public Safety Initiatives

In 2012, the Public Safety & Enforcement Division embarked on several initiatives designed to combat human trafficking in Virginia. The Division created a full-time position for an assistant attorney general to serve as Anti-Trafficking Coordinator for the office and to spearhead the office's efforts in training, community outreach, and investigation and prosecution of trafficking crimes. The Division expanded its human trafficking outreach across the Commonwealth, training over 900 professionals in law enforcement, prosecutions, school security and administration, and victims services on trafficking in Virginia, gang movement into sex trafficking crimes, and the state laws available for prosecuting trafficking. The Division worked closely with federal prosecutors to lead both the Northern Virginia Human Trafficking Task Force (NVHTTF) and the Central Virginia Human Trafficking Working Group (CVHTWG), both of which had substantial success in disrupting trafficking operations in Northern and Central Virginia in 2012.

The Division also continues its efforts to curb domestic violence in the Commonwealth. The Division oversees a coordinator, funded by the Community Defined Solutions to Violence Against Women Grant, who is responsible for developing, implementing, and facilitating training for prosecutors and law enforcement officers on domestic and sexual violence issues. The coordinator participates in a partnership with five government and non-profit agencies to improve practice and policy related to criminal justice and advocacy response to domestic violence. In June 2012, the partnership conducted the Second Advanced Coordinated Community Response and Leadership Institute to provide leadership-focused training and support to the ten coordinated community response teams across Virginia. The training was a continuation of the First Institute training and the partnership provided technical assistance to teams in the interim. In the fall, the coordinator also provided two OAG trainings to prosecutors and law enforcement on how to effectively investigate and prosecute domestic violence cases using evidence based prosecution.

In October, the OAG hosted a public awareness event for Domestic Violence Awareness Month to bring awareness to communities across Virginia who have dedicated time and resources to improving their community response to domestic and sexual violence issues. The event included a collection drive from OAG staff and CDS partner agencies to provide pillows, pillow cases, and blankets to the residents of the Eastern Shore Coalition Against Domestic Violence Shelter. In December 2012, the OAG held a Community Recognition Program Awards event to recognize the City of Norfolk for promising practices in the area of domestic violence. The program is a collaborative effort between the OAG, Verizon Wireless, and the Action Alliance to identify localities that are promoting innovative and effective tools to use in the area of domestic violence. Through funding from Verizon, the City of Norfolk received a monetary award in addition to recognition.

In addition, in November, as a joint collaboration of the Violence Against Women Formula Grants Program (V-STOP) grant and the Rappahannock Council Against Sexual Assault, the OAG hosted "A Victim Centered Approach to

Investigating and Prosecuting Sexual Violence Cases: Training for Law Enforcement Officers, Prosecutors, and Advocates” in Lexington, Virginia. More than 50 prosecutors, law enforcement officers, advocates, victim/witness program staff, and allied professionals participated in the training. The training addressed issues related to the investigation and prosecution of sexual violence cases. Through the V-STOP grant, the Safe at Home; Safer Communities resource manual for victim advocates on working with victims of domestic and sexual violence was updated and printed. The “Safe at Home; What Everyone Should Know about Domestic Violence” brochure was updated, translated into Spanish and printed in both English and Spanish. In October, the V-STOP program, in conjunction with the Community Defined Solutions (CDS) Grant Program, held a blanket and pillow drive for the Eastern Shore Coalition Against Domestic Violence shelter and held a community event in honor of Domestic Violence Awareness month. The event showcased the efforts of the ten teams that participated in the CDS Leadership Institute and highlighted the importance of coordinated community responses to end domestic violence. The V-STOP program also provides outreach to the Native American population in Virginia; during 2012, the OAG attended the Chickahominy and Mattaponi tribal powwows to provide attendees with public awareness materials.

Finally, through the Division, the maintains the post office box that serves as the “substitute” mailing address for participants in the Address Confidentiality Program (ACP), a voluntary, confidential mail-forwarding service for victims of domestic violence who have recently moved to a location unknown to their abusers. ACP permits a participant to use the address, which has no relation to the participant’s actual address, in lieu of his or her home. As of July 1, 2011, the ACP was expanded and made available to victims across the Commonwealth. Since its inception in November 2010 and statewide expansion of the program in July 2011, the ACP has increased the number of adult and child participants by 164%. In 2012, ACP provided training to the Virginia Sexual and Domestic Violence Action Alliance and victim advocates at Marine Base Quantico regarding the program, how it works, who is eligible, and how to apply.

TECHNOLOGY, REAL ESTATE, ENVIRONMENT, FINANCIAL LAW AND TRANSPORTATION DIVISION¹

The Technology, Real Estate, Environment, Financial Law and Transportation Division provides comprehensive legal services to executive agencies, state boards and commissions for much of the Commonwealth’s government. Composed of five Sections, the Division provides legal advice across a wide range of substantive subject areas as well as guidance on matters of employment, contracts, purchasing, and the regulatory process. The Division’s attorneys regularly assist state agencies with complex and sophisticated transactions and also represent those agencies in court, often in close association with other attorneys in the Office.

¹ In late 2012, based on relative workloads, the decision was made to restructure this Division by creating a new Division to house some of these Sections as well as another from another Division. Because these changes were not in effect until 2013, they will be reflected in the 2013 volume of the Annual Report.

Technology and Procurement Law Section

The Technology and Procurement Law Section provides legal counsel to the Virginia Information Technologies Agency (VITA), Department of General Services, Information Technology Advisory Council, Secretary of Technology, Wireless E-911 Services Board, Virginia Geographic Information Network Advisory Board, Innovation and Entrepreneurship Investment Authority, the Secretary of Administration (for intellectual property, procurement, and supplier diversity issues), Department of Minority Business Enterprise (for procurement and supplier diversity issues), and the Special Assistant to the Governor for Supplier Diversity and Procurement Compliance, as well as dozens of other agencies and institutions in areas involving contracts, technology issues, intellectual property, and procurement.

In 2012, this Section provided legal assistance for Commonwealth initiatives such as the Electronic Health and Human Resources (eHHR) Program, the procurement and transition to a new statewide provider of electronic government (eGov) services, the procurement of renewed photogrammetric data for Virginia's Base-mapping Program (VBMP), the Commonwealth's Alternative Fuels initiative, the Unemployment Insurance Modernization project, the Commonwealth's small business enhancement program, its creation of a certification program for employment services organizations (ESOs), and cooperative procurement arrangements, among others. This Section also continued to provide necessary legal support to VITA in its management of the Commonwealth's Comprehensive Infrastructure Agreement with Northrop Grumman Systems Corporation. This included assistance to help VITA address performance problems, negotiate contract amendments desired by the parties, and plan for long-term issues.

This Section provided assistance to various Commonwealth agencies, institutions, and boards related to various contract performance and billing problems, technology acquisitions, trademark applications, licensing of Commonwealth data and software to other parties, data security issues, intellectual property agreements, Internet issues, electronic contracting, structuring of procurements, and resolution of procurement protests and lawsuits. Additionally, the Section provided workshop training for public procurement professionals at the annual Public Procurement Forum sponsored by the DGS, and at a training program sponsored by the Capital Area Purchasing Association.

Real Estate and Land Use Section

The Real Estate and Land Use Section (RELU) handles several specialized areas of legal practice. Real estate questions and transactions affect every state agency to some degree. RELU handles the majority of these transactions directly, or provides support and assistance to agency counsel who wish to retain their role as primary agency contact for the transaction. The Section does not handle VDOT right of way acquisitions. During 2012, RELU opened 312 new matters and closed 251 matters. At the end of 2012, the Section was handling 386 active cases with an estimated value in excess of \$2 billion.

Significant transactional real estate matters handled for the Commonwealth include sales, purchases, and leases of and easements on state lands. RELU provides daily advice on real estate issues to the Department of General Services (DGS) and handles

the sale and exchange of state surplus property. The Section also handles all leasing and other real property matters for the Department of Military Affairs, the Department of Veterans' Services and the Alcoholic Beverage Control Board. In addition, the Section provides significant real estate support to the various institutions of higher education as well as support to state agencies seeking to lease state property for the placement of communications towers. Real estate litigation includes boundary line disputes, landlord/tenant litigation, title disputes and federal condemnation actions, as well as miscellaneous real estate related matters. Additionally, the Section reviews real estate related legislation introduced in each session of the General Assembly and assists with the preparation and review of legislation being proposed by the Executive Branch when requested by agencies or Cabinet Secretaries.

During 2012, the Section continued to do significant work regarding a range of issues related to the rights of the Commonwealth in and to subaqueous lands. RELU worked closely with the Environmental Section to advise state agencies and help resolve these issues. During 2012, the Section assisted the Department of Conservation and Recreation with a public-private partnership agreement for its first canopy tour project, authorizing a private company to build suspended walkways in and among the canopies of the trees at Andy Guest State Park. The Section also assisted the Department of Game and Inland Fisheries in both the acquisition of land and the public-private partnership agreement for the construction of its new headquarters building. The Section continues to advise the Virginia Outdoors Foundation on its open space easements, as well as general legal matters, and serves as agency counsel for the Department of Historic Resources, including its historic preservation easement programs and the renovation and restoration incentive programs administered by the Department.

The Section provides advice to agencies, and works with the Construction Litigation Section, on construction procurement, contract management, and dispute resolution issues involving all construction matters other than VDOT projects. The Section provides a wide range of professional services, from review of construction bid documents, advice regarding the appropriate public procurement measures to be followed, representation and advice during bid protests, advice on contract interpretation during construction and participation in negotiations to resolve disputes during performance, up to the tender of a formal complaint and transfer of the case to the Construction Litigation Section. One RELU attorney has assisted VDOT with contract administration and claims resolution for the Interstate 495 High Occupancy Transit lanes project, the project to widen of Interstates 66 and 95, and other significant VDOT projects in Northern Virginia.

RELU also advises the DGS Division of Engineering and Buildings (DEB), regarding policies, procedures and other issues that arise in that Division's role as statewide construction manager and building official. Following the dissolution of the Design Build/Construction Management Review Board in 2011, RELU has worked closely with DEB to revise its policies and procedures to accurately reflect relevant changes in the law and to draft new policies for adoption by the Secretary of Administration. The Section also reviews and approves all required bid, payment and performance bonds for construction projects in which DGS is involved.

RELU continues to serve as the General Counsel to the Fort Monroe Authority (FMA) and counsel to the Governor on all matters related to Fort Monroe. The Fort,

which traditionally has been a U.S. Army installation, contains approximately 365 acres of land with over 400 buildings and other facilities, many of which have historical significance. Fort Monroe was listed on 2005 Base Relocation And Closure list, and the Army ceased all active military operations there on September 15, 2011. Approximately two-thirds of the land area at Fort Monroe will revert to the Commonwealth, perhaps one-sixth of the land area is disputed as to whether it reverts to the Commonwealth or is federal surplus, and the remaining one-sixth is undisputed federal surplus property. All of the undisputed federal surplus property will be transferred to the National Park Service (NPS) to create the Fort Monroe National Monument. The Governor has agreed that certain portions of the Commonwealth's reversionary land will also be transferred to the NPS for the National Monument. Coordinating all of the activities and actions necessary to have a functioning and useful National Monument was a significant focus during 2012. Negotiations with the Army regarding remaining conveyance issues will continue in 2013, along with work for the FMA and with the Army and the National Park Service on a variety of related issues.

The Section continues to assist Virginia State University in the acquisition of approximately 165 parcels of land needed for its planned convocation center. This work involves the drafting of purchase agreements and deeds, review of title work and closing on the properties. It also involves continuing advice to the University and to DGS on the various title related and other legal issues that inevitably arise with a major assemblage of property from a large number of parcels not in common ownership.

Environmental Section

The Environmental Section primarily represents agencies reporting to the Secretary of Natural Resources, as well as the Department of Mines, Minerals and Energy, the Department of Forestry, and the Environmental Health Division of the Virginia Department of Health. Section attorneys provide a range of legal services, including litigation, review of regulation and legislation, transactional work, representation in personnel issues, and other related matters.

In July 2012, on behalf of the Virginia Department of Transportation (VDOT), the Section filed suit against the U.S. Environmental Protection Agency (EPA), challenging an expansion of EPA's regulatory power, from its authorized role under the Clean Water Act (CWA) to establish Total Maximum Daily Load (TMDL) restoration plans with maximum acceptable levels of pollutant discharges to meet water quality standards, to EPA's recently claimed authority to control the quantity or flow of water itself and related land use characteristics such as the amount of impervious cover (*e.g.*, rooftops, roads, and parking lots) in any given watershed. The Fairfax County Board of Supervisors joined VDOT in suing EPA over the TMDL issued by EPA for the Accotink Creek watershed in Fairfax County. The Accotink TMDL is one of the first four so-called "flow TMDLs" established by EPA anywhere in the United States. In December, U.S. District Judge Liam O'Grady heard arguments from the Attorney General and counsel representing the other parties on plaintiffs' Rule 12(c) motion for judgment on the pleadings.

On behalf of the Commonwealth, the Section also participated in an EPA/DOJ stormwater management enforcement case against homebuilder Toll Brothers, Inc. The EPA filed the Complaint and a draft Consent Decree in June 2012, with Virginia and Maryland as co-plaintiffs. The case is pending in the U.S. District Court for the

Eastern District of Pennsylvania. This Section is also representing the Commonwealth in an action against various potentially responsible parties in connection with a Superfund site in Portsmouth, Virginia. The site remediation will include the removal, consolidation and treatment of thousands of yards of creosote-soaked sediment from the Southern Branch of the Elizabeth River, the creation of new wetlands to replace those lost due to the sediment consolidation, implementation of institutional controls to ensure the integrity of the remediated site, and the recovery of damages caused by the loss of natural resources.

The Section represented the State Water Control Board (SWCB) in an action brought by the Chesapeake Bay Foundation (CBF) and the Citizens of Stumpy Lake seeking judicial review of SWCB's 2003 Virginia Water Protection (VWP) Permit and the Board's *Virginia Water Protection Permit Program Regulation* that would allow the construction of a mixed-use development in the City of Chesapeake adjacent to Stumpy Lake. By final order entered in January 2012, the Circuit Court held that CBF and the Citizens of Stumpy Lake failed to meet their burden of establishing (i) that the SWCB had insufficient evidential support for its findings or (ii) that the Board had violated § 62.1-44.15:5(D) or any other laws or regulations. CBF filed its appeal of that order on in October, and this Office filed a motion to dismiss in November, based on the Circuit Court's lack of appellate jurisdiction. The case is still pending before the Court of Appeals.

In addition, the Section is representing the Department of Environmental Quality (DEQ) and the SWCB in two other administrative appeals. The Petitioners are seeking judicial review of Virginia Pollutant Discharge Elimination System permits issued to a Publicly Owned Treatment Works and coal-fired power plant that allow the municipal and industrial facilities to discharge into state waters in accordance with specific effluent limitations. The matters are pending in the Circuit Courts of Mecklenburg County and the City of Richmond, respectively.

In 2009, EPA and DEQ on behalf of the Commonwealth initiated an enforcement action against the Hampton Roads Sanitation District (HRSD) seeking injunctive relief and civil penalties in response to HRSD's illegal discharge of pollutants in violation of the CWA and the State Water Control Law related to numerous unpermitted overflows from HRSD's sanitary sewer system. A Consent Decree was negotiated and finalized in 2010. The parties are in the process of modifying the Consent Decree to accommodate a regionalization study and, if warranted based upon the study results and approval of the affected localities, the regionalization of the locality sewer systems. In order to provide time for this to occur, the parties have agreed to extend the deadline for the HRSDC to submit a Regional Waste Water Management Plan from November 26, 2013 to July 31, 2014.

The Section represented the Virginia Marine Resources Commission (VMRC) in an enforcement action brought against a restaurant for an unpermitted, floating addition. The VMRC ordered the Chincoteague Inn to remove a barge it was using as a temporary restaurant addition, asserting it was an unlawful encroachment on state-owned bottom land. The Circuit Court ruled against VMRC, finding that the commission lacked jurisdiction to order the removal because the addition was a vessel. In August, a panel of the Court of Appeals reversed and remanded the matter for further findings after concluding that federal maritime law does not preempt VMRC's authority to regulate state-owned bottom land. The Court of Appeals,

however, granted the Inn's petition for rehearing *en banc*, which the Court held in November.

The Section also represented the VMRC when a citizen brought a quiet title action claiming that he owned one of the Commonwealth's barrier islands located on the sea side of the Eastern Shore. He pleaded that he owned the island because it had attached to his property by means of either silting or accretion. After a one-day bench trial, the Circuit Court ruled for the Commonwealth on the grounds that to rule in the plaintiff's favor on the evidence presented would require the Court to engage in speculation.

The Section successfully represented the Virginia Department of Health (VDH) in a hookah lounge's appeal of its violations of the Virginia Indoor Clean Air Act (VICAA) that VDH cited during a restaurant inspection. Patrons of the restaurant were observed smoking and no signs were posted prohibiting smoking, in violation of the VICAA. The Appellant asserted that he was exempt from the requirements of § 15.2-2825 because, although he was operating as a restaurant, he also was operating as a "tobacco retail store" that is exempted from VICCA's requirements. The Circuit Court found that, while there should be an exemption for hookah lounges to the requirements of restaurants under the VICAA, there simply was not one that applied to the appellant and, therefore, VDH did not commit an error of law, and the decision of the agency was upheld. The restaurant has appealed to the Court of Appeals.

The Section provided counsel to the Department of Conservation and Recreation (DCR) during the complex effort to authorize localities to develop stormwater management programs and issue stormwater permits while integrating stormwater with the Erosion and Sediment Control and Chesapeake Bay Preservation Act programs. The Section worked with staff from DCR on developing a legally sound model ordinance that incorporated germane statutes and regulations and took into account constraints on local authority and a variety of legal concerns. The Section also worked on developing regulations setting forth a protocol for determining pollutant removal efficiencies for best management practices used in stormwater management. The Section additionally advised DCR throughout the development of the Small Municipal Separate Storm Sewer System (MS4) General Permit and the Arlington County MS4 Individual Permit, including assisting with extensive negotiations with the EPA, localities, and various constituencies.

Financial Law and Government Support Section

The Financial Law and Government Support Section provides legal counsel to the agencies and boards reporting to the Secretaries of Administration, Commerce and Trade, Agriculture and Forestry, Veterans Affairs and Homeland Security and Finance, as well as to the secretariats. These agencies and boards include the Department of Agriculture and Consumer Services and all the boards serviced by that agency, the Virginia Economic Development Partnership, the Virginia Tourism Authority and Virginia Film Office, the Department of Professional and Occupational Regulation and the boards serviced by that agency, the Department of Taxation, the Department of the Treasury, the Department of Veterans Services, the Virginia Employment Commission (VEC), the Department of Labor and Industry (DOLI), the Department of Housing and Community Development and the boards serviced by that agency, the Virginia Resources Authority, the Virginia Board of Accountancy, the

Department of Business Assistance, and the State Board of Elections. This Section also provides advice to certain independent agencies, including the Virginia Retirement System and the Virginia Workers Compensation Commission. In addition, this Section works with constitutional officers and local government attorneys to assist in the resolution of issues of local concern as they arise.

In 2012, representing the Board for Branch Pilots, the Section appealed to the Court of Appeals a ruling of a Circuit Court that had overturned a board decision on licensure. The Court of Appeals held in the board's favor and reversed the Circuit Court in *Board for Branch Pilots v. McCrory*. In addition, the Court of Appeals *en banc* ruled in favor of the Board for Contractors in *Muse Construction Group v. Board for Contractors*, reversing a panel decision that would have signaled a dramatic change in appeals practice under the Administrative Process Act. The *en banc* decision in *Muse* confirms that Rule 2A:4(a) requires formal service of process in an appeal of a agency case decision in the same manner in which process is served to initiate a civil matter. Mailing the petition for appeal is insufficient service under Rule 2A:4(a).

As a result of economic conditions, the number of unemployment benefit appeals from the VEC has increased steadily since 2007. In 2012, the VEC was served with 168 petitions for judicial review, only slightly fewer than the record number of 174 petitions filed in 2011. In 2012, in the one published opinion of the Court of Appeals of Virginia of a case involving VEC, *Smith v. VEC and Swift Transportation, Inc.*, the Court affirmed the circuit court's decision to uphold the VEC's finding.

The Section successfully represented DOLI in two appeals to the Virginia Court of Appeals: *Mar v. Malveaux, Commissioner Department of Labor and Industry*, and *National College Of Business and Technology, Inc. v. Malveaux, Commissioner Department of Labor and Industry*. The Supreme Court refused to review the decision of the Court of Appeals in *National College of Business and Technology*.

On behalf of the Department of Taxation, this Section also handles a significant volume of litigation regarding state tax assessments with respect to individual and corporate income taxes, retail sales and use taxes, and other state taxes. This caseload includes complex litigation regarding land preservation tax credits.

The Section also represents the Department of Alcoholic Beverage Control (ABC) and prosecutes violations of the animal fighting and animal cruelty law. On behalf of ABC, the Section litigated 7 appeals of administrative actions at the circuit court level all of which resulted in favorable outcomes for the agency. One cases was appealed to Court of Appeals and was affirmed. The Section responded to 60 requests for assistance from animal control, law enforcement and commonwealth's attorneys regarding animal neglect/cruelty, dangerous dog and animal fighting cases throughout the Commonwealth. The Section, under special prosecution agreements with several localities, successfully prosecuted eight individuals for animal cruelty and animal fighting in 2012.

Transportation Section

The Transportation Section represents and advises the state agencies, offices, authorities, and boards that report or are assigned to the Secretary of Transportation. These agencies, offices, authorities, and boards include: the Virginia Department of

Transportation (VDOT), the Commonwealth Transportation Board (CTB), the Department of Motor Vehicles, the Commission on the Virginia Alcohol Safety Action Program (VASAP), the Department of Rail and Public Transportation (DRPT), the Virginia Port Authority (VPA), the Virginia Department of Aviation, the Virginia Aviation Board, the Motor Vehicle Dealer Board, the Board of Towing and Recovery Operators, the Virginia Commercial Space Flight Authority and the Office of Transportation Public-Private Partnerships for the Commonwealth of Virginia. The Section also advises and acts as counsel to the Secretary of Transportation.

Section attorneys serve transportation client agencies and entities in numerous administrative, regulatory, transactional, contractual and litigation matters, including Public-Private Transportation Act (PPTA) transactions; bond issuance, refunding and refinancing; contract negotiation, drafting and dispute resolution; eminent domain issues and condemnation proceedings; land use issues; outdoor advertising and highway sign issues relating to rights of way; personnel issues; environmental issues; procurement disputes; titling and registration of automobiles; licensure and regulation of drivers; motor fuels tax collection and enforcement; licensure, regulation and discipline of motor vehicle dealers; administration of motor vehicle dealer franchise laws and regulation of disputes between franchise dealers and manufacturers; licensure and regulation of towing and recovery operators; administration of the VASAP program; review of transportation legislation; drafting and negotiation of rail and other grant arguments; responses to freedom of information requests; conflict of interest questions; and administrative hearings involving a wide array of issues and several different transportation agencies and entities.

In 2012, attorneys in the Section appeared in state and federal courts throughout Virginia, including the Supreme Court of Virginia, to represent and protect the Commonwealth's transportation interests in litigation. For example, the Section participated in a federal court suit against the Environmental Protection Agency (EPA) concerning its attempt to regulate water itself as a pollutant by imposing restrictions on the flow of water in Accotink Creek in Fairfax County. The Court's ruling could save Virginia taxpayers nearly \$300 million. Section attorneys also helped to defend a suit brought against the \$2.1 billion PPTA project to build a new Portsmouth-Norfolk tunnel, rehabilitate the existing Portsmouth-Norfolk tunnel and extend the Martin Luther King Freeway. Section attorneys also were instrumental in bringing to close several key PPTA transactions in 2012, including the Northern Virginia High Occupancy Toll Lanes project and the Route 460 Corridor project. In addition, considerable time and effort were spent advising the VPA during its consideration of proposals to privatize the operation of the Port of Virginia. Finally, Section attorneys also appeared in numerous eminent domain proceedings to resolve property owner damage claims.

Due to favorable interest rates in 2012, the Section also assisted in the issuance of several refunding and refinancing bonds, as well as new bonds, to finance the Commonwealth's transportation infrastructure. First, the Section assisted the VPA in the issuance of Port Fund Revenue Refunding Bonds Series 2012, in the amount of \$108,050,000. The Section assisted VDOT and the CTB in the issuance of Federal Transportation Grant Anticipation Revenue Notes in the amount of \$297,590,000 to fund part of the Commonwealth's share of the cost of the Portsmouth-Norfolk tunnel project. Finally, the Section assisted VDOT and the CTB with the Fairfax County

Economic Development Authority (FEDA) issuance of Transportation Contract Revenue Refunding Bonds Series 2012 for the purpose of refunding certain FEDA bonds previously issued to finance a portion of the cost of the construction of certain improvements to State Route 28 in Fairfax and Loudoun Counties.

There was significant Section involvement in rail transportation issues during 2012. Section attorneys participated in negotiations with the Federal Railroad Administration and the state of North Carolina concerning the funding and development of high speed rail in Virginia. They advised DRPT concerning the Virginia-North Carolina High Speed Rail Compact. Section attorneys participated in the negotiation and drafting of agreements for the implementation of high speed passenger rail service between Norfolk and Richmond. They also participated in negotiations concerning state-supported passenger rail operations from Lynchburg to Washington and from Richmond to Washington, D.C. Section attorneys advised the Secretary of Transportation and DRPT concerning Phase 2 of the Dulles Metrorail Project, and participated in the negotiation and drafting of a Memorandum of Agreement for that project with the U.S. Secretary of Transportation and officials from the Metropolitan Washington Airports Authority, Fairfax County, Loudoun County and the Washington Metropolitan Area Transit Authority. Finally, Section attorneys advised DRPT and the Secretary of Transportation concerning the continued funding of the Virginia Railway Express.

LEGISLATIVE ACCOMPLISHMENTS

During the 2012 Session of the General Assembly, the Office of the Attorney General helped to further legislation to protect private property rights, improve public safety, and provide opportunities for veterans and senior citizens throughout the Commonwealth.

This year marked the second passage of a constitutional amendment to protect property rights in the Commonwealth. The amendment to Article I, Section 11 of the Constitution of Virginia appeared on the November 2012 ballot and was passed by the voters. The new constitutional provisions, effective January 1, 2013, provide that private property can be taken or damaged only for a public use, only with just compensation to the owner, and only to the extent necessary for the public use. The Office also worked to ensure measures were adopted to require just compensation to be equal to or exceed the value of the property taken, lost profits, lost access and damages to the residue caused by the taking of private property. The Office worked with various stakeholders to allow public service companies, Public Service Corporation or railroad the power of eminent domain for public use when such exercise is for the authorized provision of utility, common carrier, or railroad services. The amendment provides that a taking or damaging of private property is not for public use if the primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue or economic development, except for the elimination of public nuisances exist on the property, and it shifts the burden of proving that the use is public to the condemnor rather than the property owner. work

This Office also engaged legislators and others to address various measures to protect seniors and the disabled from abuse and neglect. The Office led efforts to enact several changes to the Virginia Fraud Against Taxpayers Act (VFATA) and the laws governing the Attorney General's duties related to the regulation of medical

assistance, including (i) exempting certain information furnished to this Office from disclosure under the Virginia Freedom of Information Act, (ii) imposing a 3-year statute of limitations on claims for employer retaliation under the VFATA, (iii) permitting the Attorney General to share information obtained as part of a VFATA investigation with other state and federal governmental entities, (iv) allowing the Attorney General to issue interrogatories as part of an investigation of services furnished under medical assistance, and (v) requiring health care entities to disclose records to the OAG in connection with such investigations. Additionally, the Attorney General furthered Virginia's national leadership in the area of Medicaid fraud enforcement by expanding the authority of the Office by seeking authorization to strengthen the enforcement powers of Virginia's Medicaid Fraud Control Unit by adding sworn law enforcement investigators to the prosecution team.

In addition to these efforts to protect Virginia's seniors, the Attorney General proposed legislation to expedite funding for Line of Duty death beneficiaries, and expanded the availability of benefits to include campus police officers. Finally, this Office was proud to be involved in working with the House and Senate on numerous initiatives to improve the safety of Virginians. These initiatives ranged from strengthening the penalties associated with human trafficking offenses and protecting children from methamphetamine production.

OPINIONS SECTION

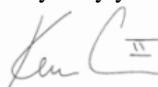
The Opinions Section processes and manages requests made pursuant to § 2.2-505 for official opinions of the Attorney General as well as conflict of interests opinions for state government officers and employees and members of the General Assembly. The Section also handles confidential informal opinions that are issued by other OAG attorneys. In 2012, the Opinions Section received over 150 opinion requests, including requests not statutorily entitled to a response, that were withdrawn or were answered by previously issued opinions. The Office issued over 70 official, informal, and conflict of interests opinions in 2012, including the 40 official opinions published herein. The Section is responsible for publishing the Annual Report of the Office of the Attorney General mandated by § 2.2-516 and presenting it to the Governor of Virginia on May 1st.

CONCLUSION

It is an honor and pleasure to serve the Commonwealth as Attorney General. The dedicated professionals who served the Office last year are named on the following pages. While it is impossible to include all of their accomplishments in this report, it is clear the citizens of the Commonwealth are well served by the efforts of these individuals.

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli II
Attorney General

PERSONNEL OF THE OFFICE¹

Kenneth T. Cuccinelli II	Attorney General
Charles E. James Jr.	Chief Deputy Attorney General
Patricia L. West	Chief Deputy Attorney General
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John F. Childrey	Deputy Attorney General
G. Michael Favale	Deputy Attorney General
David E. Johnson.....	Deputy Attorney General
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Wesley G. Russell Jr	Deputy Attorney General
E. Duncan Getchell Jr.....	Solicitor General of Virginia
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Elizabeth A. Andrews.....	Sr. Assistant Attorney General/Chief
C. Meade Browder Jr.....	Sr. Assistant Attorney General/Chief
Craig M. Burshem	Sr. Assistant Attorney General/Chief
Patrick W. Dorgan.....	Sr. Assistant Attorney General/Chief
Samuel E. Fishel IV.....	Sr. Assistant Attorney General/Chief
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Howard M. Casway.....	Senior Assistant Attorney General
George W. Chabalewski.....	Senior Assistant Attorney General
Ellen E. Coates	Senior Assistant Attorney General
Gary L. Conover.....	Senior Assistant Attorney General

¹ This list includes all persons employed and compensated by the Office of the Attorney General during calendar year 2011, as provided by the Office's Division of Administration. The most recent title is used for any employee whose position changed during the year.

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Jon M. Johnston..... Senior Criminal Investigator
 Scott D. Jones Senior Criminal Investigator
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 Patricia M. Lewis Unit Program Coordinator
 Deborah L. Madison..... Director of Information Systems
 Deborrah W. Mahone..... Paralegal Sr. Expert/Legislative Specialist
 Jason A. Martin Computer Forensic Analyst
 Sara I. Martin..... Human Resources Analyst
 Tomisha R. Martin Claims Specialist
 Joshua A. Marwitz..... Investigator
 Benjamin L. Mason..... Deputy Scheduler and Press Assistant
 Stephanie B. Maye Legal Secretary Senior
 Angela M. McCoy..... Administrative Legal Secretary Senior
 Judy O. McGuire Claims Representative
 George T. McLaughlin..... Investigator/Forensic Examiner
 Melissa A. McMenemy Program Coordinator
 Katelyn E. Melo Deputy Director of Administration
 Natalie A. Mihalek Paralegal Senior
 David J. Miller..... Investigator
 Lynice D. Mitchell Office Services Specialist Senior
 James B. Mixon Jr. Analyst/Community Outreach Coordinator
 Karen G. Molzhon..... Legal Secretary Senior
 Eda M. Montgomery Senior Financial Investigator
 Jonah F. Morrison..... IT Support Specialist I
 Patricia A. Morrison..... Unit Manager
 Zachary H. Moyer Criminal Investigator/Computer Forensic Examiner
 Howard M. Mulholland..... FCIC Financial Investigator
 Janice M. Myer..... Exec. Asst. to the Chief Dep. Att’y Gen.
 Mary C. Nevetral..... Receptionist
 Connie J. Newcomb Director of Office Operations
 Trudy A. Oliver-Cuoghi..... Paralegal
 Jennifer L. Onusconich..... Paralegal
 Sheila B. Overton Internet Services Administrator
 Janice R. Pace..... Financial Manager
 Sharon P. Pannell Legal Secretary Senior

Doris M. Parham	Intake Specialist
Rebecca A. Parks.....	Program Coordinator, GRIP
John W. Peirce.....	Senior Criminal Investigator
Coty D. Pelletier.....	Investigator
Jane A. Perkins	Paralegal Senior Expert
Bruce W. Popp	Deputy Director, Information Systems
Jacquelin T. Powell	Legal Secretary Senior Expert
Jennifer L. Powell.....	Administrative Legal Secretary Senior
Sandra L. Powell	Legal Secretary Senior
Meredith K. Quillen	Director of Administration
Syed A. Rahman.....	Auditor
Kunaal J. Rathod	IT Support Specialist II
N. Jean Redford.....	Legal Secretary Senior Expert
Luvenia C. Richards.....	Legal Secretary
Ryan C. Rios	Financial Advisor
David A. Ridsen	Investigator
Alfreda J. Robinson.....	Human Resources Assistant
Hamilton J. Roye.....	Administrative Coordinator
Joseph M. Rusek.....	MFCU Investigative Supervisor
Constance S. Saupé	Legal Secretary
Lauri A. Schinzer	Claims Specialist
Michelle S. Scott	Legal Secretary
Elizabeth G. Sherron	Senior Financial Investigator
Sara J. Skeens	eDiscovery Supervisor
Debra L. Smith	Legal Secretary Senior
Faye H. Smith.....	Human Resource Manager
Jameen C. Smith.....	Claims Specialist Senior
Jessica C. Smith.....	Administrative Legal Secy. Sr./PS Init. Coordinator
Gerald B. Snead II.....	EEO Manager
Cheryl L. Snyder	Legal Secretary
Michele A. Stanley	Investigator
Eva A. Stuart	Constituent Services Administrator
Nicollette K.D. Stumpf.....	Receptionist
Rhonda H. Suggs.....	Paralegal Senior
Tara N, Talbott	Nurse Investigator
Gregory G. Taylor.....	Claims Representative
Jeanette T. Taylor.....	Legal Secretary
Kimberly Edward Taylor.....	Executive Assistant to Solicitor General
David A. Terry	Computer Programmer
Susan W. Terry.....	Paralegal Senior
Daniel W. Thaw	Investigator
Patricia S. Thomas.....	Nurse Investigator
Erin K. Thompson	Investigator
Katherine E. Tonneman.....	Paralegal

Michelle L. Townsend..... Unit Manager
 John Tran..... IT Student Assistant
 Mary E. Trapp Intake Specialist
 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 Program
 Laura C. Verser Paralegal
 Kathleen B. WalkerProgram Assistant, Victim Notification Program
 Christine A. Wells Financial Manager
 Cortley D. West..... EEO/Intake Manager
 Nanora W. Westbrook.....Program Asst. Sr., Victim Notification Program
 Amy R. WightSpecial Projects Manager/GRIP Director
 Kimberly Wilborn Paralegal
 M. Donette WilliamsAdministrative Coordinator
 Timothy L. Wilson Administration/Operations Manager
 Tiffany D. WilliamsIntake Specialist
 Brenda K. Wright Legal Secretary Senior Expert
 Michael J. Wyatt..... Investigator
 Abigail T. Yawn..... Legal Secretary Senior
 James A. Zamparello..... Investigator
 Apryl T. Ziegler..... Paralegal

ATTORNEYS GENERAL OF VIRGINIA
1776 – 2012

Edmund Randolph.....	1776–1786
James Innes	1786–1796
Robert Brooke	1796–1799
Philip Norborne Nicholas.....	1799–1819
John Robertson.....	1819–1834
Sidney S. Baxter.....	1834–1852
Willis P. Bocock	1852–1857
John Randolph Tucker.....	1857–1865
Thomas Russell Bowden.....	1865–1869
Charles Whittlesey (military appointee).....	1869–1870
James C. Taylor.....	1870–1874
Raleigh T. Daniel	1874–1877
James G. Field.....	1877–1882
Frank S. Blair	1882–1886
Rufus A. Ayers.....	1886–1890
R. Taylor Scott	1890–1897
R. Carter Scott.....	1897–1898
A.J. Montague	1898–1902
William A. Anderson	1902–1910
Samuel W. Williams.....	1910–1914
John Garland Pollard.....	1914–1918
J.D. Hank Jr. ¹	1918–1918
John R. Saunders.....	1918–1934
Abram P. Staples ²	1934–1947
Harvey B. Apperson ³	1947–1948
J. Lindsay Almond Jr. ⁴	1948–1957
Kenneth C. Patty ⁵	1957–1958
A.S. Harrison Jr.....	1958–1961
Frederick T. Gray ⁶	1961–1962

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

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

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

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

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

Robert Y. Button	1962–1970
Andrew P. Miller.....	1970–1977
Anthony F. Troy ⁷	1977–1978
John Marshall Coleman.....	1978–1982
Gerald L. Baliles	1982–1985
William G. Broaddus ⁸	1985–1986
Mary Sue Terry	1986–1993
Stephen D. Rosenthal ⁹	1993–1994
James S. Gilmore III.....	1994–1997
Richard Cullen ¹⁰	1997–1998
Mark L. Earley	1998–2001
Randolph A. Beales ¹¹	2001–2002
Jerry W. Kilgore.....	2002–2005
Judith Williams Jagdmann ¹²	2005–2006
Robert F. McDonnell.....	2006–2009
William C. Mims ¹³	2009–2010
Kenneth T. Cuccinelli II.....	2010 –

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

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

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

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

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

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

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

¹³ 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

CASES DECIDED IN SUPREME COURT OF VIRGINIA¹

Appalachian Power Co. v. State Corporation Commission. Affirming the disallowance of \$27 million in a rate adjustment clause for environmental compliance costs claimed to be embedded in “capacity equalization” payments to affiliate utilities, and reversing the denial of \$6 million in such costs accounted for in the company’s base rates.

Baker v. Commonwealth. Affirming Court of Appeals’ decision affirming three possession of a firearm by a felony convictions.

Barson v. Commonwealth. Reversing Court of Appeals’ decision affirming a conviction of “harassment by computer” finding emails at issue were not “obscene.”

Belew v. Commonwealth. Reversing Court of Appeals’ decision and remanding the case with directions to review the petition for appeal on its merits and consider the missing transcript as part of the record.

Blue Ridge Environmental Defense League v. Commonwealth. Affirming Court of Appeals reversal of trial court ruling setting aside permit issued by State Water Control Board to Dominion Power for discharges from North Anna Nuclear Power Plant.

Branham v. Commonwealth. Affirming Court of Appeals’ decision finding the trial court did not err in denying defendant’s motion to suppress.

Brown v. Commonwealth. Reversing Court of Appeals’ decision and remanded the case to the intermediate appellate court with direction to remand the same to the trial court for resentencing.

Brown v. Virginia State Bar. Denying a petition for appeal of attorney, whose license suspension was affirmed by the Supreme Court, of the Bar’s assessment of costs against him. Under the Rules of the Supreme Court, the Disciplinary Board Chair’s decision on the assessment of costs is final and non-appealable.

Burke v. Catawba Hospital. Refusing appeal of nurse whose grievance was dismissed and affirmed by the Court of Appeals.

Carr v. Commonwealth. Affirming Court of Appeals’ decision rejecting defendant’s argument he was entitled to be sentenced for an accommodation offense with regard to his conviction for possession of cocaine with intent to distribute.

Cofield v. Commonwealth. Reversing Court of Appeals’ decision dismissing an appeal for failure to file transcripts on time.

Collins v. Commonwealth. Affirming Court of Appeals’ decision that held a bail bondsman licensed in another state but not in Virginia could be convicted of attempted abduction and use of a firearm in the commission of a felony.

¹ A complete listing of all the cases handled by the Office of the Attorney General is not reprinted in this Report. Only 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*. Further, several noteworthy Supreme Court cases are highlighted in the Letter to the Governor describing the accomplishments of each Division of the Office of the Attorney General.

Commonwealth v. Blaxton. Reversing the trial court's decision to allow a respondent to be conditionally released as a sexually violent predator to reside and be supervised out of state. Similar to its decision in *Commonwealth v. Amerson*, the Court went on to further differentiate criminal supervision obligations and transfer of that supervision pursuant to the Interstate Compact.

Commonwealth v. Quarles. Reversing Court of Appeals' decision reversing and dismissing the defendant's convictions for robbery and conspiracy to commit robbery.

Conley v. Commonwealth. Vacating 5-5 decision order of the Court of Appeals' sitting en banc denying a writ of actual innocence and reinstating panel decision granting the writ.

Curtis v. Weithop. Dismissing petition for writs of mandamus and prohibition against a judge, President of the Virginia State Bar, and Attorney General.

Demille v. Commonwealth. Affirming that the sexually violent predator determination need not be based on expert testimony that expressly states that ultimate opinion and that a trial court is instead entitled to look at the entirety of the record in making its determination.

Dunham v. Commonwealth. Affirming Court of Appeals' decision affirming the circuit court's revocation of previously suspended sentence.

E.C. v. Va. Dep't of Juvenile Justice. Reversing and remanding the circuit court's dismissal of a habeas petition finding it erred in holding petitioner was no longer in custody.

Enriquez v. Commonwealth. Affirming Court of Appeals' decision that found the evidence was sufficient to support a finding the defendant was under the influence of alcohol while in actual physical control of the vehicle.

Farabee v. Commissioner of the Department of Behavioral Health and Developmental Services. Dismissing a petitioner's writ of habeas corpus contesting his return of custody to the Department of Behavioral Health and Developmental Services following his release from the Department of Corrections.

Gleason v. Commonwealth. Affirming death sentences imposed for two capital murder convictions imposed by the Wise County Circuit Court.

Haas v. Commonwealth. Affirming Court of Appeals' refusal to refer the case to the circuit court for an evidentiary hearing on the veracity of the recantations offered in support of a writ of actual innocence.

In re Davis. Refusing petition for writ of mandamus against general district court clerk, sheriff and others arising out of eviction, seeking a stay of unlawful detainer proceedings.

In re: Hunter. Refusing petition for writs of mandamus and prohibition to require judge to schedule motions for hearing on the same day as previously scheduled motions.

In re: Hunter. Refusing petition for writs of prohibition and mandamus against judge who issued a capias for Hunter for failing to appear.

In re: McGann. Dismissing appeal of decision of Bar Disciplinary Board finding that attorney violated Rule 1.4(b) of the Rules of Professional Conduct and imposing a Public Reprimand Without Terms.

Johnson v. Anis. Reversing the circuit court's grant of a writ of habeas corpus based upon its determination trial counsel was ineffective for failing to allege the specific grounds of mistake, fear, misunderstanding and misrepresentation in his motion to withdraw the guilty plea.

La Cava v. Commonwealth. Reversing Court of Appeals' decision dismissing an appeal for failure to file transcripts on time.

Lahey v. Johnson. Affirming the circuit court's dismissal of a habeas petition as time-barred.

Lazzaro v. Dorsey. Dismissing appeal of a sanction imposed by a judge.

Livingston v. Virginia State Bar. Appealing Bar Disciplinary Board's public reprimand with terms arising out of a violation of Rule 1.1, which relates to competent representation; Rule 3.1, which relates to bringing frivolous claims and contentions; and Rule 3.8(a), which relates to filing a charge not supported by a probable cause.

McCloud v. Commonwealth. Affirming Court of Appeals' decision affirming convictions for carrying a concealed weapon and possession of a firearm by a convicted felon.

Meade v. Virginia State Bar. Dismissing appeal of suspension of attorney's license to practice law for failure to comply with a subpoena from the Bar.

Newton v. Commonwealth. Reversing Court of Appeals' decision and dismissing conviction for gang participation.

Porter v. Warden, Sussex I State Prison. Dismissing habeas corpus petition challenging conviction for capital murder and sentence of death from Norfolk Circuit Court.

Price v. Commonwealth. Affirmed Court of Appeals' decision upholding sentence for embezzlement.

Prieto v. Commonwealth. Affirming death sentences imposed for two capital murder convictions by the Fairfax County Circuit Court.

Rives v. Commonwealth. Affirming Court of Appeals' decision affirming a conviction for making a harassing telephone call.

Roper v. Virginia State Bar. Denying attorney's motion to stay the suspension of his license to practice law and motion for sanctions against the Bar.

Rushing v. Commonwealth. Reversing Court of Appeals' decision and dismissing convictions for gang participation and use of a firearm in the commission of burglary.

Shellman v. Commonwealth. Affirming the SVP Act's provision for conducting annual review hearings by videoconferencing as constitutional.

Smallenberg v. Virginia State Bar. Dismissing appeal of a three-year suspension of license to practice law for several failures to comply with requirement to issue notices of a previous thirty-day suspension and various interim suspensions.

Spencer v. Virginia State Bar. Reversing and dismissing complaint against attorney appealing public admonition without terms for violation of Rule 4.2, Communication with Persons Represented by Counsel, holding that he was not given sufficient notice.

Stevens v. Commonwealth. Affirming Court of Appeals' decision finding trial court did not err in denying defendant's motion to suppress.

Taylor v. Cone. Refusing appeal of decision granting a plea of quasi-judicial immunity to a clerk of a juvenile and domestic relations district court.

Turner v. Commonwealth. Reversing Court of Appeals' decision and remanding charge of aggravated malicious wounding for a new trial.

Va. Electric & Power Co. v. State Corporation Commission. Affirming the SCC's determination that the 10.9% fair rate of return approved in the 2011 biennial review case shall be used to measure company earnings from 2011 and 2012 in the 2013 biennial review case, as opposed to a 11.36% blended return, and this does not constitute retroactive ratemaking.

Waters v. White. Denying petition for writ of mandamus to require Goochland General District Court clerk to file inmate's notice of appeal.

CASES PENDING IN THE SUPREME COURT OF VIRGINIA²

Baird ex rel. Barnes v. Stokes. Appealing dismissal of a medical malpractice case involving several doctors and the Eastern Virginia Medical School.

Commonwealth v. Tuma. Appealing the Court of Appeals' ruling a Brady violation occurred even though evidence was available for the defendant at trial, and that the evidence was material.

Daily Press v. Commonwealth. Appealing Newport News Circuit Court's denial of a motion to unseal records from a completed criminal trial.

Henderson v. Commonwealth. Appealing the Court of Appeals' *en banc* decision affirming circuit court's revocation of probation.

Jhurilal v. Commonwealth. Appealing the Court of Appeals' decision finding the evidence was sufficient to convict the defendant of transporting marijuana into Virginia.

Lawlor v. Commonwealth. Direct appeal from Fairfax County Circuit Court conviction for capital murder and sentence of death.

McCrory v. Board for Branch Pilots. Appealing Court of Appeals reversal of trial court decision to vacate board's denial of an application for licensure as a branch pilot.

Morva v. Commonwealth. Petition for writ of habeas corpus challenging death sentences and capital murder convictions from Montgomery County Circuit Court.

Northam v. Virginia State Bar. Appealing the Bar Disciplinary Board's public reprimand arising from a violation of conflict of interest rules when Northam's law partner inadvertently met with a potential client for representation in divorce proceedings and that client divulged confidential information to Northam's partner. Northam continued to represent the husband, notwithstanding Rule 1.10 on imputed disqualification.

² Although these cases were pending in the Supreme Court in 2012, some have reached decision in early 2013, prior to publication of this Report. Those case decisions will be included in the 2013 Annual Report's Cases Decided.

Peterson v. Commonwealth & Pryde v. Commonwealth. Appealing denial of motion to set aside verdict in the wrongful death trial arising from the April 16, 2007, shootings at Virginia Tech. Plaintiffs are appealing the dismissal of President Steger as a Defendant.

Powell v. Commonwealth. Appealing the Court of Appeals' ruling a pat-down following a valid *Terry* stop was reasonable under the circumstances.

Stevenson v. Hamilton. Petitioning for writ of mandamus concerning the renewal of a concealed handgun permit. Petitioner alleges the circuit court must consult with local law enforcement and process his renewal application pursuant to § 18.2-308(D).

Wilson v. Commonwealth. Appealing the Court of Appeals' ruling the evidence was sufficient to support conviction for grand larceny.

CASES REFUSED BY THE SUPREME COURT OF VIRGINIA

Amarasinghe v. Virginia Board of Medicine. Refused an appeal challenging the Board of Medicine's summary suspension of a license to practice medicine.

Assessment and Training Solutions Consulting Corp. v. Department of Taxation. Refusing to hear appeal from trial court decision upholding department's denial of a sales and use tax exemption for personal property under § 58.1-609.3(5) because the property was not used exclusively in basic research or research and development.

National College of Business and Technology, Inc. v. Malveaux, Commissioner Department of Labor and Industry. Refusing to hear appeal from ruling of Court of Appeals affirming trial court determination that department properly classified asbestos-related violations as "other than serious" violations rather than "de minimis" violations.

Wendy's Inc. v. Virginia Department of Taxation. Refusing to hear appeal from trial court's entry of summary judgment in favor of taxpayer allowing a claimed deduction.

CASES IN THE SUPREME COURT OF THE UNITED STATES

Andrews v. Paxson. Petitioning for writ of certiorari in dismissal of § 1983 suit against juvenile and domestic relations district court judge based on actions taken in child support hearing.

ASWAN v. Commonwealth. Denying a petition for writ of certiorari of the Society Without a Name (ASWAN) who sued the Commonwealth and Virginia Commonwealth University under the Americans with Disabilities Act and the Fair Housing Act, claiming conspiracy to move homeless people out of downtown Richmond, by moving a soup kitchen two miles away.

Bolls v. Board of Bar Examiners. Denying a petition for writ of certiorari in litigation challenging the Board's refusal to release July 2009 bar exam answers.

Brooks v. Arthur. Petitioning for writ of certiorari in dismissal of suit brought by corrections officers complaining of unconstitutional discharge in violation of their protected freedom of speech.

Harding v. Osborn. Denying a petition for writ of certiorari in dismissal of action against judge.

Pearson v. Leon Winston. Pending petition for writ of certiorari to review grant of writ of habeas corpus challenging capital murder conviction and sentence of death from Lynchburg Circuit Court.

Rives v. Commonwealth. Pending petition for certiorari seeking review of conviction for telephone harassment.

Scott v. U.S. National Bank. Denying a petition for writ of certiorari in case alleging judges and others engaged in a conspiracy to deprive plaintiff of two parcels of property.

OFFICIAL OPINIONS

OF

ATTORNEY GENERAL

KENNETH T. CUCCINELLI II



Section 2.2-505 of the *Code of Virginia* authorizes the Attorney General to render official written advisory opinions only when requested 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; Commonwealth's attorneys and county, city or town attorneys; sheriffs, treasurers, and commissioners of the revenue; the State Corporation Commission; electoral board chairmen or secretaries; and state agency heads.

Each opinion in this report is preceded by an opinion number and 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: 2012 Op. Va. Att'y Gen. __.

Opinions of the Attorney General beginning with opinions issued in January 1996, and Annual Reports of the Attorney General may be accessed on the Internet at www.vaag.com. Opinions of the Attorney General are also available 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 1976.



OP. NO. 12-031

ADMINISTRATION OF GOVERNMENT: DEPARTMENT OF MINORITY BUSINESS ENTERPRISE

The Department may not certify a Florida-based firm as a “small business” in Virginia, because Florida makes a “minority business enterprise” certification available to certain small businesses based in Florida but does not permit similar businesses based in Virginia to apply for that certification or its associated benefits.

MS. IDA O. MCPHERSON

DIRECTOR, DEPARTMENT OF MINORITY BUSINESS ENTERPRISE

JUNE 29, 2012

ISSUE PRESENTED

You ask whether the Department of Minority Business Enterprise (“the Department”) may certify as a “small business” a Florida-based company meeting the Virginia definition of “small business” when the State of Florida has no separate small business certification program and denies Virginia firms the benefits of its “minority business enterprise” certification program.

RESPONSE

It is my opinion that the Department may not certify a Florida-based firm as a “small business” in Virginia, because Florida makes a “minority business enterprise” certification available to certain small businesses based in Florida but does not permit similar businesses based in Virginia to apply for that certification or its associated benefits.

APPLICABLE LAW AND DISCUSSION

Pursuant to § 2.2-1403(8) of the *Code of Virginia*, the Director of Virginia’s Department of Minority Business Enterprise is authorized to “[a]dopt regulations to implement certification programs for small, women- and minority-owned businesses” Generally, such certification programs are not limited to Virginia-based enterprises;¹ however, § 2.2-1403(8) further provides that

Such certification programs shall deny certification to vendors from states that deny like certifications to Virginia-based small, women-owned or minority-owned businesses or that provide a preference for small, women-owned, or minority-owned businesses based in that state that is not available to Virginia-based businesses.

The determination of whether Florida businesses are eligible for certification in Virginia, therefore, depends on Florida’s treatment of Virginia-based firms when they apply for like certifications in Florida.

While Virginia certifies small, women-owned, and minority-owned businesses separately, Florida combines all three criteria in the certification it provides under the label “minority business enterprise.”² Therefore, the eligibility of Virginia firms to seek this certification in Florida is a precondition of Florida-based firms’ eligibility to seek all three certifications in Virginia. In particular, small businesses seeking

certification with Florida's Division of Purchasing do so within the framework of this certification, but it is available only to small businesses that are domiciled in Florida.³ Because Florida's certification and its associated benefits⁴ are not available to small businesses based in Virginia, the Department, pursuant to § 2.2-1403(8), is precluded from certifying a Florida-based business as a small business in Virginia.⁵

CONCLUSION

Accordingly, it is my opinion that the Department may not certify a Florida-based firm as a "small business" in Virginia, because Florida makes a "minority business enterprise" certification available to certain small businesses based in Florida but does not permit similar businesses based in Virginia to apply for that certification or its associated benefits.

¹ See 7 VA. ADMIN. CODE § 10-21-130 (2012) (providing that the Department may certify a non-Virginia based business if it meets the applicable eligibility standards for certification as a small, women-owned or minority-owned business). See also VA. CODE ANN. § 2.2-1401 (2011) (defining "minority individual," "minority-owned business," and "small business" to require the individuals or owners to be citizens of the United States or legal resident aliens).

² See FLA. STAT. § 288.703 (2012) (defining "minority business enterprise" as a "small business concern . . . owned by minority persons" and defining "minority person" as a Florida resident who has certain racial or ethnic origins or who is an "American woman"). See also FLA. STAT. § 287.0943(1) (2012) (Office of Supplier Diversity to confirm certification criteria); and FLA. ADMIN. CODE ANN. r.60A-9.001 (2012) and r.60A-9.005 (2012) (setting forth certification criteria consistent with the above definitions).

³ See FLA. ADMIN. CODE ANN. r.60A-9.005(5) (2012) ("The applicant must demonstrate that it is domiciled in Florida"). See also FLA. STAT. § 288.703 ("Minority business enterprise" must be "domiciled in Florida," and "Minority person" must be a "lawful permanent resident of Florida").

⁴ See, e.g., "Benefits of a State of Florida Certified Business Enterprise," available at http://www.dms.myflorida.com/other_programs/office_of_supplier_diversity_osd/certification/benefits_of_a_state_of_florida_certified_business_enterprise (indicating such businesses are "the first tier of businesses referred to state agencies seeking to include supplier diversity as a part of their purchase order and contract opportunities" and that such certification is "Florida's premier stamp of approval for minority, women, and service-disabled veteran business enterprises. It is widely accepted across the State of Florida in the private sector as well as cities, counties, school districts, hospitals, water management districts and other quasi governmental entities.").

⁵ The intent of § 2.2-1403(8) is generally to make Virginia's certification programs for small businesses, women-owned businesses, and minority-owned businesses available to businesses owned by United States citizens or legal resident aliens in other states, but to do so in a manner that maintains an incentive for other states to provide reciprocity to Virginia firms.

OP. NO. 12-060

ADMINISTRATION OF GOVERNMENT: INVESTMENT OF PUBLIC FUNDS ACT

The term "domestic bank," as used in § 2.2-4509, is not limited to banks located in the Commonwealth of Virginia, but rather refers to a bank located in the fifty United States or the District of Columbia and organized under the laws of one of the fifty states, the District of Columbia or the United States.

JASON J. HAM, ESQUIRE
TOWN ATTORNEY FOR THE TOWN OF DAYTON
SEPTEMBER 7, 2012

ISSUES PRESENTED

You ask whether the term “domestic bank” in § 2.2-4509 of the *Code of Virginia* refers to any United States bank, or, in the alternative, is restricted to only Virginia banks.

RESPONSE

It is my opinion that the term “domestic bank,” as used in § 2.2-4509, is not limited to banks located in the Commonwealth of Virginia, but rather refers to a bank located in the fifty United States or the District of Columbia and organized under the laws of one of the fifty states, the District of Columbia or the United States.

APPLICABLE LAW AND DISCUSSION

Section 2.2-4509, a provision of the Virginia Investment of Public Funds Act (“VIPFA”),¹ generally permits the “Commonwealth and all public officers, municipal corporations, and other political subdivisions and other public bodies of the Commonwealth [to] invest [certain public] moneys . . . in negotiable certificates of deposit and negotiable bank deposit notes of **domestic banks and domestic offices of foreign banks** . . .”² VIPFA, however, does not expressly define the terms “domestic bank” or “foreign bank.” As such, the term “domestic” in this case could mean within the Commonwealth, or, more broadly, within the United States, while the term “foreign” could refer to an entity located outside of the United States, or simply outside the borders of the Commonwealth.³

I am aware of no other place in the *Code of Virginia* where the terms “domestic bank” or “foreign bank” are specifically defined. Ordinarily, when a particular word in a statute is not defined therein, the word should be accorded its ordinary meaning.⁴ *Black’s Law Dictionary* sets forth the following relevant definitions for the word “domestic”: (1) “[o]f or relating to one's own country”; and (2) “[o]f or relating to one's own jurisdiction.”⁵ Moreover, *Black’s Law Dictionary* further defines the word “foreign” in the following pertinent ways: (1) “[o]f or relating to another country”; and (2) “[o]f or relating to another jurisdiction.”⁶ Based on the foregoing definitions, a “domestic bank” as contemplated by § 2.2-4509 could refer to a bank located in the Commonwealth, or, in the alternative, a bank located in the United States. Because these definitions do not resolve the ambiguity, I must turn to other means of statutory construction to respond to your inquiry.

“The Code of Virginia constitutes a single body of law, and other sections can be looked to where the same phraseology is employed.”⁷ Moreover, “statutes may be considered as *in pari materia* when they relate to the same person or thing, the same class of persons or things or to the same subject or to closely connected subjects or objects.”⁸ The Virginia statutes applicable to banks⁹ incorporate by reference the term “foreign bank” as defined by a federal statute relating to interstate branching of foreign banks.¹⁰ This federal statute defines “foreign bank” as “. . . any company organized under the laws of a foreign country, a territory of the United States, Puerto Rico, Guam, American Samoa, or the Virgin Islands, which engages in the business of banking, or any subsidiary or affiliate, organized under such laws, of any such company[.]”¹¹ Because the Virginia banking statutes and § 2.2-4509 discuss closely connected subject matter (i.e., foreign versus domestic banks), I conclude that the term “foreign bank” in VIPFA refers to banks

organized and operated outside of the fifty United States and the District of Columbia. Conversely, the term “domestic bank,” therefore, must refer to a bank physically located in any of the fifty United States or the District of Columbia, and organized under the laws of one of the fifty states, the District of Columbia or the United States.¹²

This interpretation is consistent with the apparent aim of VIPFA.¹³ Based on a review of the entirety of VIPFA,¹⁴ it is evident that the purpose of the act as a whole is to safeguard monies belonging to the Commonwealth and its subdivisions by requiring investment in safe and reliable devices, and by establishing standards of care by which such monies must be invested.¹⁵ Accordingly, I must assume that the purpose of § 2.2-4509 is to further the purpose of the VIPFA as a whole.¹⁶

CONCLUSION

Accordingly, it is my opinion that the term “domestic bank” refers to a bank located in the fifty United States or the District of Columbia and organized under the laws of one of the fifty states, the District of Columbia or the United States; the term is not restricted to banks located in the Commonwealth of Virginia.

¹ VA. CODE ANN. §§ 2.2-4500 through 2.2-4518 (2011 & Supp. 2012).

² Emphasis added.

³ See *infra* notes 5 and 6 and accompanying text.

⁴ See, e.g., *McKeon v. Commonwealth*, 211 Va. 24, 27, 175 S.E.2d 282, 284 (1970).

⁵ BLACK’S LAW DICTIONARY 396 (abr. 7th ed. 2000).

⁶ BLACK’S LAW DICTIONARY 521 (abr. 7th ed. 2000).

⁷ *King v. Commonwealth*, 2 Va. App. 708, 710, 347 S.E.2d 530, 531 (1986) (citing *First Nat’l Bank of Richmond v. Holland*, 99 Va. 495, 504, 39 S.E. 126, 129-30 (1901)).

⁸ *Prillaman v. Commonwealth*, 199 Va. 401, 405, 100 S.E.2d 4, 7 (1957).

⁹ VA. CODE ANN. §§ 6.2-800 through 6.2-946 (2010 & Supp. 2012).

¹⁰ Section 6.2-836 (2010) (definition of “home state”); 12 U.S.C. § 3103(c) (2012). See also 12 U.S.C. § 3101(7) (2012).

¹¹ 12 U.S.C. § 3101(7) (2012).

¹² Compare *supra* note 5 and accompanying text with *supra* note 6 and accompanying text.

¹³ The primary purpose of statutory construction is to “ascertain and give effect to legislative intent.” *Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983) (citing *Tiller v. Commonwealth*, 193 Va. 418, 69 S.E.2d 441 (1952)).

¹⁴ “[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.’ In construing statutes, courts should give the fullest possible effect to the legislative intent embodied in the entire statutory enactment.” Va. Real Estate Bd. v. Clay, 9 Va. App. 152, 157, 384 S.E.2d 622, 625 (1989) (citations omitted).

¹⁵ See VA. CODE ANN. §§ 2.2-4500 (2011) (permitting sinking funds to be invested in, among other things, federal and state debt, and Virginia municipal debt where there is no evidence of default); 2.2-4501 (permitting monies other than sinking funds to be invested in, among other things, federal and state debt, Virginia and other state municipal debt where there has been no default); 2.2-4502 (permitting investment in “prime quality” commercial paper, and other commercial paper, provided that certain safeguards taken); 2.2-4504 (permitting investment of moneys other than sinking funds into bankers’ acceptances); 2.2-4505 (permitting investment into United States treasury bonds); 2.2-4506 (permitting the Commonwealth and its subdivisions to engage in securities lending, providing that the state treasury is fully collateralized at all

times); 2.2-4507 (permitting the Commonwealth and its subdivisions to invest in collateralized repurchase agreements); 2.2-4508 (permitting investment in mutual funds); 2.2-4510 (permitting investment in “high quality” corporate bonds, or other bonds, provided that strict investment guidelines established); 2.2-4511 (permitting investment in high quality asset-backed securities); 2.2-4512 (permitting investment in high quality foreign debt); and 2.2-4514 (establishing a standard of care for investment of public funds).

¹⁶ See *supra* note 13.

OP. NO. 12-022

ADMINISTRATION OF GOVERNMENT: STATE AND LOCAL CONFLICT OF INTERESTS ACT

No conflict of interest precludes members of local governing bodies who also serve on community action boards from voting in budgetary matters of the local government when such items may affect the community action program funding.

THE HONORABLE ROSLYN C. TYLER
MEMBER, HOUSE OF DELEGATES
MARCH 30, 2012

ISSUE PRESENTED

You inquire whether an impermissible conflict of interest precludes members of local governing bodies who also serve on community action boards from voting in budgetary matters of the local government when such items may affect the community action program funding.

RESPONSE

It is my opinion that no conflict of interest precludes members of local governing bodies who also serve on community action boards from voting in budgetary matters of the local government when such items may affect the community action program funding.

APPLICABLE LAW AND DISCUSSION

The Community Action Act¹ establishes and governs community action agencies² to facilitate the development of social and economic opportunities for low-income persons.³ These agencies are administered by community action boards. Pursuant to § 2.2-5303, with limited exception, “[o]ne-third of the members of the board shall be elected public officials or their designees, who shall be selected by the local governing body of the service area[.]”

As you note, the elected public officials selected to serve on a community action board often will be members of the local governing body. In both capacities, such an individual is subject to the State and Local Conflict of Interests Act (“the Act”).⁴ In general, the Act restricts the ability of state and local officers and employees to have personal interests in certain contracts with their own or other governmental agencies;⁵ and it prohibits the participation of such officers and employees in transactions of their governmental agencies in which they have a personal interest.⁶ Your inquiry involves the transactional restriction.

Section 2.2-3112 requires, in the absence of an exception, governmental officers to disqualify themselves from transactions of their agencies in which they have a personal interest. Voting on budgetary matters constitutes a transaction under the Act.⁷

Under the Act, a “personal interest in a transaction”

exists when an officer or employee or a member of his immediate family has a personal interest in property or a business or governmental agency, or represents or provides services to any individual or business and such property, business or represented or served individual or business (i) is the subject of the transaction or (ii) may realize a reasonably foreseeable direct or indirect benefit or detriment as a result of the action of the agency considering the transaction.^[8]

The Act defines “personal interest” as

a financial benefit or liability accruing to an officer...or to a member of his immediate family. Such interest shall exist by reason of (i) ownership in a business if the ownership interest exceeds three percent of the total equity of the business; (ii) annual income that exceeds, or may reasonably be anticipated to exceed, \$10,000 from ownership in...a business; (iii) salary, other compensation, fringe benefits, or benefits from the use of property, or any combination thereof, paid or provided by a business or governmental agency that exceeds, or may reasonably be anticipated to exceed, \$10,000 annually; (iv) ownership of real or personal property if the interest exceeds \$10,000 in value and excluding ownership in a business, income, or salary, other compensation, fringe benefits or benefits from the use of property; (v) personal liability incurred or assumed on behalf of a business if the liability exceeds three percent of the asset value of the business; or (vi) an option for ownership of a business or real or personal property if the ownership interest will consist of (i) or (iv) above.^[9]

Assuming members of local government bodies earn more than \$10,000 annually for their service, they have a personal interest in their position with the governing body. To the contrary, provided a member of a community action board serves on the board as a volunteer, without compensation, he does not have a personal interest in his position on the board or its transactions. Thus, because the elected official has no personal interest in the community action board, he also has no personal interest in any transactions that may affect the board. As such, a member of a local governing body who is appointed to serve without compensation on a community action board is not restricted from voting on the budgetary matters of the governing body that may affect community action program funding.

CONCLUSION

Accordingly, it is my opinion that no conflict of interest precludes members of local governing bodies who also serve on community action boards from voting in budgetary matters of the local government when such items may affect the community action program funding.

¹ VA. CODE ANN. §§ 2.2-5400 through 2.2-5408 (2011).

² A community action agency is “a local subdivision of the Commonwealth, a combination of political subdivisions, a separate public agency or a private nonprofit agency that has the authority under its applicable charter or laws to receive funds to support community action activities and other appropriate measures designed to identify and deal with the causes of poverty in the Commonwealth, and that is designated as a community action agency by federal law, federal regulations or the Governor.” Section 2.2-5400.

³ Section 2.2-5401.

⁴ VA. CODE ANN. §§ 2.2-3100 through 2.2-3131 (2011). The Act applies to officers and employees of governmental agencies. An “‘*officer*’ means any person appointed or elected to any governmental or advisory agency . . . whether or not he receives compensation or other emolument office.” Section 2.2-3101. “‘*Governmental agency*’ means each component part of the legislative, executive or judicial branches of state and local government, including each office, department, authority, post, commission, committee, and each institution or board created by law to exercise some regulatory or sovereign power or duty as distinguished from purely advisory powers or duties.” *Id.*

⁵ See § 2.2-3106(A).

⁶ See § 2.2-3112(A)(1).

⁷ “‘*Transaction*’ means any matter considered by any governmental or advisory agency . . . on which official action is taken or contemplated.” Section 2.2-3101.

⁸ *Id.*

⁹ *Id.*

OP. NO. 12-025

ADMINISTRATION OF GOVERNMENT: VIRGINIA PUBLIC PROCUREMENT ACT

AVIATION: METROPOLITAN WASHINGTON AIRPORTS AUTHORITY

A state agency can negotiate to include in its grant agreement a provision that makes MWAA's receipt of Virginia funds conditional upon MWAA conducting the procurement in a manner that does not give a preference to offerors who will have a PLA.

Although such a condition would be enforceable in accordance with general contract laws, it could not be enforced through the special remedial provisions contained in the new legislation, because MWAA is not subject to the statute providing those remedies.

THE HONORABLE MARK D. SICKLES

MEMBER, HOUSE OF DELEGATES

JULY 6, 2012

ISSUES PRESENTED

You ask whether recent legislation directing a state agency, when providing a grant of state funds for the construction or operation of public works, to ensure that bid specifications and other documents for the project neither require nor prohibit bidders, offerors, contractors, or subcontractors to enter into, or adhere to, a Project Labor Agreement (“PLA”) affects the Commonwealth’s procurement authority for bodies such as the Metropolitan Washington Airports Authority (“MWAA”).¹

RESPONSE

It is my opinion that a state agency can negotiate to include in its grant agreement a provision that makes MWAA's receipt of Virginia funds conditional upon MWAA conducting the procurement in a manner that does not give a preference to offerors who will have a PLA. It is further my opinion that, although such a condition would be enforceable in accordance with general contract laws, it could not be enforced through the special remedial provisions contained in the new legislation, because MWAA is not subject to the statute providing those remedies.

BACKGROUND

During its 2012 regular session, the General Assembly enacted House Bill 33 and Senate Bill 242.² The Governor signed these bills on April 9, 2012, and they are effective beginning July 1, 2012. The legislation amended the Virginia Public Procurement Act³ by adding a new section - § 2.2-4321.2. The text of the provision pertinent to your inquiry, § 2.2-4321.2(C), is as follows:

A state agency issuing grants, providing financial assistance, or entering into cooperative agreements for the construction, manufacture, maintenance, or operation of public works shall ensure that neither the bid specifications, project agreements, nor other controlling documents therefor awarded by recipients of grants or financial assistance or by parties to cooperative agreements, nor those of any construction manager acting on behalf of such recipients, shall: (1) Require or prohibit bidders, offerors, contractors, or subcontractors to enter into or adhere to agreements with one or more labor organizations, on the same or related projects; or (2) Otherwise discriminate against bidders, offerors, contractors, subcontractors, or operators for becoming or refusing to become or remain signatories or otherwise to adhere to agreements with one or more labor organizations, on the same or other related projects.

APPLICABLE LAW AND DISCUSSION

Pursuant to the newly enacted § 2.2-4321.2, a state agency issuing grants or providing financial assistance for construction of public works "shall ensure" that the bid specifications and certain other documents issued by the recipients do not discriminate against offerors based on whether they will have an agreement with a labor organization.⁴ To facilitate compliance, the amendment also provides that, if a recipient of such grants or financial assistance "performs in a manner contrary to" the new provisions, injunctive relief may be granted to prevent the violation, and confers upon offerors, contractors, and others standing "to challenge any bid specification ... that violates the provisions of this section."⁵ As a further enforcement tool, the new section implicitly prohibits state agencies from providing the funds until such time as compliance with the bills is "ensure[d]."⁶ Additionally, irrespective of the enactment of § 2.2-4321.2 and in the absence of such a law, a granting agency can negotiate to include similar requirements as a condition of signing any commitment to provide grants or financial assistance.

MWAA is a public body corporate and politic that is independent of Virginia.⁷ The General Assembly expressly exempted MWAA from the provisions of the Virginia Public Procurement Act.⁸ Though otherwise permissible, the newly added remedies and requirements are not applicable to or enforceable against MWAA. Nonetheless, MWAA's exemption from the Virginia Public Procurement Act does not insulate it from general laws pertaining to the enforcement of contracts, and state agencies would be able to seek judicial remedies if MWAA were to breach a contractual commitment it made not to include a PLA preference in its procurement documents or to otherwise meet the conditions found in § 2.2-4321.2.⁹

Although MWAA is exempt from § 2.2-4321.2, state agencies dealing with MWAA are not. To comply with the statute's command that they "shall ensure" no PLA preference be given, state agencies engaged in issuing grants to, providing financial assistance to, or entering into cooperative agreements for the construction, maintenance, or operation of public works with MWAA or similar entities must require that the contract documents specify that no PLA preference be given and that the conditions found in § 2.2-4321.2 be met, and must provide the appropriate remedial measures if the contract terms are not honored.

CONCLUSION

Accordingly, it is my opinion that a state agency can negotiate to include in its grant agreement a provision that makes MWAA's receipt of Virginia funds conditional upon MWAA conducting the procurement in a manner that does not give a preference to offerors who will have a PLA. It is further my opinion that, although such a condition would be enforceable in accordance with general contract laws, it could not be enforced through the special remedial provisions contained in the new legislation, because MWAA is not subject to the statute providing those remedies.

¹ You also ask a question relating to appointments to the MWAA Board of Directors. The subject of MWAA Board appointments is presently the subject of litigation. Thus, in accordance with longstanding principles, this Office will decline to opine on matters that are associated with pending litigation. *See* 2012 Op. Va. Att'y Gen. 11-004 at 1 n.1. *See also* Op. Va. Att'y Gen.: 1996 at 152, 153; 1987-88 at 45, 46; 1977-78 at 34.

²*See* H.B. 33, 2012 Reg. Sess. (Va.), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?121+ful+HB33ER+pdf>, and S.B. 242, 2012 Reg. Sess. (Va.), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?121+ful+SB242ER+pdf>, respectively. The enrolled versions of these bills are identical in all respects material to this opinion and will be referred to hereafter collectively as the "bills." *See* 2012 Va. Acts chs. 685, 732.

³ VA. CODE ANN. §§ 2.2-4300 through 2.2-4377 (2011 & Supp. 2012).

⁴ Section 2.2-4321.2(C) (Supp. 2012).

⁵ *See* § 2.2-4321.2(D) and (E).

⁶ Pursuant to § 2.2-4321.2(C), a state agency issuing grants "shall ensure" compliance by the recipients. If a state agency is unable to obtain the required commitment from a proposed recipient, the state agency's only remaining avenue for complying with the new section would be to withhold the grants and thus avoid becoming a "state agency issuing grants...." This implicit command to withhold funds would not affect a right to receive funds that has already vested before the effective date of the new statute. *See* VA. CODE ANN. § 1-239 (2011) ("No new act of the General Assembly shall be construed ... in any way whatever to affect ... any right accrued, or claim arising before the new act of the General Assembly takes effect....").

⁷ VA. CODE ANN. § 5.1-153 (2010). See § 5.1-156(B) (2010); 49 U.S.C. § 49106.

⁸ Section 5.1-174 (2010). See also *Washington-Dulles Transp., Ltd. v. Metro. Wash. Airports Auth.*, 263 F.3d 371, 376 (4th Cir. 2001).

⁹ See, e.g., § 5.1-156(A)(11) (MWAA shall have the power “[t]o sue and be sued in its own name”), § 5.1-173 (2010) (“[t]he courts of the Commonwealth of Virginia shall have original jurisdiction of all actions brought by or against the Authority” and “[t]he Authority shall be liable for its contracts...”); *Washington-Dulles Transp., Ltd.*, 263 F.3d at 376.

OP. NO. 11-126

ADMINISTRATION OF GOVERNMENT: VIRGINIA PUBLIC PROCUREMENT ACT

Act allows localities to adopt design-build procedures that limit the locality to the selection of no more than five offerors deemed fully qualified and best suited for the project.

MARK D. STILES, ESQUIRE
CITY ATTORNEY, CITY OF VIRGINIA BEACH
FEBRUARY 10, 2012

ISSUE PRESENTED

You ask whether the Virginia Public Procurement Act,¹ as amended by the Virginia General Assembly in Chapter 594 of the 2011 Acts of Assembly, permits localities to adopt design-build construction project procedures that limit prequalification² to no more than five offerors deemed fully qualified and best suited for the project.

RESPONSE

It is my opinion that the Public Procurement Act allows localities to adopt design-build procedures that limit the locality to the selection of no more than five offerors deemed fully qualified and best suited for the project.

BACKGROUND

The General Assembly in 2011 enacted legislation that eliminated the Design-Build/Construction Management Review Board (“the Board”).³ Prior to its elimination, the Board, among its other responsibilities, granted approval to localities to use competitive negotiations for the procurement of design-build or construction management contracts. The Board ensured such negotiations proceeded in accord with the Board’s regulations for a two-step competitive negotiation process. In light of the Board’s elimination, the 2011 legislation made additional changes so that procedures adopted by localities for design-build construction projects now must include a two-step competitive negotiation process that is consistent with standards established by the Division of Engineering and Buildings (“DEB”) of the Department of General Services.⁴

APPLICABLE LAW AND DISCUSSION

The Virginia Public Procurement Act establishes that the competitive sealed bid process is the preferred method of construction procurement for localities to follow.⁵

Nonetheless, as currently enacted, § 2.2-4303(D)(3) authorizes localities with populations in excess of 100,000, which include the City of Virginia Beach,⁶ to use competitive negotiation when procuring a contractor for design-build construction projects. Specifically, the statute provides that such procurements shall be in compliance with the design-build requirements found in § 2.2-4308 and with the two-step competitive negotiation process established in § 2.2-4301.

Section 2.2-4308, which governs the procurement of design-build contracts by localities, requires that a locality adopt “procedures governing the selection, evaluation and award of design-build . . . contracts [that are] consistent with those described . . . for the procurement of nonprofessional services through competitive negotiation[,]” which are set forth in § 2.2-4301. Pursuant to § 2.2-4301, “[s]election shall be made of two or more offerors deemed to be fully qualified and best suited among those submitting proposals.... After negotiations have been conducted with each offeror so selected, the public body shall select the offeror which, in its opinion, has made the best proposal, and shall award the contract to that offeror.” Thus, the first step of competitive negotiation involves narrowing the number of offerors deemed to be fully qualified and best suited for the project. The second step involves negotiating with the group selected in the first step and selecting a contractor.

Also relative to your inquiry, § 2.2-4308 further provides, in pertinent part:

Design-build projects shall include a two-step competitive negotiation process consistent with standards established by the Division of Engineering and Buildings of the Department of General Services for state agencies.

DEB’s procedures are governed by § 2.2-4306, which provides that the Commonwealth’s

Procurement of construction by the design-build method shall be a two-step competitive negotiation process. In the first step, offerors shall be requested to submit their qualifications. Based on the information submitted and any other relevant information which the Commonwealth may obtain, no more than five offerors deemed most suitable for the project shall be selected by the Commonwealth and requested to submit proposals.

Under the Dillon Rule, a locality has “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.”⁷ Although the General Assembly has not expressly granted localities the specific authority to limit the number of offerors deemed qualified and best suited, the above-cited provisions establish that local government bodies are to adopt procedures consistent with those maintained by DEB. Clearly, given the state’s five-qualified-offeror selection limitation, a procedure adopted by a locality that mirrors that requirement would be consistent with the DEB standard. I therefore conclude that a locality may establish a requirement to select no more than five offerors deemed most suitable for the project with whom it may then negotiate to select a contractor to be awarded design-build contract.

CONCLUSION

Accordingly, it is my opinion that the Public Procurement Act allows localities to adopt design-build procedures that limit the locality to the selection of no more than five offerors deemed fully qualified and best suited for the project.

¹ VA. CODE ANN. §§ 2.2-4300 through 2.2-4377 (2011).

² “Prequalification” under the Virginia Public Procurement Act is found in § 2.2-4317. Prequalification in this sense is not required by the statutes relating to the selection of an offeror for a design-build construction project.

³ 2011 Va. Acts chs. 594, 681.

⁴ *Id.*; Section 2.2-4308 (2011).

⁵ Section 2.2-4308(A).

⁶ The 2010 United States Census determined the City of Virginia Beach to have a population of 437,994. U.S. Census Bureau State and County QuickFacts for the City of Virginia Beach, Virginia, *available at* <http://quickfacts.census.gov/qfd/states/51/5182000.html>

⁷ *Tabler v. Bd. of Supvrs.*, 220 Va. 200, 202, 269 S.E.2d 358, 359 (1980).

OP. NO. 11-127

AGRICULTURE: RIGHT TO FARM

Aquaculture does not constitute an agricultural operation under the Virginia Right to Farm Act.

THE HONORABLE BRENDA L. POGGE
MEMBER, HOUSE OF DELEGATES
MARCH 9, 2012

ISSUE PRESENTED

You inquire whether aquaculture is considered an agricultural operation for purposes of the Virginia Right to Farm Act.¹

RESPONSE

It is my opinion that aquaculture does not constitute an agricultural operation under the Virginia Right to Farm Act.

APPLICABLE LAW AND DISCUSSION

The Virginia Right to Farm Act (the “Act”) is intended to “limit the circumstances under which agricultural operations may be deemed to be a nuisance”² by restricting localities’ ability to “unreasonably restrict or regulate farm structures or farming and forestry practices in an agricultural district or classification” through zoning ordinances.³

The Act defines “agricultural operation” as “any operation devoted to the bona fide production of crops, or animals, or fowl including the production of fruits and vegetables of all kinds; meat, dairy, and poultry products; nuts, tobacco, nursery, and

floral products; and the production and harvest of products from silviculture activity.”⁴

When statutory language is clear and unambiguous, the plain meaning of the language used should determine the legislative intent, unless such a literal construction would lead to a manifest absurdity.⁵ Also, related statutes must be considered together in construing their various material provisions.⁶ Finally, statutes must be construed to give meaning to all of the words enacted by the General Assembly, and thus, interpretations that render statutory language superfluous are to be avoided.⁷

Aquaculture is defined as “the propagation, rearing, enhancement, and harvest of aquatic organisms in controlled or selected environments, conducted in marine, estuarine, brackish, or fresh water.”⁸ “Aquatic organisms” in turn are “any species or hybrid of aquatic *animal* or plant[.]”⁹

Although the Virginia Right to Farm Act does not define the word “animal,” it is clear that “animal” can be defined as to include virtually all living creatures, including the fish and other non-plant organisms that are part and parcel of aquaculture. For example, *The American Heritage Dictionary, New College Edition*, defines “animal” in the first instance as meaning “[a]ny organism of the kingdom Animalia, distinguished from plants by certain typical characteristics, such as the power of locomotion, fixed structure and limited growth, and nonphotosynthetic metabolism.”¹⁰ Similarly, another provision of the Code¹¹ defines “animal” as “any organism of the kingdom Animalia, other than a human being.”¹² Accordingly, in certain contexts, the word “animal” is broad enough to encompass at least some of the products of aquaculture.

While in certain circumstances “animal” may be so construed, the relevant analysis necessary to answer your inquiry is whether such a construction is possible given the language of the Right to Farm Act, for “[t]he 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.”¹³ Reading the language of the Right to Farm Act in its entirety leads to the conclusion that “animal” in the Act was not intended to encompass fish or other non-mammals.

Specifically, in the Right to Farm Act, the General Assembly did not exempt from certain local zoning actions only operations regarding “animals,” but rather, exempted operations related to “the bona fide production of . . . animals, *or fowl*”¹⁴ *The American Heritage Dictionary, New College Edition*, defines “fowl” as “[a]ny of various birds of the order Galliformes; especially the common, widely domesticated chicken, *Gallus gallus*.”¹⁵

Clearly, chickens and other fowl are part of the kingdom Animalia. Therefore, if the General Assembly intended for “animal” in the Right to Farm Act to include all organisms belonging to the kingdom Animalia, there would have been no need to add the phrase “or fowl” to the statute.¹⁶ To interpret “animal” to include all members of the kingdom Animalia renders the phrase “or fowl” superfluous, and thus, such a construction must be rejected if possible.¹⁷

Given basic dictionary definitions, alternative constructions for “animal” are possible. *The American Heritage Dictionary, New College Edition*, secondarily defines “animal” as “[a]ny such organism other than a human being; especially, a mammal.”¹⁸ Interpreting the word “animal” in the Right to Farm Act as including common barnyard animals (cows, pigs, horses, etc.) with a general limitation that such animals also be mammals is consistent with the secondary dictionary definition of “animal” and gives meaning to the General Assembly’s inclusion of the phrase “or fowl” in the Right to Farm Act. Accordingly, under the canons of statutory construction detailed above, this interpretation should be adopted.

CONCLUSION

Accordingly, it is my opinion that aquaculture does not constitute an agricultural operation under the Right to Farm Act.

¹ VA. CODE ANN. §§ 3.2-300 through 3.2-302 (2008).

² Section 3.2-301 (2008).

³ *Id.*

⁴ Section 3.2-300 (2008).

⁵ See *HCA Health Servs. of Va., Inc. v. Levin*, 260 Va. 215, 220, 530 S.E.2d 417, 419-420 (2000). See also *Wright v. Commonwealth*, 278 Va. 754, 759, 685 S.E.2d 655, 657 (2009).

⁶ See *Colbert v. Commonwealth*, 47 Va. App. 390, 395, 624 S.E.2d 108, 110 (2006).

⁷ See *Cook v. Commonwealth*, 268 Va. 111, 114, 597 S.E.2d 84, 86 (2004).

⁸ Section 3.2-2600 (2008).

⁹ *Id.* (emphasis added).

¹⁰ THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, NEW COLLEGE EDITION 52 (1981).

¹¹ See *First Nat’l Bank of Richmond v. Holland*, 99 Va. 495, 504, 39 S.E. 126, 129-30 (1901) (examining various sections of Code and history of legislation to determine whether terms “goods or chattels” were intended to embrace “choses in action” and stating that the “Code is one act, prepared and adopted as such, and therefore in construing section 2414 we are not confined to the language of that section, but can look to other sections of the Code where the same terms are employed.”). See also 1975-76 Op. Va. Att’y Gen. 3, 4-5 (the statutory definition of law-enforcement officer, while limited for use in Chapter 16, Title 9 of the Code, “does provide assistance in defining the term ‘law-enforcement officer’ in other sections of the Code”).

¹² Section 3.2-5900 (2008). The express language of Section 3.2-5900, however, limits the application of its definition of “animal” and other terms to instances where the terms are “used in this subtitle” Section 3.2-5900 is in Subtitle V of Title 3.2. The Right to Farm Act is not part of Subtitle V, but rather, is part of Subtitle I of Title 3.2.

¹³ *Kohlberg v. Va. Real Estate Comm’n*, 212 Va. 237, 239, 183 S.E.2d 170, 172 (1971) (explaining doctrine of *noscitur a sociis*, a canon of construction based on Latin phrase meaning “it is known by its associates,” BLACK’S LAW DICTIONARY 1084 (7th ed. 1999)). 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).

¹⁴ Section 3.2-300 (2008) (emphasis added).

¹⁵ THE AMERICAN HERITAGE DICTIONARY, *supra* note 10, at 520.

¹⁶ In fact, if the General Assembly wished to include the production of non-plant products of aquaculture within the Right to Farm Act's exemption, it would only need to delete the phrase "or fowl" from the statute.

¹⁷ See *Cook*, 268 Va. at 114, 597 S.E.2d at 86.

¹⁸ THE AMERICAN HERITAGE DICTIONARY, *supra* note 10, at 52 (emphasis added).

OP. NO. 11-004

AVIATION: METROPOLITAN WASHINGTON AIRPORTS AUTHORITY

Governor was authorized to divest the Commonwealth of its interest in the Dulles Toll Road as part of project to extend Metrorail.

Agreements between various parties control the circumstances under which Virginia can regain control over the project and void the MOU.

Assent of all parties to the MWAA Compact was not required for MWAA to operate the Dulles Toll Road.

Agreements signed by Loudoun County detail the scope of its obligation in connection with this project. Finally, it Neither the state nor the federal freedom of information statute applies to MWAA under the plain terms of those statutes.

THE HONORABLE ROBERT G. MARSHALL
MEMBER, VIRGINIA HOUSE OF DELEGATES
MAY 25, 2012

ISSUES PRESENTED

You raise a number of issues in connection with the Dulles Toll Road and the extension of Metrorail. Specifically, you ask what authority allowed the Governor to divest the Commonwealth of its interest in the Dulles Toll Road and "grant it" to the Metropolitan Washington Airports Authority ("MWAA"). You further ask whether such a conveyance was lawful in the absence of concurrence by the General Assembly. You also inquire whether Virginia can regain control over the Dulles Toll Road and the Dulles Rail project and void the Memorandum of Understanding ("MOU"). You further ask whether all parties to the MWAA Compact must approve the MWAA "takeover" of the toll road. You also inquire whether Virginia would have any liability for payment of the extension of Metrorail should MWAA default on its bond payments. You further ask whether Loudoun County bears any obligation to pay for all or part of a Metrorail station that is constructed in the County. Finally, you ask whether MWAA is exempt from state and federal freedom of information statutes.

RESPONSE

It is my opinion that, although the issue has not been conclusively resolved, under the only available precedent, the Governor was authorized to divest the Commonwealth of its interest in the Dulles Toll Road as part of the overall project to extend Metrorail. The agreements between various parties control the circumstances under

which Virginia can regain control over the project and void the MOU. It is further my opinion that the assent of all parties to the MWAA Compact was not required for MWAA to operate the Dulles Toll Road. I also conclude that the agreements signed by Loudoun County detail the scope of its obligation in connection with this project. Finally, it is my opinion that neither the state nor the federal freedom of information statute applies to MWAA under the plain terms of those statutes.¹

BACKGROUND

The extension of Metrorail to Dulles Airport and its financing, in part, through tolls paid by users of the Dulles Toll Road, has attracted controversy on various grounds, including the cost of the project relative to alternatives. Policy questions aside, the Supreme Court of Virginia's decision in *Gray v. Virginia Secretary of Transportation* provides the following background:²

The MWAA is a regional public entity established by an interstate compact, which was approved by the United States Congress in 1986. *See* 49 U.S.C. § 49101 *et seq.* The General Assembly and the City Council of the District of Columbia enacted legislation to establish the MWAA. Code § 5.1-152 *et seq.*; D.C. Code § 9-901 *et seq.* According to . . . § 5.1-153, the MWAA is “a public body corporate and politic and independent of all other bodies,” *see also* 42 U.S.C. § 49106(a)(2); D.C. Code § 9-902, created for the purpose of “acquiring, operating, maintaining, developing, promoting and protecting Ronald Reagan Washington National Airport and Washington Dulles International Airport.” Code § 5.1-156. . . .

On September 7, 1950, the United States Congress enacted legislation authorizing “the construction, protection, operation, and maintenance of a public airport in or in the vicinity of the District of Columbia.” Pub. L. 81-762, 64 Stat. 770. Construction for the airport commenced in 1958, and the airport was dedicated on November 17, 1962, as Dulles International Airport. In 1984, it was renamed Washington Dulles International Airport (Dulles Airport). As part of the overall project, the Dulles Airport Access Highway (DAAH) was constructed to connect the airport to Interstate 495 (the Beltway) and Interstate 66. The entire road is limited to airport traffic only and has no exits west of the Beltway, other than direct access to the airport. Due to public demand for local access routes off of the DAAH, the United States Department of Transportation and the Director of the then existing Metropolitan Washington Airports entered into an agreement with the Commonwealth, dated July 6, 1981 (“the 1981 Agreement”), to construct a new road in the existing right-of-way for the DAAH. This new road, which has access for local traffic, is known as the Dulles Toll Road. VDOT constructed the Dulles Toll Road in the early 1980's and has maintained and operated the highway since it was opened to public use. By deed of easement dated January 9, 1990, the MWAA conveyed to the Commonwealth the right to use additional land within the DAAH right-of-way to widen the Dulles Toll Road.

On March 24, 2006, the Secretary of Transportation executed a Memorandum of Understanding (MOU) between the Commonwealth of

Virginia and the MWAA concerning the Dulles Corridor Metrorail Project^[3] (Metrorail Project) and the Dulles Toll Road. The MOU recites that the Dulles Toll Road was “constructed upon property owned by the federal government and leased to [the MWAA], pursuant to several deeds of easement to the Commonwealth of Virginia for the construction of the Dulles Toll Road.” In the MOU, the parties agreed that the Commonwealth, acting through VDOT and the Commonwealth Transportation Board, “will transfer possession and control over the Dulles Toll Road right-of-way and all improvements thereto to the [MWAA],” that the MWAA will assume all operational, maintenance, toll-setting, toll-collection, debt, and financial responsibility for the Dulles Toll Road, and that the MWAA will construct certain phases of the Metrorail Project. Pursuant to the MOU, the Commonwealth agreed to transfer to the MWAA funds dedicated for the design and construction of the Metrorail Project and revenues collected from operation of the Dulles Toll Road. Finally, the MOU provides that “[r]evenues collected from the Dulles Toll Road shall be used for any and all costs related to the operation, maintenance and debt service of the Dulles Toll Road, and the design, construction and financing of the Dulles Corridor Metrorail Project.”

On December 29, 2006, the VDOT and the MWAA entered into the first of several agreements contemplated by the MOU. Among other things, the agreement transferred to the MWAA the authority to set toll rates for the Dulles Toll Road.

APPLICABLE LAW AND DISCUSSION

Your first question addresses the authority of the Governor to divest the Commonwealth of its interest in the Dulles Toll Road and “grant it” to MWAA. You further ask whether such a conveyance was lawful in the absence of concurrence by the General Assembly. While there is no express authority authorizing the Governor to alienate the Commonwealth’s limited interest in the Toll Road, a variety of statutes provide broad flexibility to the executive branch to provide for roads and public transportation.

The General Assembly has provided that departments, including the Department of Transportation (“VDOT”), have the power to “[m]ake and enter into contracts and agreements necessary or incidental to the performance of its duties and execution of its powers under this title.”⁴ Departments also have the power to “[d]o all acts necessary or convenient to carry out the respective purposes for which the department was created.”⁵ This authority extends to the Secretary of Transportation, who is responsible to the Governor for, among other things, the “Department of Transportation [and the] Department of Rail and Public Transportation.”⁶

The Commonwealth Transportation Board (CTB) is given the power to monitor and “approve actions taken by the Department of Rail and Public Transportation . . . in order to ensure the efficient and economical development of public transportation, the enhancement of rail transportation and the coordination of such rail and public transportation plans with highway programs.”⁷ The CTB also can “enter into

contracts with local districts, commissions, agencies or other entities created for transportation purposes.”⁸ In turn, the Director of the Department of Rail and Public Transportation is vested with “the power to *do all acts necessary or convenient* for establishing, maintaining, improving, and promoting public transportation, transportation demand management, ridesharing, and passenger and freight rail transportation in the Commonwealth.”⁹

Similarly, the Commissioner of Transportation is given the power to “to *do all acts necessary or convenient* for constructing, improving, maintaining, and preserving the efficient operation of the roads embraced in the systems of state highways and to further the interests of the Commonwealth in the areas of public transportation, railways, seaports, and airports.”¹⁰ When the General Assembly wishes to limit this broad discretion, it knows how to do so. For example, the General Assembly provided in § 2.2-1150 that

[p]rior to entering into any negotiations for the conveyance or transfer of any portion of Camp Pendleton or any military property that has been or may be conveyed to the Commonwealth pursuant to a recommendation by the Defense Base closure Realignment Commission, the Department shall give written notice to all members of the General Assembly within the planning district in which the property is located.

Finally, specifically in connection with this project, the General Assembly has authorized the CTB to “provide for the additional improvements to the Dulles Toll Road and Dulles Access Road corridor . . . including but not limited to, mass transit, including rail”¹¹

In *Gray*, the Commonwealth argued that the authority outlined above is broad enough to permit Executive Branch officials to negotiate the MOU described above, which transfers the Commonwealth’s right of way over the Dulles Toll Road to MWAA. I note that the only court to consider this question concluded that the transfer of the Commonwealth’s interest pursuant to the MOU was permissible.¹² Therefore, although there is no precedent from the Supreme Court of Virginia delineating the precise authority of the Governor in this context, the Governor’s actions were upheld in a court of law.

You further ask whether Virginia can void the MOU that Governor Kaine reached, and regain control over the Toll Road and the Dulles Rail project. In addition, you inquire whether Virginia can seek federal aid to provide relief to the motorists who are asked to shoulder the burden of financing the extension of Metrorail.

Various complex and detailed agreements address whether and how Virginia can regain control over the Dulles Toll Road and Metrorail project, including agreements relating to and/or governing assignment of the Metrorail Project to MWAA and granting a permit to MWAA to operate the Dulles Toll Road. Key agreements that govern these transactions include Dulles Toll Road Permit and Operating Agreement between VDOT and MWAA, entered on December 29, 2006 and amended on July 9, 2007 and November 1, 2008 (“Operating Agreement”); Assignment and Assumption Agreement between the Virginia Department of Rail and Public Transportation

("DRPT") and MWAA, entered on June 28, 2007; and the Further Assurances Agreement between VDOT, DRPT and MWAA, entered on November 1, 2008.¹³ These agreements list certain factual situations in which the agreements may be terminated;¹⁴ provide remedies for noncompliance and termination;¹⁵ and govern the rights, responsibilities and remedies associated with the bond financing of the Dulles Toll Road and Metrorail Project.¹⁶

For instance, the Operating Agreement provides for its termination by either party 1) if any Terminating Order is issued or entered prior to Final Acceptance of the Metrorail Project that prevents, prohibits or invalidates the transfer to MWAA of operational control over the Toll Road, prevents or prohibits MWAA from being able to obtain or maintain the financing permitted by the Operating Agreement, or prevents or prohibits MWAA from being able to construct the Metrorail Project; or 2) after Final Acceptance of the Metrorail Project if any Termination Order is issued or entered that prevents, prohibits or invalidates the transfer to MWAA of operational control over the Toll Road.¹⁷ The Operating Agreement further provides for termination and/or other remedies if there is a material Non-Compliance by MWAA¹⁸ (as defined in those sections). In addition, the Assignment and Assumption Agreement provides that either MWAA or DRPT may require the other party to enter into a reassignment agreement, under which the Metrorail Project can be transferred back to DRPT. Such transfer results upon the occurrence of any one or more of the Non-Compliance events specified in § 14.01(c) of the Operating Agreement when such event either 1) prevents, prohibits or invalidates the transfer to MWAA of operational control over the Toll Road; 2) prevents or prohibits MWAA from being able to obtain or maintain the financing permitted by the Operating Agreement; or 3) prevents or prohibits MWAA from being able to construct the Metrorail project.

You also ask whether the Commonwealth may apply for federal aid in order to reduce the liability that motorists will have to shoulder to finance the Metrorail Project.¹⁹ Whether or not the Commonwealth may apply for federal aid and further, the more critical question of whether the Commonwealth is eligible to receive such aid, are essentially questions of fact and any response would be entirely speculative and outside the purview of an official opinion.

You next ask whether all the parties to the MWAA Compact would have to approve the takeover of the Dulles Toll Road by MWAA. It is my opinion that the agreement of all the parties to the Compact governing MWAA would not be required to approve MWAA's takeover of the Dulles Toll Road. Instead, the approval of MWAA's Board would be sufficient to confer upon MWAA the authority and responsibility to operate and maintain the Dulles Toll Road.

The MWAA Compact and enabling legislation is set out in Chapter 10 of Title 5.1 of the *Code of Virginia*. Section 5.1-155(A) establishes the membership of MWAA, providing that the Authority shall consist of 13 members: five appointed by the Governor of the Commonwealth of Virginia; three appointed by the Mayor of the District of Columbia; two appointed by the Governor of the State of Maryland; and three appointed by the President of the United States. It also provides that for the purposes of doing business, seven members shall constitute a quorum.²⁰

The MWAA Compact further provides that the Authority has the power to plan, establish, operate develop, construct, enlarge, maintain, equip and protect the airports;²¹ and to make and enter into all contracts and agreements necessary or desirable to the performance of its duties and the furnishing of services to the travelling public and airport users;²² and to do all acts and things necessary or convenient to carry out the powers expressly granted in the act.²³ Moreover, § 5.1-175 requires the Compact to be “liberally construed to affect the purposes thereof.” The overarching purpose of the agreements in question is to extend Metrorail to the airport for the convenience of passengers. Given this broad language and the purpose behind the agreements, it is my opinion that the Compact bestows upon the Authority the power to enter into the agreements relating to the Dulles Rail Project and the transfer and operation of the Dulles Toll Road.²⁴

You next inquire whether Virginia would have any liability for the extension of the Metrorail in the event MWAA were to default on its bond payments. The financing of, and liability for, the Dulles Metrorail Project are addressed by the various agreements relating to and/or governing assignment of the Metrorail Project to MWAA and granting a permit to MWAA to operate the Dulles Toll Road. Those agreements include various terms and provisions that address financing relating to the Dulles Toll Road and the Metrorail Project.

Article 5 of the Operating Agreement addresses financing terms. Section 5.01(a) provides that MWAA is “solely responsible for obtaining and repaying all financing, at its own cost and risk and without recourse to [VDOT], necessary to maintain, improve, equip, modify, repair and operate the Toll Road and any Capital Improvements throughout the Term and necessary to develop and construct the Dulles Corridor Metrorail Project.” Section 5.01(b) further provides that neither the Commonwealth, or VDOT, the CTB nor any other agency, instrumentality or political subdivision of the Commonwealth “has any liability whatsoever for payment of the principal sum of any Toll Revenue Bonds, any other obligations issued or incurred by [MWAA] in connection with [the Operating] Agreement, the Toll Road or the Dulles Corridor Metrorail Project, or any interest accrued thereon or any other sum secured by or accruing under any Toll Road Financing Document.” Except for a violation by the Department of its express obligations to a Trustee, Toll Road Financing Documents are prohibited from containing any provisions under which a Trustee would be entitled to seek damages or other amounts from VDOT due to VDOT’s breach of the Operating Agreement. Further, other provisions in § 5.02 require that Indentures associated with the sale of bonds contain statements prohibiting Trustees and bondholders from naming or joining VDOT, the Commonwealth Transportation Board, the Commonwealth or any officer thereof in any legal proceeding regarding collection of the debt associated with the subject bonds, nor seek damages from VDOT, other than damages for violation by VDOT of its express obligations to bondholders set forth in Article 5 of the Operating Agreement.

The Operating Agreement, however, upon its termination based on specified grounds, requires VDOT to take one of several actions.²⁵ Generally, VDOT either may enter into a new agreement with the Trustee named in the Indenture to continue to collect tolls on the Toll Road and remit them to the Trustee for the benefit of the bondholders

or, in the alternative, VDOT can provide sufficient funds to MWAA to pay, purchase, redeem, defease, or otherwise satisfy any outstanding Toll Revenue Bonds.²⁶ Any such action on the part of VDOT, however, would be “subject to General Assembly approval, as required, and subject to appropriation by the General Assembly.”²⁷

Your next question centers on the construction of a Metrorail station in Loudoun County. You ask whether the County would bear any obligation to pay for all or part of such a facility. Fairfax County, Loudoun County and MWAA (the “Funding Partners”) have entered into the Agreement to Fund the Capital Cost of Construction of Metrorail in the Dulles Corridor, dated July 19, 2007 (the “Funding Partners Agreement”), which addresses local funding options for the Metrorail. In the Funding Partners Agreement, Loudoun County has committed to a share of the Phase 2 Cost of the Metrorail project in an amount which, when added to any amount contributed by Loudoun towards the Phase 1 Cost (although no such contribution is anticipated by the Funding Partners), totals 4.8 percent of the entire Dulles Rail Project Cost.²⁸ The commitment is subject to all conditions set forth in the Funding Partners Agreement, including, in particular, “the approval by Fairfax and Loudoun of the terms and conditions of the 100% preliminary engineering cost estimate for Phase 2,”²⁹ as well as appropriation and allocation of the funding. Loudoun may also be responsible for in-kind contributions, such as real property needed to permit the Washington Metropolitan Area Transit Authority to operate and maintain the Metrorail Project.³⁰ Therefore, Loudoun County has obligated itself to bear some of the cost of the project, but not for any one particular station.

Loudoun County, nonetheless, has committed to use best efforts to secure additional funding sources to fund the cost of design and construction for the parking facilities at the Phase 2 planned Metrorail stations in Loudoun County at Route 606 and Route 772, respectively.³¹ Loudoun County also intends to apply with Fairfax County and/or MWAA for credit assistance from the U.S. Department of Transportation through the federal Transportation Infrastructure Finance and Innovation Act (“TIFIA”) program, Loudoun’s portion of any TIFIA loan to be applied to the cost of the Phase 2 Loudoun parking facilities.³² If Loudoun County is unable to secure sufficient additional funding for the design and construction of the Phase 2 parking facilities, despite its best efforts, the amount of any funding shortfall shall be considered to be part of the total Metrorail Project cost and funded as provided for in the Funding Partners Agreement.³³

Your final question concerns the applicability of state and federal freedom of information laws to MWAA. The Virginia Freedom of Information Act applies to “public bod[ies],” which are defined as

any legislative body, authority, board, bureau, commission, district or agency of the Commonwealth or of any political subdivision of the Commonwealth, including cities, towns and counties, municipal councils, governing bodies of counties, school boards and planning commissions; boards of visitors of public institutions of higher education; and other organizations, corporations or agencies in the Commonwealth supported wholly or principally by public funds.^[34]

When statutory language is clear and unambiguous, the plain meaning of the language used should determine the legislative intent.³⁵ MWAA does not fit within the definition of “public body.” MWAA is not an authority of a “district or agency of the Commonwealth,” or of “any political subdivision of the Commonwealth.” Instead, Virginia and the District of Columbia, through a compact, have created the authority.³⁶ Moreover, the U.S. Court of Appeals for the Fourth Circuit has determined that MWAA is not subject to Virginia’s FOIA.³⁷

A United States District Court in Maryland similarly rejected the application of Maryland’s freedom of information law to a regional transit authority created by interstate compact.³⁸ The court reasoned that

Upon entering into an interstate compact, a state effectively surrenders a portion of its sovereignty; the compact governs the relations of the parties with respect to the subject matter of the agreement and is superior to both prior and subsequent law.^[39]

Notably, the MWAA Compact does not specify that one or both of the freedom of information statutes applies to MWAA. The Maryland federal court further noted that the mere fact that signatories to an interstate compact have adopted separate freedom of information statutes does not mean that the body created by the compact is subject to those freedom of information laws.⁴⁰ Finally, the fact that MWAA is subject to suit in Virginia⁴¹ does not mean that MWAA is also subject to the Freedom of Information Act.

Finally, the federal Freedom of Information Act applies to an “agency” of the United States.⁴² The term “agency” does not include entities created pursuant to an interstate compact.⁴³ Therefore, MWAA is not subject to the federal Freedom of Information Act.

CONCLUSION

Accordingly, it is my opinion that although the issue has not been conclusively resolved, under the only available precedent, the Governor was authorized to divest the Commonwealth of its interest in the Dulles Toll Road as part of the overall project to extend Metrorail. The agreements between various parties control the circumstances under which Virginia can regain control over the project and void the MOU. It is further my opinion that the assent of all parties to the MWAA Compact was not required for MWAA to operate the Dulles Toll Road. I also conclude that the agreements signed by Loudoun County detail the scope of its obligation in connection with this project. Finally, it is my opinion that neither the state nor the federal freedom of information statute applies to MWAA under the plain terms of those statutes.

¹ You pose a number of other questions. Those questions are currently at issue in pending litigation. Under longstanding principles, this Office will decline to opine on matters that are in pending litigation.

² *Gray v. Va. Sec’y of Transp.*, 276 Va. 93, 98-99, 662 S.E.2d 66, 68-69 (2008). In *Gray*, the Court held that the doctrine of sovereign immunity did not apply because the constitutional provisions at issue were “self-executing.” *Id.* at 106-07, 662 S.E.2d at 73.

³ “The Metrorail project is for the purpose of expanding the existing metrorail system to Dulles Airport.” *Id.* at 99 n.2, 662 S.E.2d at 69 n.2.

⁴ VA. CODE ANN. § 2.2-601(2) (2011).

⁵ *Id.*

⁶ Section 2.2-228 (2011).

⁷ VA. CODE ANN. § 33.1-12(9)(a) (2011).

⁸ Section 33.1-12(9)(d) (2011).

⁹ Section 33.1-391.3 (2011) (emphasis added).

¹⁰ Section 33.1-13 (emphasis added).

¹¹ 1995 Va. Acts ch. 560 § 14.

¹² See *Gray v. Va. Sec’y of Transp.*, Case No. CL07-203-4 (Richmond Cir. Ct. Oct. 17, 2008) (unpublished order).

¹³ Some of these documents are available on MWAA’s website, <http://www.mwaa.com/tollroad/2469.htm>. See also <http://www.metwashairports.com/dulles/2548.htm>.

¹⁴ See Dulles Toll Road Permit & Operating Agreement, arts. 14 & 15, as amended by First and Second Amends. to the Dulles Toll Road Permit & Operating Agreement.

¹⁵ *Id.*

¹⁶ See *id.* art. 5.

¹⁷ Second Amend. to the Dulles Toll Road Permit & Operating Agreement § 3 (amending § 14.01(c) of the Operating Agreement). Included in the term “Terminating Order” is “any valid law or any final and non-appealable judgment, directive, order, award, decree or final decision of any federal, state, local or other court or tribunal or any federal or state agency or other body exercising adjudicative, regulatory, judicial or quasi-judicial powers and any final and non-appealable award in any arbitration proceeding.” *Id.* § 6 (amending Exhibit A of the Operating Agreement).

¹⁸ Operating Agreement §§ 15.01 & 15.02.

¹⁹ For purposes of this Opinion, I interpret “liability that motorists will have to shoulder” to mean tolls.

²⁰ Steps have been taken to amend the MWAA Compact to increase the membership of the Authority to 17 members and to make other governance changes. See Consolidated and Further Continuing Appropriations Act, 2012, Pub. L. No. 112-55, § 191, 125 Stat. 552, 671 (2011); 2012 Va. Acts chs. 549, 712.

²¹ VA. CODE ANN. § 5.1-156(A)(2) (2010).

²² Section 5.1-156(A)(13).

²³ Section 5.1-156(A)(16).

²⁴ I note that by resolution dated December 20, 2006, the MWAA Board voted to approve execution of the Master Transfer Agreement and the Operating Agreement and that the Board continues to take actions, on occasion, to address and approve other issues and matters associated with the Dulles Toll Road. See <http://www.mwaa.com/tollroad/2469.htm>.

²⁵ Second Amend. to the Operating Agreement § 4 (amending § 14.01(d) of the Operating Agreement).

²⁶ *Id.*

²⁷ *Id.*

²⁸ Agreement to Fund the Capital Cost of Constr. of Metrorail in the Dulles Corridor § 2.2 (b)(3), available at

<https://docs.google.com/viewer?a=v&q=cache:EHHfa807v9IJ:www.loudoun.gov/controls/speerio/resources/RenderContent.aspx?data%3D2fc19a32291149848f8ab29844ca15b4%26tabid%3D326+Agreement+to+Fund+the+Capital+Cost+of+Constr.+of+Metrorail+in+the+Dulles+Corridor&hl=en&gl=us&pid=bl&srcid=ADGEEs2wB2JqezvNndFJdoaWmXrd9Pbf3uxQYzkzEbJE7wFJ3CgWjYqmJd3KVwGSwSZmyR371s>

DEYZFwIEN4SsiWnXXnJiXvy5qmApHZHlz9IRXJkCvxCkeifYr13DojRSRvHQsdw&sig=AHIEtbSf3VDoSgHu_NSLZji56heSD6N9dw (last visited May 17, 2012).

²⁹ *Id.* § 2.3(b).

³⁰ *Id.* § 2.5.

³¹ See Memorandum of Agreement Among United States Department of Transportation, Commonwealth of Virginia, Fairfax County, Loudoun County, The Washington Metropolitan Area Transit Authority, and The Metropolitan Washington Airports Authority § 3.2(b) (effective December 30, 2011), available at <http://www.dot.gov/affairs/2011/FTADulles.pdf>.

³² *Id.* Exhibit One.

³³ *Id.* § 3.2(d). Loudoun County committed to making best efforts to secure additional funding sources as one of several steps by the parties to this agreement to reduce the total Metrorail Project cost that otherwise will be funded through the Funding Partners Agreement that relies in large part on Dulles Toll Road revenues.

³⁴ VA. CODE ANN. § 2.2-3701 (2011).

³⁵ See *Wright v. Commonwealth*, 278 Va. 754, 759, 685 S.E.2d 655, 657 (2009).

³⁶ 49 U.S.C. § 49103; VA. CODE ANN. § 5.1-153 (2010).

³⁷ *Parkridge 6 LLC v. U.S. Dep't of Transp.*, 420 F. App'x 265, 268 (4th Cir. 2011) (MWAA “exists ‘independent of Virginia and its local governments, the District of Columbia, and the United States Government.’ 49 U.S.C. § 49106(a)(2)-(3) (2006). As such, it is not subject to Virginia’s FOIA”). The Fourth Circuit declined to address whether MWAA is subject to the federal FOIA because that issue had not been presented in the lower court.

³⁸ *C.T. Hellmuth & Assocs., Inc. v. Wash. Metro. Area Transit Auth.*, 414 F. Supp. 408, 410 (D. Md. 1976).

³⁹ *Id.* at 409.

⁴⁰ *Id.* at 409.

⁴¹ VA. CODE ANN. § 5.1-173(A); D.C. CODE § 9-922(a).

⁴² 5 U.S.C. § 551(1).

⁴³ 5 U.S.C. § 552.

OP. NO. 12-047

CIVIL PROCEDURE: JUDGMENTS AND DECREES GENERALLY

Code of Virginia does not permit a judgment debtor to present a circuit court clerk a release of a judgment for entry without the court granting a motion made pursuant to § 8.01-455.

SOVEREIGN IMMUNITY

Whether or not a clerk would be entitled to the protections of sovereign immunity, is a fact-specific question that cannot be answered in the abstract.

THE HONORABLE JUDY L. WORTHINGTON
CLERK OF THE CIRCUIT COURT, CHESTERFIELD COUNTY
JUNE 29, 2012

ISSUES PRESENTED

You inquire whether a judgment debtor may present a release from judgment to a circuit court clerk for entry. You further inquire what a circuit court clerk’s duty is

with respect to entering such a release presented by a judgment debtor. Lastly, you ask whether a circuit court clerk may be held liable if a release presented by a judgment debtor is subsequently determined to be fraudulent or erroneously recorded.

RESPONSE

It is my opinion that the *Code of Virginia* does not permit a judgment debtor to present a circuit court clerk a release of a judgment for entry without the court granting a motion made pursuant to Va. Code § 8.01-455. Because I have answered your first question in the negative, your second question is moot. Your final inquiry, whether or not a clerk would be entitled to the protections of sovereign immunity, is a fact-specific question that cannot be answered in the abstract.

APPLICABLE LAW AND DISCUSSION

Two Code provisions are relevant to your inquiry. First, § 8.01-454 provides, in relevant part:

In all cases in which payment or satisfaction of any judgment so docketed is made, which is not required to be certified to the clerk under § 8.01-455, it shall be the duty of the judgment creditor, himself, or by his agent or attorney, to cause such payment or satisfaction by the defendant, whether in whole or in part . . . to be entered within thirty days after the same is made, on such judgment docket. . . .

Second, § 8.01-455(A) provides, in relevant part:

A defendant in any judgment, his heirs or personal representatives, may, on motion, after ten days' notice thereof to the plaintiff in such judgment . . . apply to the court in which the judgment was rendered, to have the same marked satisfied, and upon proof that the judgment has been paid off or discharged, such court shall order such satisfaction to be entered on the margin of the page in the book wherein such judgment was entered, and a certificate of satisfaction to be entered on the margin of the page in the book wherein such judgment was entered, and a certificate of such order to be made to the clerk of the court in which such judgment is required . . . to be docketed, and the clerk of such court shall immediately, upon the receipt of such certificate, enter the same in the proper column of the judgment docket opposite the place where such judgment is docketed.

In construing a statute, the plain meaning of the language determines the legislative intent unless a literal construction would lead to a manifest absurdity.¹ Statutes must be construed to give meaning to all of the words enacted by the General Assembly, and a court is “not free to add language, nor to ignore language, contained in statutes.”² Additionally, “a statute is not to be construed by singling out a particular phrase,” but must be construed as a whole,³ and related statutes must be considered together in construing their various material provisions.⁴

Applying these principles, I make two conclusions. First, a judgment creditor, who has received whole or partial payment of a judgment from a judgment debtor, has an obligation under § 8.01-454 “to cause such payment or satisfaction by the defendant .

. . . to be entered within thirty days after the same is made, on [the] judgment docket.” Second, a judgment debtor is not authorized to present a judgment release directly to the clerk, but rather, must proceed through the motion process set forth in § 8.01-455. If the circuit court grants the motion and orders the judgment marked satisfied, the clerk of court is responding to the order of the court and not any documentation presented to the clerk by the judgment debtor. Thus, the clerk is not empowered to mark a judgment satisfied based on documentation that is provided solely by the judgment debtor.

Because I conclude that the clerk is not empowered to enter a judgment release presented by the judgment debtor, your second question is moot. With regard to your third inquiry, concerning the potential liability of a circuit court clerk for an erroneous recording of an instrument, I note that the availability of the defense of sovereign immunity is necessarily a fact-specific question.⁵ Accordingly, I cannot answer it in the abstract.

CONCLUSION

Accordingly, it is my opinion that the *Code of Virginia* does not permit a judgment debtor to present a circuit court clerk a release of a judgment for entry without the court granting a motion made pursuant to § 8.01-455. Because I have answered your first question in the negative, your second question is moot. Your final inquiry, whether or not a clerk would be entitled to the protections of sovereign immunity, is a fact-specific question that cannot be answered in the abstract.

¹ Halifax Corp. v. First Union Nat’l Bank, 262 Va. 91, 99-100, 546 S.E.2d 696, 702 (2001).

² Signal Corp. v. Keane Fed. Sys., 265 Va. 38, 46, 574 S.E.2d 253, 257 (2003).

³ Va. Elec. & Power Co. v. Citizens for Safe Power, 222 Va. 866, 869, 284 S.E.2d 613, 615 (1981).

⁴ See Colbert v. Commonwealth, 47 Va. App. 390, 395, 624 S.E.2d 108, 110 (2006).

⁵ See, e.g., 1997 Op. Va. Att’y Gen. 203, 207.

OP. NO. 12-030

CIVIL PROCEDURE: JURIES

While § 8.01-341(5) provides an exemption from jury service for licensed practicing attorneys, it does not bar lawyers from serving on a jury when a lawyer is willing to waive the exemption.

For the purpose of § 8.01-341(5), a “licensed practicing attorney” is a person licensed to practice law in any state or territory of the United States, including the District of Columbia, who is engaged in the active practice of law.

THE HONORABLE PAUL FERGUSON
CLERK OF THE CIRCUIT COURT, ARLINGTON COUNTY
MAY 18, 2012

ISSUES PRESENTED

You inquire whether, consistent with § 8.01-341(5), a licensed practicing attorney is

permitted to serve as a juror or whether that individual must be excused from jury service. You further inquire whether the exemption provided in § 8.01-341(5) is limited to attorneys who practice in Virginia.

RESPONSE

It is my opinion that, while § 8.01-341(5) provides an exemption from jury service for licensed practicing attorneys, it does not bar lawyers from serving on a jury when a lawyer is willing to waive the exemption. It is further my opinion that, for the purpose of § 8.01-341(5), a “licensed practicing attorney” is a person licensed to practice law in any state or territory of the United States, including the District of Columbia, who is engaged in the active practice of law.

APPLICABLE LAW AND DISCUSSION

Section 8.01-341 of the *Code of Virginia* provides, in pertinent part, “The following shall be exempt from serving on juries in civil and criminal cases: . . . 5. Licensed practicing attorneys” Thus, in clear and unequivocal terms, the General Assembly has exempted licensed practicing attorneys from jury service. You ask whether this exemption serves to bar licensed practicing attorneys from sitting on a jury or whether licensed practicing attorneys may waive the exemption, and thus, be eligible for jury service.

The Supreme Court of Virginia has expressed that the statutory exemption from jury service found in § 8.01-341(5) does not bar licensed practicing attorneys from serving on juries. Specifically, in *Caterpillar Tractor Co. v. Hulvey*, the Court noted that while § 8.01-341(5), renders a “[licensed practicing attorney] exempt from jury service, [it does] not make him incompetent to serve”¹ on a jury. I therefore conclude that licensed practicing attorneys are permitted to serve on juries if they are willing to waive the exemption granted by statute.

With respect to your second question, whether the exemption afforded “licensed practicing attorneys” extends to attorneys licensed and practicing outside Virginia, I find no cases directly on point. Thus, I rely on familiar rules of statutory construction to answer your inquiry. Foremost, in construing a statute, the plain meaning of the language determines the legislative intent unless a literal construction would lead to a manifest absurdity.² Further, statutes must be construed to give meaning to all of the words enacted by the General Assembly, and a court is “not free to add language, nor to ignore language, contained in statutes.”³

Section 8.01-341(5) does not contain language limiting the exemption for licensed practicing attorneys to those licensed and practicing law in the Commonwealth of Virginia. While other statutes in the *Code of Virginia* specifically reference “Virginia attorneys” to indicate a requirement that the attorney be licensed by the Virginia State Bar,⁴ § 8.01-341(5) does not contain any words of qualification or limitation in reference to licensed attorneys. For example, §§ 54.1-3900.01 and 54.1-3936, which relate to the regulation of the legal profession and protection of client funds and interests, specify that these statutes concern “the quality of legal services provided by *Virginia attorneys*.”⁵ Similarly, § 54.1-3901, which relates to the practice of patent

law, distinguishes among an attorney “who is admitted as an active member of the Virginia State Bar,” an attorney “who is not an active member of the Virginia State Bar,” and an attorney “who is authorized to practice law in any state or territory of the United States, or the District of Columbia.” Unlike these statutes, § 8.01-341(5) does not include a reference to Virginia or the Commonwealth. Absent language qualifying or limiting application of the exemption to attorneys from a particular jurisdiction, the exemption must extend to all licensed practicing attorneys.⁶ Accordingly, § 8.01-341(5) encompasses all attorneys who are licensed and practicing in any state or territory of the United States, including the District of Columbia.⁷

I do note, however, that irrespective of any jurisdictional question, § 8.01-341(5) does require that the lawyer be a “practicing” attorney for the exemption to apply. The adjective “practicing” is commonly defined as “[a]ctively working in a particular profession or occupation: *a practicing attorney*.”⁸ Thus, a practicing attorney is engaged in the active practice of law. *Black’s Law Dictionary* defines the practice of law as “[t]he rendition of services requiring the knowledge and the application of legal principles and technique to serve the interests of another with his consent.”⁹ The “active practice of law” thus contemplates an attorney-client relationship.¹⁰ *Black’s Law Dictionary* further states that the practice of law “is not limited to appearing in court, or various shapes of litigation, but embraces the preparation of pleadings, and other papers incident to actions and special proceedings, and in larger sense includes legal advice and counsel and preparation of legal instruments by which legal rights and obligations are established.”¹¹ In short, anyone who is licensed as an attorney and regularly engages in what is generally thought of as the practice of law, whether in a courtroom, in an office setting, or in a corporate setting, is a “licensed practicing attorney[.]” for the purposes of § 8.01-341(5), and thus, is exempt from jury service.

Based on the above, I conclude that § 8.01-341(5) exempts from jury service those persons licensed to practice law in any state or territory of the United States, including the District of Columbia, who are engaged in the active practice of law.

CONCLUSION

Accordingly, it is my opinion that, while § 8.01-341(5) provides an exemption from jury service for licensed practicing attorneys, it does not bar lawyers from serving on a jury when a lawyer is willing to waive the exemption. It is further my opinion that, for the purpose of § 8.01-341(5), a “licensed practicing attorney” is a person licensed to practice law in any state or territory of the United States, including the District of Columbia, who is engaged in the active practice of law.

¹ 233 Va. 77, 85, 353 S.E.2d 747, 752 (1987) (citation omitted).

² *Halifax Corp. v. First Union Nat’l Bank*, 262 Va. 91, 99-100, 546 S.E.2d 696, 702 (2001).

³ *Signal Corp. v. Keane Fed. Sys.*, 265 Va. 38, 46, 574 S.E.2d 253, 257 (2003).

⁴ *See* VA. CODE ANN. §§ 54.1-2348 (2010); 54.1-3900.01 (2008); 54.1-3936 (2005); 54.1-3901 (2000).

⁵ (Emphasis added).

⁶ See *Smith Mt. Lake Yacht Club v. Ramaker*, 261 Va. 240, 246, 542 S.E.2d 392, 395 (2001).

⁷ Dicta in *Hulvey* buttresses this conclusion. The juror whose alleged misconduct was the subject of the case “was licensed to practice in the District of Columbia but not in the Commonwealth of Virginia.” *Hulvey* at 79, 353 S.E. 2d at 748. Because the Court found that the exemption did not serve as a bar to jury service, it did not have to directly address whether an attorney licensed other than in Virginia would fall within the exemption. In referencing § 8.01-341(5) and noting that the juror’s status as an attorney “may have rendered him exempt from jury service[,]” however, the Court suggested he would. *Id.* at 85, 353 S.E. 2d at 752.

⁸ THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, NEW COLLEGE EDITION 972 (1981) (emphasis in original).

⁹ BLACK’S LAW DICTIONARY 1172 (6th ed. 1990).

¹⁰ *Id.*

¹¹ *Id.*

OP. NO. 11-140

CONSERVATION: VIRGINIA CONSERVATION EASEMENT ACT/OPEN-SPACE LAND ACT

Conservation easement obtained under the Virginia Conservation Easement Act or the Open-Space Land Act is not extinguished by application of the common law doctrine of merger of estates when the easement holder acquires fee simple title to the encumbered land.

THE HONORABLE THOMAS DAVIS RUST
MEMBER, HOUSE OF DELEGATES
AUGUST 31, 2012

ISSUE PRESENTED

You ask whether a conservation easement is extinguished by application of the common law doctrine of merger when the holder of the conservation easement under the Virginia Conservation Easement Act¹ or the Open-Space Land Act² acquires the fee simple interest in the same land.

RESPONSE

It is my opinion that a conservation easement obtained under the Virginia Conservation Easement Act (“VCEA”) or the Open-Space Land Act (“OSLA”) is not extinguished by application of the common law doctrine of merger of estates when the easement holder acquires fee simple title to the encumbered land.

BACKGROUND

You relate that the Commonwealth, through its Department of Conservation and Recreation (“DCR”), is considering the acquisition of certain real property to be used as a public park. You also relate that some of the subject property is encumbered by existing conservation easements.³

APPLICABLE LAW AND DISCUSSION

Merger is described as the “annihilation of one estate in another”⁴ and under contemporary Virginia jurisprudence, it is the general rule that existing easements are extinguished by operation of law when the easement holder acquires the fee simple title to the encumbered land.⁵ Upon unity of ownership, “the [easement] right must necessarily cease to be an easement, for it becomes one of the rights of property to which all owners of land are entitled.”⁶ In other words, one cannot have an easement in his own land. As recently explained by one Virginia trial court, it is generally the case that when the easement holder becomes the owner of the encumbered land, the need or purpose of the easement is eliminated.⁷ Nevertheless, as noted by that same trial court and discussed herein, conservation easements are not typical easements whose purposes are necessarily obviated when ownership of the two estates – the easement and fee – become united in the same person or entity.⁸

Conservation easements, which are a recent creation of the law,⁹ stand in sharp contrast to conventional easements, such as right-of-way or recreational easements. Conventional easements are private agreements entered into for the exclusive benefit of the grantee or similarly situated future owners of that property. In the case of a right-of-way easement, it follows that the easement would merge into the fee upon unity of ownership because the easement, as a separate, independent encumbrance, is no longer necessary; the right ceases to be an easement because it becomes one of the rights to which all owners of land are entitled.¹⁰ The formation of conservation easements, on the other hand, are authorized under OSLA and VCEA in order to facilitate conservation and historic preservation in furtherance of the Commonwealth’s policy to protect its natural resources and historic sites.¹¹ As the statutory framework of OSLA and VCEA demonstrate, conservation easements serve a much more public function than conventional easements.

The Code establishes the special and public nature of conservation easements. Acquisition and stewardship of these easements are supported by public moneys through general fund appropriations and public grants,¹² tax exemptions and benefits¹³ and tax incentives to grantors in cases of charitable gifts of conservation easements.¹⁴ Further, under OSLA and VCEA, only certain public and nonprofit entities are authorized to hold conservation easements.¹⁵ Additionally, VCEA expressly provides standing to the Attorney General and specific government agencies and localities for actions affecting conservation easements.¹⁶

The terms of OSLA and VCEA clearly evince a strong policy preference favoring the continuation of conservation easements. Specifically, holders of easements authorized under OSLA are prohibited from releasing the easement unless certain statutory criteria are met and upon the substitution of like-kind land for the released easement-encumbered land.¹⁷ Applying the doctrine of merger to extinguish the easement would circumvent these requirements. “Open-space land” could be disposed of beyond the parameters of the statute and without substitute land, resulting in a net-loss of open-space. Additionally, VCEA provides as a default that a “conservation easement shall be perpetual in nature unless the instrument creating it otherwise provides a specific time.” Thus, the thrust of the statutory scheme is to

promote and continue conservation efforts. Using merger to extinguish such easements therefore, would permit easement holders to extinguish them outside of the stated terms of the deed or in contravention of the stated public interest, which clearly runs contrary to the manifest intent of the statutes.¹⁸

Based on the foregoing public policy objectives and regulation of these easements, it can be concluded that conservation easements are held and administered by the easement holders not for themselves, but on behalf of the public¹⁹ and in furtherance of state policy. A 2010 circuit court decision supports this conclusion. In that case, the court found that conservation easements “are not subject to the typical common law analysis of merger as would be appropriate to rights of way between two adjoining tracts[;]”²⁰ for, as the court found, the holder of a conservation easement is “not the sole party receiving the benefit of th[e] easement.”²¹ The court looked to the intent of the parties to create a permanent conservation easement and the extensive statutory framework to facilitate the same in determining that merger would not apply to extinguish the subject conservation easement.²²

In the proposed transaction you describe, DCR would acquire land that is encumbered by a conservation easement. Assuming the encumbered land is covered by a conservation easement under the OSLA, both estates (the easement and the fee) would be owned by the Commonwealth (or one of its agencies). Nevertheless, mere ownership of the estates by the Commonwealth would not necessarily obviate the purpose of or need for the conservation easement: that is, the easement would continue to provide natural or historic resource protection in accordance with its stated terms and in furtherance of state policy.²³ This stands in sharp contrast to a conventional easement – such as a right-of-way or recreational easement – whose purpose or necessity is obviated when the easement holder becomes the owner of the encumbered land.²⁴ Moreover, allowing merger to extinguish the conservation easement in this instance would put DCR, a public actor, in the peculiar position of obstructing state policy in contravention to its stated mission to conserve the Commonwealth’s natural resources. In my view, such an inapposite result cannot be supported by invoking a doctrine developed at common law for the sole purpose of simplifying the land records²⁵ and without reference to the policies or statutes authorizing conservation easements in Virginia.

Therefore, in light of the various statutory limitations on extinguishment of a conservation easement, and because the preservation of a conservation easement would continue to provide natural and historic resource protection in furtherance of state policy, it is my opinion that the doctrine of merger would not apply to extinguish a conservation easement when the easement holder acquires fee simple title to the encumbered land. If the proposed transaction is completed so that the Commonwealth acquires the fee interest to land for which it already holds a conservation easement, the conservation easement would continue to be held by the Commonwealth subject to the limitations on its transfer and release imposed by the OSLA,²⁶ while the fee, if not similarly restricted,²⁷ could be sold or otherwise transferred in the discretion of DCR’s director.²⁸

CONCLUSION

Accordingly, it is my opinion that a conservation easement obtained under the Virginia Conservation Easement Act or the Open-Space Land Act is not extinguished by application of the common law doctrine of merger of estates when the easement holder acquires fee simple title to the encumbered land.

¹ Virginia Conservation Easement Act, VA. CODE ANN. §§ 10.1-1009 through 10.1-1016 (2012).

² Open-Space Land Act, VA. CODE ANN. §§ 10.1-1700 through 10.1-1705 (2012).

³ For purposes of this opinion, I make no distinction between conservation easements created under OSLA or VCEA, unless specifically noted.

⁴ *Little v. Bowen*, 76 Va. 724, 727 (1882).

⁵ *See Read v. Jones*, 152 Va. 226, 231, 146 S.E. 263, 264 (1929) (easements are extinguished when ownership of the dominant and servient estates become united in one and the same person); *accord Davis v. Henning*, 250 Va. 271, 462 S.E.2d 106 (1995) (easement for ingress and egress was extinguished by the doctrine of merger when easement holder acquired ownership of the encumbered land); *see also Little*, 76 Va. at 727 (“[Merger] takes place usually when a greater estate and a less coincide and meet in one and the same person ... whereby the less is immediately merged – that is, drowned in the greater.”).

⁶ *Read*, 152 Va. at 232, 146 S.E. at 264.

⁷ *Piedmont Env’tl Council v. Malawer*, 80 Va. Cir. 116, 118 (Jan. 28, 2010).

⁸ *Id.* at 118-19.

⁹ *See* 1966 Va. Acts ch. 461 (OLSA); 1988 Va. Acts chs. 720, 891 (VCEA).

¹⁰ *Read*, 152 Va. at 232, 146 S.E. at 264.

¹¹ *See* 1966 Va. Acts ch. 461 (declaring that “the provision and preservation of permanent open-space land are necessary to help ... provide or preserve necessary park, recreational, historic and scenic areas, and to conserve land and other natural resources” and authorizing the acquisition of real property interests, including easements in gross, as a means of preserving open-space land); *United States v. Blackman*, 270 Va. 68, 81, 613 S.E.2d 442, 448 (2005) (“In enacting VCEA, the General Assembly undertook to comprehensively address various land interests that can be used for conserving and preserving the natural and historical nature of property. In so doing, the General Assembly addressed the use of such easements in a manner consistent with [current law], the Open-Space Land Act, and the public policy favoring land conservation and preservation of historic sites and buildings in the Commonwealth as expressed in the Constitution of Virginia.”). *See also* VA. CONST. art. XI, § 1 (“To the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings. Further, it shall be the Commonwealth’s policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.”); VA. CONST. art. XI, § 2 (“In the furtherance of such policy, the General Assembly may undertake the conservation, development, or utilization of lands or natural resources of the Commonwealth, the acquisition and protection of historical sites and buildings, and the protection of its atmosphere, lands, and waters from pollution, impairment, or destruction, by agencies of the Commonwealth or by the creation of public authorities, or by leases or other contracts with agencies of the United States, with other states, with units of government in the Commonwealth, or with private persons or corporations....”).

¹² *See* § 10.1-1020 (2012) (establishing the Virginia Land Conservation Fund for purposes of providing grants to state agencies and other nonprofit entities for conservation and historic preservation purposes).

¹³ *See* § 10.1-1011(A) (providing an exemption of state and local taxation for perpetual conservation easements) and § 10.1-1011(B) (requiring that assessments of the fee interest in land that is subject to a perpetual conservation easement reflect the reduction in the fair market value of the land).

¹⁴ See VA. CODE ANN. §§ 58.1-510 through 58.1-513 (2009 & Supp. 2012). The provisions comprise the “Virginia Land Conservation Incentives Act of 1999” providing tax credits to individuals and corporations for donations of interests in real property for conservation and historic preservation purposes.

¹⁵ Under OSLA, an eligible public body is defined as “any state agency having authority to acquire land for a public use, or any county or municipality, any park authority, any public recreational facilities authority, any soil and water conservation district, any community development authority ... or the Virginia Recreational Facilities Authority.” Section 10.1-1700. Under VCEA, an eligible holder is defined as “a charitable corporation, charitable association, or charitable trust ...” whose primary purposes include “(i) retaining or protecting the natural or open-space values of real property; (ii) assuring the availability of real property for agricultural, forestal, recreational, or open-space use; (iii) protecting natural resources; (iv) maintaining or enhancing air or water quality; or (v) preserving the historic, architectural or archaeological aspects of real property.” Section 10.1-1009.

¹⁶ Section 10.1-1013.

¹⁷ Section 10.1-1704.

¹⁸ I note that federal tax law similarly imposes restrictions on the transfer or extinguishing of certain deeds for conservation easements. First, for those easements conveyed as a tax-deductible charitable gift, a tax deduction is available only if the deed requires the property to continue to advance its conservation purposes.¹⁸ See 26 C.F.R. § 1.170A-14. Second, if an unexpected change in the conditions of the property renders it unsuitable for conservation purposes, a deduction still may be available if a court extinguishes the deed’s restrictions and the proceeds of a subsequent transfer of the property are used by the grantee in a manner consistent with the conservation purposes of the original gift. 26 C.F.R. § 1.170A-14(g)(6)(i).

¹⁹ See Nancy A. McLaughlin, *Conservation Easements and the Doctrine of Merger*, 74 DUKE J. L. & CONTEMP. PROBS. 279, 280 (2011). The author points out the public and charitable status of conservation easement holders and public subsidies to acquire such easements to demonstrate that conservation easements “are held and enforced by government entities and charitable organizations on behalf of the public.” *Id.* at 280.

²⁰ *Piedmont Env’t Council*, 80 Va. Cir. at 119 (construing *United States v. Blackman*, 270 Va. 68, 613 S.E.2d 442 (2005)).

²¹ *Id.* at 118.

²² *Id.* at 118-19.

²³ See McLaughlin, *supra* note 19, at 287.

²⁴ *Piedmont Env’t Council*, 80 Va. Cir. at 118 (“The clear intent of the parties was the creation of a detailed conservation easement in perpetuity, so as to protect the scenic value of the real estate for the general public. This contrasts with a scenario in which some years later the owner of a dominant and servient tract became one and the same, this eliminating the need or purpose of the easement”).

²⁵ See McLaughlin, *supra* note 19, at 288 (citing the RESTATEMENT (THIRD) OF PROPERTY: MORTGAGES § 8.5 cmt. a (1997)) (“The merger doctrine was developed solely to serve the function of simplifying property titles in an era when writings were not used to release property interests.”).

²⁶ See § 10.1-1701 (authorizing public bodies to hold conservation easements under OSLA) and § 10.1-1704 (prohibiting the release of “open-space land” unless in accordance with the specific requirements of the statute).

²⁷ See McLaughlin, *supra* note 19, at 285 n.22 (discussing instances where technically, but to no effect, merger may occur when the instruments of conveyance for both the easement and the fee interest “have precisely the same terms and purpose – protection of the conservation values of the subject property in perpetuity as specified in the easement.”).

²⁸ See, e.g., VA. CODE ANN. § 10.1-109 (2012) (authorizing the Director of DCR, with the consent and approval of the Governor and the General Assembly, to convey, lease or demise to any person for consideration any lands owned or controlled by DCR).

OP. NO. 12-046**CONSTITUTION OF THE UNITED STATES: FOURTH AMENDMENT****ADMINISTRATION OF GOVERNMENT: DEPARTMENT OF LAW**

Fourth Amendment protections are rights attaching to persons that can be asserted only by them either directly or through an association. Attorney General of Virginia lacks standing to bring such a claim on behalf of citizens of the Commonwealth.

THE HONORABLE ROBERT B. BELL
MEMBER, HOUSE OF DELEGATES
JUNE 29, 2012

ISSUE PRESENTED

You ask whether an individual or the Attorney General of Virginia may bring suit against the federal government claiming a violation of the Fourth Amendment for searches conducted at airports.

RESPONSE

It is my opinion that Fourth Amendment protections are rights attaching to persons that can be asserted only by them either directly or through an association. It is further my opinion that the Attorney General lacks standing to bring such a claim on behalf of citizens of the Commonwealth.

APPLICABLE LAW AND DISCUSSION

The Fourth Amendment of the United States Constitution prevents the government from conducting “unreasonable searches and seizures.”¹ This restriction upon government is directed primarily to protection of individual and personal rights.² The protection is personal and only the one subject to an allegedly unconstitutional search and seizure may be heard to complain.³ Moreover, the Commonwealth does not have standing to assert the constitutional rights of its citizens against the federal government,⁴ including claims alleging a violation of the Fourth Amendment.

In *Bivens v. Six Unknown Agents of the FBI*,⁵ “[the Supreme Court of the United States] held that a search and seizure that violates the Fourth Amendment can give rise to an action for damages against the offending federal officers even in the absence of a statute authorizing such relief”⁶ Nonetheless, although such *Bivens* claims have been permitted,⁷ the merits of “search-and-seizure claims depend heavily upon their individual facts[.]”⁸ Whether any person would possess a valid claim as a result of a search at an airport, therefore, would turn upon facts not provided. I note, however, that airport screening in general has survived challenge.⁹

CONCLUSION

Accordingly, it is my opinion that Fourth Amendment protections are rights attaching to persons that can be asserted only by them either directly or through an association.

It is further my opinion that the Attorney General lacks standing to bring such a claim on behalf of citizens of the Commonwealth.

¹ U.S. CONST. amend. IV.

² *United States v. White*, 322 U.S. 694, 698 (1944).

³ *Simmons v. United States*, 390 U.S. 377, 389 (1968) (“rights assured by the Fourth Amendment are personal rights, and [] they may be enforced . . . only at the instance of one whose own protection was infringed by the search and seizure.”).

⁴ *Massachusetts v. Mellon*, 262 U.S. 447 (1923).

⁵ 403 U.S. 388 (1971).

⁶ *United States v. Stanley*, 483 U.S. 669, 678 (1987).

⁷ *Bivens v. Six Unknown Agents of the FBI*, 403 U.S. 388 (1971).

⁸ *Simmons*, 390 U.S. at 393. See *Ayeni v. Mottola*, 35 F.3d 680, 689 (2d Cir. 1994).

⁹ Courts addressing the validity of such searches have upheld them based on both a determination of reasonability given a balance between the nature of the threat and the level of intrusion involved, see *United States v. Hartwell*, 436 F.3d 174 (3d Cir. 2006); *United States v. Skipworth*, 482 F.2d 1272 (5th Cir. 1973), and a finding that the passenger consented to such searches by electing to travel by air, see *United States v. De Angelo*, 584 F.2d 46 (4th Cir. 1978); *United States v. Allman*, 336 F.3d 555 (7th Cir. 2003).

OP. NO. 11-135

CONSTITUTION OF VIRGINIA: BILL OF RIGHTS

Proposed “eminent domain” amendment, if adopted, would not expand the meaning of “damages” to such an extent that it would enable the owners of property located in the vicinity of, or affected by, an unpopular public facility to recover damages when none of their land has been taken for the facility.

The Amendment, if adopted, will not prevent the use of eminent domain by a locality to acquire land for the upgrading of public infrastructure, such as roads and utility facilities, to support a locality’s redevelopment plan to promote and encourage high density, multi-use, urban-style development, so long as the condemnor can meet its burden of proving that the use of the property taken is a public use.

THE HONORABLE JACKSON H. MILLER
MEMBER, HOUSE OF DELEGATES
JANUARY 26, 2012

ISSUES PRESENTED

You ask several questions regarding a proposed amendment to Article I, § 11 of the Constitution of Virginia (“the Amendment”) relating to the taking or damaging of private property by the power of eminent domain.¹

1. You ask whether the Amendment, if adopted, would expand the meaning of “damages” to such an extent that it would enable the owners of property located in the vicinity of, or affected by, an unpopular public facility to recover damages, even when none of their land has been taken for the facility;

2. You ask whether the Amendment, if adopted, would require local governments to compensate property owners for “lost access” and “lost profits” in the following examples:² (a) the conversion of a major cross-town highway featuring at-grade intersections and lined with businesses to a limited-access-only highway with grade-separated interchanges that would eliminate the direct access of abutting landowners and require access through a back road or other separate access road; (b) the reconstruction of major arterial streets within a city or town to four-lane divided roads with medians, resulting in vehicular access being limited by the medians to right-in and right-out for abutting commercial property owners, eliminating left-in and left-out turns for vehicles; (c) the closure of a street, which happens to be lined with commercial businesses, during a period that extends for approximately 54 hours, from 4:00 p.m. on Friday through 10:00 p.m. Sunday to host a festival; and (d) other similar temporary road closures for parades; and
3. You ask whether the Amendment, if adopted, would prevent the use of eminent domain by a locality to acquire land for the upgrading of public infrastructure (*i.e.*, roads and utility facilities) to support a redevelopment plan adopted by the locality to promote and encourage high density, multi-use, urban-style development in the place of aging low-density suburban-style development.

RESPONSE

It is my opinion that:

1. The Amendment, if adopted, would not expand the meaning of “damages” to such an extent that it would enable the owners of property located in the vicinity of, or affected by, an unpopular public facility to recover damages when none of their land has been taken for the facility;
2. Bearing in mind that determinations in condemnation cases always depend on the precise facts of a particular case, the following general conclusions may be made with respect to your examples:
 - (a) Damages sustained when a major cross-town highway is converted to a limited access only highway which eliminates all direct access to the major highway by abutting landowners are compensable under our current Constitution and will remain compensable under the Amendment;
 - (b) The design and construction of highways and roads, including the installation of medians and other traffic management and safety features, represent the exercise of the Commonwealth’s police power, the exercise of which generally is not compensable under our current Constitution, provided that a reasonable means of ingress and egress for an abutting property remains; whether limitations on vehicular access will be compensable under the Amendment will depend on how the General Assembly defines by statute “lost access” and “lost profits,” but a property owner likely will have an opportunity to present to the body determining just compensation evidence of the damages alleged to have been sustained;
 - (c) The temporary closure of a street for a weekend festival represents the reasonable exercise of the police power by a locality, is not a taking or damaging

of property and, thus, would not be compensable if the Amendment is adopted; and

(d) The temporary closure of a road to accommodate a parade represents the reasonable exercise of the police power by a locality, is not a taking or damaging of property and, thus, would not be compensable if the Amendment is adopted; and

3. The Amendment, if adopted, will not prevent the use of eminent domain by a locality to acquire land for the upgrading of public infrastructure, such as roads and utility facilities, to support a locality's redevelopment plan to promote and encourage high density, multi-use, urban-style development, so long as the condemnor can meet its burden of proving that the use of the property taken is a public use.

BACKGROUND

The General Assembly has proposed amending specific provisions pertaining to eminent domain in Article I, Section 11, of Virginia's Constitution and has initiated the amendment process pursuant to Article XII, § 1 (entitled "Amendments"). The initial step in that process was House Joint Resolution 693, agreed to at the 2011 session of the General Assembly. The joint resolution is set forth below in its entirety:

CHAPTER 757

HOUSE JOINT RESOLUTION NO. 693

Proposing an amendment to Section 11 of Article I of the Constitution of Virginia, relating to taking or damaging of private property.

Agreed to by the House of Delegates, February 23, 2011

Agreed to by the Senate, February 22, 2011

RESOLVED by the House of Delegates, the Senate concurring, a majority of the members elected to each house agreeing, That the following amendment to the Constitution of Virginia be, and the same hereby is, proposed and referred to the General Assembly at its first regular session held after the next general election of members of the House of Delegates for its concurrence in conformity with the provisions of Section 1 of Article XII of the Constitution of Virginia, namely:

Amend Section 11 of Article 1 of the Constitution of Virginia as follows:

ARTICLE 1

BILL OF RIGHTS

Section 11. Due process of law; obligation of contracts; taking *or damaging* of private property; prohibited discrimination; jury trial in civil cases.

That no person shall be deprived of his life, liberty, or property without due process of law; that the General Assembly shall not pass any law impairing the obligation of contracts; ~~nor any law whereby private property shall be taken or damaged for public uses, without just compensation, the term "public uses" to be defined by the General Assembly;~~ and that the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be

abridged, except that the mere separation of the sexes shall not be considered discrimination.

That in controversies respecting property, and in suits between man and man, trial by jury is preferable to any other, and ought to be held sacred. The General Assembly may limit the number of jurors for civil cases in courts of record to not less than five.

That the General Assembly shall pass no law whereby private property, the right to which is fundamental, shall be damaged or taken except for public use. No private property shall be damaged or taken for public use without just compensation to the owner thereof. No more private property may be taken than necessary to achieve the stated public use. Just compensation shall be no less than the value of the property taken, lost profits and lost access, and damages to the residue caused by the taking. The terms "lost profits" and "lost access" are to be defined by the General Assembly. A public service company, public service corporation, or railroad exercises the power of eminent domain for public use when such exercise is for the authorized provision of utility, common carrier, or railroad services. In all other cases, a taking or damaging of private property is not for public use if the primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development, except for the elimination of a public nuisance existing on the property. The condemnor bears the burden of proving that the use is public, without a presumption that it is.^[3]

The present efforts to amend Virginia's Constitution have been strongly influenced by the decision of the United States Supreme Court in the case of *Kelo v. New London*.⁴ In *Kelo*, the City of New London, Connecticut condemned non-blighted residential property belonging to Susette Kelo for the primary purpose of promoting economic development. Her land was condemned so it could be used for the benefit of private business. The decision prompted an outpouring of criticism that began with the rather pointed dissent of Justice O'Connor, who was joined by Chief Justice Rehnquist and Justices Scalia and Thomas. As stated in Justice O'Connor's dissent: "Under the banner of economic development, all private property is now vulnerable to being taken and transferred to another private owner, so long as it might be upgraded...."⁵ The Court's decision, based on the Fifth Amendment to the United States Constitution, was the final blow in Susette Kelo's efforts to save her property, as the Constitution and other laws of Connecticut afforded her no relief. Significantly, the majority in *Kelo* emphasized "that nothing in our opinion precludes any State from placing further restrictions on its exercise of the takings power" and that "many States already impose 'public use' requirements that are stricter than the federal baseline."⁶

In an effort to address concerns raised by the *Kelo* decision, as well as the concerns of Virginians, the General Assembly enacted § 1-219.1 of the *Code of Virginia*, entitled "Limitations on eminent domain."⁷ The proposed Amendment to the Virginia Constitution incorporates a number of the central concepts contained in § 1-219.1, including the right to private property being a fundamental right.

The proposed Amendment is designed to establish, as an integral part of Virginia's Constitution, that the right to own and possess private property is a fundamental right and to embody that principle in the laws and jurisprudence of the Commonwealth of Virginia. A fundamental right "must be a right 'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if [it were] sacrificed.'"⁸ As Justice Thomas noted in his dissent in *Kelo*, "[t]he Public Use Clause, in short, embodied the Framers' understanding that property is a natural, fundamental right, prohibiting the government from 'tak[ing] property from A. and giv[ing] it to B.'" *Calder v. Bull*, 3 Dall. 386, 388 (1798); see also *Wilkinson v. Leland*, 2 Pet. 627, 658 (1829); *Vanhorne's Lessee v. Dorrance*, 2 Dall. 304, 311 (CC Pa. 1795).⁹ The majority result in *Kelo* raised significant concerns regarding whether the right to own property was "'deeply rooted in this Nation's history and tradition' or 'implicit in the concept of ordered liberty.'" A recent opinion of this Office has suggested that, under the current state of the law, property rights are not now recognized as a fundamental right.¹⁰ In light of these circumstances, the authors of the proposed Amendment decided to remove all doubt, at least in Virginia's jurisprudence, by explicitly stating that the right to own property will be deemed a fundamental right in Virginia.¹¹

In furtherance of that objective, the Amendment will impose specific limitations on the exercise of eminent domain powers and help ensure that "no private property shall be damaged or taken for public use without just compensation to the owner thereof." The Amendment will reinforce the requirement for a "public use" and provide clarification by specifying what is not considered to be a "public use." In the event private property is "damaged" by a public project or use, the proposed Amendment will retain the existing requirement that just compensation is due to the owner thereof, even in the absence of a direct taking of an owner's property. (In our Constitution, as it now exists, the term "damaged" or "damages" is used in a legal sense, as further discussed below.) Regarding compensation, however, the Amendment provides that "just compensation shall be no less than the value of the property taken, lost profits and lost access, and damages to the residue caused by the taking." The General Assembly is directed to define the added terms of "lost profits" and "lost access," which may expand the scope of just compensation for damages, depending upon the wording of the definitions in the legislation to be enacted.

APPLICABLE LAW AND DISCUSSION

If the Amendment ultimately is adopted and incorporated into our Constitution, an important issue will be how and to what extent the Amendment will affect existing statutes and case law pertaining to eminent domain, including statutes such as § 1-219.1. Without attempting a detailed analysis, I will outline certain general principles or rules that will apply. As noted in the case of *Swift & Co. v. Newport News*,¹² a decision that followed soon after the adoption of Virginia's Constitution of 1902: "And all statutes existing when such a Constitution is adopted, or which might thereafter be passed, inconsistent with its provisions, are nullified by such constitutional prohibition, though legislation may nevertheless be desirable and valuable for the purpose of defining the right [*i.e.*, rights and limitations] and aiding in its enforcement."¹³ Of particular interest is the fact that the 1902 Constitution

amended the eminent domain provisions from Virginia's prior Constitution by requiring just compensation when property has been "damaged" for public uses.¹⁴ Significantly, the decision in *Swift & Co.* also states that "[i]t is also well settled that the common law remains in force in this State, except when changed by statute or the Constitution, which operate prospectively only[.]"¹⁵

More importantly, however, the Amendment will be interpreted, in part, in conformance with the following provision set forth in Article IV, § 14, of the current Constitution of Virginia:

The authority of the General Assembly shall extend to all subjects of legislation not herein forbidden or restricted; and a specific grant of authority in this Constitution upon a subject shall not work a restriction of its authority upon the same or any other subject. The omission in this Constitution of specific grants of authority heretofore conferred shall not be construed to deprive the General Assembly of such authority, or to indicate a change of policy in reference thereto, unless such purpose plainly appear.^[16]

As noted in *FFW Enterprises v. Fairfax County*,¹⁷ the first paragraph of Article IV, § 14 is the appropriate starting place when addressing the power of the General Assembly.¹⁸ This case further affirms that "[t]he Constitution does not grant power to the General Assembly; it only restricts powers "otherwise practically unlimited."¹⁹ Stated differently, "the legislature has the power to legislate on any subject unless the Constitution says otherwise."²⁰ Except to the extent of conflicts with the Amendment, the vast majority of our existing eminent domain statutes and related body of case law should remain applicable.

The current eminent domain provisions in the Constitution of Virginia state, in part, as follows: "[t]hat the General Assembly shall not pass any law...whereby private property shall be taken or damaged for public uses, without just compensation."²¹ This basic limitation is carried forward in the proposed Amendment. Deletion of the phrase "the term 'public uses' to be defined by the General Assembly" from the present Constitution and its omission from the Amendment's new language shall not be construed to limit or deprive the legislature of such authority (*i.e.*, to define "public uses"),²² but other provisions in the Amendment do represent substantive changes in policy of the type referenced in Article IV, § 14 of our Constitution. Such substantive policy changes will (1) operate to impose certain express limitations on the ability of the General Assembly to define what constitutes a public use,²³ (2) expand the scope of just compensation to include "lost access" and "lost profits," as defined by the General Assembly, which will allow a property owner who suffers condemnation of his property to put on appropriate evidence and receive compensation that more fully covers his losses,²⁴ (3) prohibit excessive takings beyond what is necessary to achieve the stated public use, and (4) impose upon the condemnor the burden of proving that the use is public and eliminate any presumption that it is.

The limitation that private property may not be taken or damaged except for a "public use," without just compensation to the owner thereof, will continue to be a basic component of our Constitution under the proposed Amendment.²⁵ The ability of the

General Assembly to define public uses will continue, subject to constitutional limitations. As a repository of sovereign powers, including the police power and the power of eminent domain, the Commonwealth of Virginia may delegate such powers to its departments, agencies and institutions, as well as to its political subdivisions and to private entities (such as utilities and railroads). Such delegations and their scope are legislative functions, but will be subject to any constitutional limitations.²⁶ Nonetheless, in any given case, ““what constitutes a ‘public use’ is a judicial question to be decided by the courts.””²⁷ As previously noted, the extensive body of statutory and case law regarding eminent domain that has been enacted and developed over the years will continue to provide valuable direction and precedent, except where inconsistent with the proposed Amendment.

I will now address your specific questions and issues seriatim.

I.

Before responding to your first inquiry, the concept of “damage” to, or “damaging” of, private property must be distinguished from the requirement for “just compensation” to a landowner whose property has been taken or damaged in conjunction with a public use. Under the proposed Amendment, the terms “lost access” and “lost profits” will be components of “just compensation.” If property is “damaged” for public uses under Virginia’s Constitution, just compensation will include, depending on the facts of the particular case, compensation for “lost access” and “lost profits” to the extent authorized by the General Assembly.

Regarding damage, and as explained in *PEPCO v. Highway Commissioner*,²⁸ the contention that a landowner who has suffered damage to his private property is entitled to compensation under the eminent domain provisions of the Virginia Constitution turns on the meaning of “damage” or “damages.”²⁹ Under Article I, §11 of our Constitution, the term is not accorded its ordinary meaning. Instead, the term “means damaged in the legal sense.”³⁰ In *PEPCO*, two electric utilities that maintained pole lines on highway department right-of-way were forced to relocate their lines, but the utilities did not hold any easements or other interest in the subject land. The claim of entitlement to just compensation failed because the pole lines were installed and maintained under mere licenses or permits issued by the State Highway Commissioner that were revocable at will. Thus, the utilities suffered *damnum absque injuria*, as the physical invasion caused by the displacement of their lines “did not result in damage in the constitutional sense,” which involves damage resulting from a legal invasion that amounts to a loss of property rights.³¹

In 1902, Virginia adopted a new constitution, which amended prior eminent domain provisions in the 1869 version to include for the first time the term “damaged.”³² The then new version stated that the General Assembly “shall not enact any law whereby private property shall be taken or damaged for public uses, without just compensation.”³³ As noted in *Tidewater Railway Co. v. Shartzler*,³⁴ prior to such amendment “[i]t was uniformly held...that there could be no recovery for an injury or damage to property, no part of which was actually taken.” This was a construction that resulted in much hardship and denied justice in cases where the use, enjoyment and value of property was greatly impaired under conditions that did not amount to a

taking.³⁵ Nonetheless, even this early case recognized that merely rendering a property less desirable, such as the erection of a nearby county jail, does not constitute the damage contemplated by the Constitution, absent some “diminution in substance” caused by the public use.³⁶ The proposed Amendment will not alter this threshold requirement that there be damages in the constitutional sense. Owners of property will be no more entitled under the Amendment to compensation for the inconvenience of having an unpopular public facility located nearby than they are under current law. As demonstrated in Example (a) below, an abutter’s easement of access to a public road is a property right, the loss of which, when caused by a public use, constitutes damage in the constitutional sense.

II.

Next, I will cover the examples that you present and the impact of the proposed Amendment to Virginia’s Constitution. Given that condemnation cases usually turn on a number of very specific facts, and the details of the examples set forth in your opinion request are not fully developed, my responses must be considered as general in nature and subject to modification depending on the precise facts of a particular case.

Example (a) involves the conversion of a major cross-town highway into a limited-access-only highway that eliminates all direct highway access by abutting landowners, leaving access only by local or back roads. The facts presented are nearly identical to those in *State Highway & Transportation Commissioner v. Linsly*,³⁷ except that in *Linsly* the State Highway Commissioner planned to construct a service road providing indirect access. An easement of access to a public road (generally, an easement by implication) is a property interest, and its extinguishment by the Commonwealth or a locality under powers of eminent domain would be a form of “damage” in a legal sense. In your example, as in *Linsly*, the landowner has lost his abutter’s easement of access to a major public highway, a substantive property right, resulting in damage in the legal sense. The damage suffered entitles the landowner to just compensation. The proposed Amendment will not affect this result; however, the determination of just compensation may include a recovery for “lost profits” and “lost access” as defined by future legislation.³⁸ I decline to speculate as to how such future legislation might expand the scope of just compensation.

The facts in Example (b) involve the construction of medians affecting vehicular access. Such construction could limit ingress and egress for certain properties to right-in and right-out only. In cases such as this, where reasonable access remains, even though it is not as extensive, the current rule, stated in *Highway Commissioner v. Easley*, is that “[a]n abutting landowner’s right of access to a public road is subordinate to the police power of the state reasonably to control the use of streets so as to promote the public health, safety, and welfare,”³⁹ and that no compensation is due to the owner of property abutting a public road “when the state, in the exercise of its police powers, reasonably regulates the flow of traffic on the highway.”⁴⁰ (Of course, the key word is “reasonably,” because if access were completely eliminated there would be legal damages.) In *Easley*, the Court stated that this rule applies

regardless of whether the diminished access occurs conjointly with a taking of property.

The proposed Amendment will not change the rule in *Easley* for cases where a median or other regulation of traffic leads to diminished access and there is no taking or damaging of property. In such cases, no just compensation, including lost profits or lost access, would be due because the median or other traffic regulation would be an exercise of the police power and not an exercise of the power of eminent domain. In cases, however, where a loss of access occurs conjointly with a taking or damaging of private property, the Amendment provides that just compensation will include damages for the lost access. Under the Amendment, the term “lost access,” and thus the degree of loss that will qualify for compensation, is to be defined by the General Assembly. The property owner will have the opportunity to present evidence of the damages sustained as a result of the lost access to the body determining just compensation, but in any event, the property owner will have to show that the lost access has resulted in a diminution of value in the residue property in order to receive compensation for that damage.

In Example (c), a street is closed for an entire weekend for a festival. Under the given facts, there is no taking of land, and the same principles apply as set forth in *Easley*. Even assuming the street closure resulted in a substantial decrease in the business of abutting merchants during the course of the festival, no damages would be payable. In this situation, the relatively short duration of the closure represents the exercise of the police power and does not involve or cause any substantial “damages” in the legal sense of that term.⁴¹ This answer similarly applies to Example (d), where the road closure is to accommodate a parade and any impact lasts only for a very limited period of time.

III.

In the example presented by your Question 3, you describe a major project by a locality to facilitate a redevelopment plan. In order to accomplish the project’s objective and to induce private landowners to invest the necessary time and capital required to achieve the stated objective, such a project normally will require the enhancement of infrastructure, including road improvements and utility expansion and upgrades. The construction phase of the infrastructure improvements often will require the acquisition of title to land and easements. For purposes of completing required acquisitions, the General Assembly has granted localities condemnation authority pursuant to Title 15.2, Chapter 19 (entitled, “Condemnation”) of the Virginia Code.⁴² Article I, Section 11 of the Constitution of Virginia, however, both now and with the proposed Amendment, limits the exercise of such authority by providing that private property may not be taken (*i.e.*, condemned) except for “public uses” or “public use.”

In addition to establishing the general scope of condemnation authority granted to localities, § 15.2-1903 sets forth several mandatory prerequisites that must be satisfied prior to initiating condemnation proceedings. Simply stated, § 15.2-1903 requires a public hearing at which the governing body must adopt a resolution or ordinance approving the proposed public uses and directing the acquisition of such

property by condemnation or other means. Further, the resolution or ordinance must state, (1) the use to which the property shall be put, and (2) the necessity therefor. These two components are referenced and examined in the case of *Hoffman Family, L.L.C. v. City of Alexandria*.⁴³ *Hoffman* explains that the stated “necessity” for resorting to condemnation is a legislative function that the courts will not review unless the decision by the locality is arbitrary or capricious or in the event there is evidence of manifest fraud.⁴⁴ Subsection C of § 15.2-1903 concludes with the provision that a duly adopted resolution or ordinance that satisfies the criteria of § 15.2-1903(B) and is filed with the condemnation petition “constitutes sufficient evidence of such public use and necessity.” This statutory presumption is inconsistent with the provision in the proposed Amendment that states “[t]he condemnor bears the burden of proving that the use is public, without a presumption that it is.” If the Amendment is adopted, the statutory presumption in § 15.2-1903(C) will become void, localities will be required to prove that the use is public, and citizens whose property is subject to condemnation will have the opportunity to fully challenge any such assertion by the locality.

In discussing the “public use” requirement, the Court in *Hoffman* noted that “[t]he judicial question of what constitutes a ‘public use’ is well established.” In describing what constitutes a “public use” the Court stated as follows:

A use to be public must be fixed and definite. It must be one in which the public, as such, has an interest, and the terms and manner of its enjoyment must be within the control of the State, independent of the rights of the private owners of the property appropriated to the use.^[45]

The Virginia Supreme Court’s baseline criteria for determining a “public use” should remain intact under the proposed Amendment, except as therein provided and except as may be modified by future legislation. Under the Amendment, there is one particular provision that may impact development projects such as described in your example, depending on the precise facts. The referenced provision states that, except as otherwise provided in the Amendment, “a taking or damaging of private property is not for public use if the primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development....” Under the proposed Amendment, the determination whether the “primary use” for a condemned property is for private gain, or private benefit, etc., will be based upon the evidence presented, without any legal presumption in favor of the condemning authority, with ultimate oversight of such issue to be retained by the courts.

Furthermore, under the Amendment, the enactment in Virginia of laws similar to the laws of Connecticut in effect at the time of the *Kelo* decision, which authorized condemnation for economic development and allowed private property to be condemned and transferred to private owners all under the banner of economic development, would be unconstitutional in Virginia.

The *Hoffman* opinion, along with the dissent, demonstrates how difficult it is to reach a decision in such cases. As the Court further explains, however, “[t]he fact that property acquired to serve the public may also incidentally benefit some private individuals does not destroy the public character of the use.”⁴⁶ According to the

Court, “the focus of a public use inquiry must be on the property to be acquired by condemnation, not on its effect on neighboring properties.”⁴⁷ As noted above, the proposed Amendment would establish that “a taking or damaging of private property is not for public use if the *primary use* is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development.”⁴⁸ In the absence of a statutory definition, the plain and ordinary meaning of a term is controlling.⁴⁹ The word “primary” means “first in order of time or development” and the word “use” means “the act or practice of employing something.”⁵⁰ Thus, a court would focus on the use for which the condemning authority employs the property taken. Applying the proposed Amendment to the scenario presented in Question 3, the “primary use” of such infrastructure construction is not economic development but, instead, to provide improved transportation to the public and enhanced utility service that will facilitate and support future economic development, a secondary benefit. Note, however, that any taking or damaging of private property would nevertheless be restricted by, and subject to, Code § 1-219.1, including subsection D, which provides,

Except where property is taken (i) for the creation or functioning of a public service corporation, public service company, or railroad; or (ii) for the provision of any authorized utility service by a government utility corporation, property can only be taken where: (a) the public interest dominates the private gain and (b) the primary purpose is not private financial gain, private benefit, an increase in tax base or tax revenues, or an increase in employment.^[51]

Notwithstanding the provisions in the Amendment, localities will retain ample condemnation authority to improve and upgrade transportation and utility infrastructure in conjunction with development projects, including those planned by the locality or as may be planned by private developers and approved by the locality. The elimination of the statutory presumption in § 15.2-1903(C), however, will afford citizens a fair and open process in the determination of what constitutes a “public use” in their individual cases.

Generally, the proposed Amendment, if adopted, will result in changes to the way just compensation for a taking or damaging might be calculated. This calculation, however, will be based on the specific facts of each case and the specifics of any legislative enactment regarding the definitions of “lost profits” and “lost access” as required by the Amendment. Any speculation on the impact of such legislation or the calculation of compensation in any particular set of circumstances is beyond the scope of this opinion.

CONCLUSION

Accordingly, it is my opinion that:

1. The Amendment, if adopted, would not expand the meaning of “damages” to such an extent that it would enable the owners of property located in the vicinity of, or affected by, an unpopular public facility to recover damages when none of their land has been taken for the facility;

2. Bearing in mind that determinations in condemnation cases always depend on the precise facts of a particular case, the following general conclusions may be made with respect to your examples:

(a) Damages sustained when a major cross-town highway is converted to a limited access only highway which eliminates all direct access to the major highway by abutting landowners are compensable under our current Constitution and will remain compensable under the Amendment;

(b) The design and construction of highways and roads, including the installation of medians and other traffic management and safety features, represent the exercise of the Commonwealth's police power, the exercise of which generally is not compensable under our current Constitution, provided that a reasonable means of ingress and egress for an abutting property remains; whether limitations on vehicular access will be compensable under the Amendment will depend on how the General Assembly defines by statute "lost access" and "lost profits," but a property owner likely will have an opportunity to present to the body determining just compensation evidence of the damages alleged to have been sustained;

(c) The temporary closure of a street for a weekend festival represents the reasonable exercise of the police power by a locality, is not a taking or damaging of property and, thus, would not be compensable if the Amendment is adopted; and

(d) The temporary closure of a road to accommodate a parade represents the reasonable exercise of the police power by a locality, is not a taking or damaging of property and, thus, would not be compensable if the Amendment is adopted; and

3. The Amendment, if adopted, will not prevent the use of eminent domain by a locality to acquire land for the upgrading of public infrastructure, such as roads and utility facilities, to support a locality's redevelopment plan to promote and encourage high density, multi-use, urban-style development, so long as the condemnor can meet its burden of proving that the use of the property taken is a public use.

¹ See 2011 Va. Acts ch. 757. See also second resolutions H.J. 3, 2012 Reg. Sess. (Va.), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=121&typ=bil&val=hj3>; S.J. 3 2012 Reg. Sess. (Va.), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=121&typ=bil&val=sj3>.

² You also ask whether each of these examples constitutes a "taking" for which just compensation must be paid. The answer to this question, however, would depend on the precise facts of the particular case.

³ 2011 Va. Acts ch. 757.

⁴ *Kelo v. City of New London*, 545 U.S. 469 (2005).

⁵ *Id.* at 494 (O'Connor, J., dissenting).

⁶ *Id.* at 489.

⁷ 2007 Va. Acts chs. 882, 901, 926.

⁸ *McCabe v. Commonwealth*, 274 Va. 558, 562, 650 S.E.2d 508, 510 (2007) (quoting *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997)).

⁹ *Kelo*, 545 U.S. at 510-11 (Thomas, J., dissenting).

¹⁰ See 2011 Op. Va. Att’y Gen. 11-065 at 1-2 (“Property rights certainly benefit from constitutional protection and constitute a cornerstone of our prosperity as a Nation. Property rights, however, are not absolute.... Where, as here, a policy or regulation does not infringe upon a suspect class, such as race, or a fundamental right, such as freedom of speech, the standard of review is highly deferential toward the locality.”).

¹¹ The notion of a “fundamental right,” as opposed to other rights, comes from federal jurisprudence. When a fundamental right is impinged upon in federal jurisprudence, strict judicial scrutiny is triggered. *San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 17 (1973). Virginia courts speak of strict construction in their eminent domain cases (e.g., *Hoffman Family, L.L.C. v. City of Alexandria*, 272 Va. 274, 283, 634 S.E.2d 722, 727 (2006)), but in practice, great deference is typically provided to condemning authorities (e.g., *Hoffman*); see also *supra* note 10. Use of the phrase “fundamental right” in the Amendment would require a consistently strict construction by courts in eminent domain proceedings. Eliminating the deference granted to condemning authorities under current law is also consistent with the shifting of the burden of proof accomplished by the Amendment.

¹² *Swift & Co. v. City of Newport News*, 105 Va. 108, 52 S.E. 821 (1906).

¹³ *Id.* at 115, 52 S.E. at 824.

¹⁴ VA. CONST. of 1902, art. IV, § 58; see also *Swift & Co.*, 105 Va. at 113, 52 S.E. at 823. Article IV, Section 58 of Virginia’s 1902 Constitution added “or damaged” by providing that the General Assembly “shall not enact any law whereby private property shall be taken *or damaged* for public uses, without just compensation.”

¹⁵ *Swift & Co.*, 105 Va. at 112, 52 S.E. at 823.

¹⁶ VA. CONST. art. IV, § 14.

¹⁷ *FFW Enters. v. Fairfax Cnty.*, 280 Va. 583, 701 S.E.2d 795 (2010).

¹⁸ *Id.* at 592, 701 S.E.2d at 801.

¹⁹ *Id.* at 593, 701 S.E.2d at 801 (internal quotation marks omitted) (quoting *Lewis Trucking Corp. v. Commonwealth*, 207 Va. 23, 29, 147 S.E.2d 747, 751 (1966)).

²⁰ *Id.* at 592, 701 S.E.2d at 801 (citing 1 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 538 (1974)).

²¹ VA. CONST. art. I, § 11.

²² VA. CONST. art. IV, § 14.

²³ 2011 Va. Acts ch. 757 (In part, the Amendment specifies that “a taking or damaging of private property is not for public use if the primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue, or economic development, except for the elimination of a public nuisance existing on the property”).

²⁴ Under current law, compensation for lost access is available only in limited circumstances, and compensation for lost profits is not available at all in condemnation cases.

²⁵ 2011 Va. Acts ch. 757.

²⁶ See 1984-85 Op. Va. Att’y Gen. 129, 131 (“the power of eminent domain, as an incident of sovereignty, can be exercised only when properly delegated by the General Assembly and subject to constitutional and statutory limits”).

²⁷ *Hoffman*, 272 Va. at 285, 634 S.E.2d at 728 (quoting *City of Richmond v. Carneal*, 129 Va. 388, 394, 106 S.E. 403, 405 (1921)).

²⁸ *PEPCO v. Highway Comm’r*, 211 Va. 745, 180 S.E.2d 657 (1971).

²⁹ *Id.* at 749-50, 180 S.E.2d at 660.

³⁰ *Id.* at 749, 180 S.E.2d at 660.

³¹ *Id.* at 749-50, 180 S.E.2d at 660.

³² In the debates at the constitutional convention that led to the adoption of the Constitution of 1902, advocates for Virginia municipalities vigorously fought the proposed extension of just compensation to damages to private property. These advocates made dire warnings: “we are entering into a matter that is fraught with great danger to the public interests of this Commonwealth by taking it out of the hands of the Legislature”; “in our new and rapidly growing cities public improvements would be practically stopped”; “every city in this Commonwealth and every railroad company will be assailed with suits in our courts”; and the proposed constitutional language “will have a tendency to prevent capital from coming into our State.” I REPORT OF THE PROCEEDINGS & DEBATES OF THE CONSTITUTIONAL CONVENTION 688, 691, 694 (1906).

³³ VA. CONST. of 1902, art. IV, § 58.

³⁴ Tidewater Ry. Co. v. Shartzter, 107 Va. 562, 565, 59 S.E. 407, 408 (1907).

³⁵ *Id.* at 565, 59 S.E. at 408.

³⁶ *Id.* at 571-72, 59 S.E. at 410.

³⁷ State Highway & Transp. Comm’r v. Linsly, 223 Va. 437, 290 S.E.2d 834 (1982).

³⁸ As called for by the Amendment, the General Assembly is considering in its 2012 regular session bills that define “lost access” and “lost profits.” H.B. 1035, 2012 Reg. Sess. (Va.) *available at* <http://leg1.state.va.us/cgi-bin/legp504.exe?121+sum+HB1035>; S.B. 437, 2012 Reg. Sess. (Va.), *available at* <http://leg1.state.va.us/cgi-bin/legp504.exe?121+sum+SB437>.

³⁹ State Highway Comm’r v. Easley, 215 Va. 197, 203, 207 S.E.2d 870, 875 (1974) (citing *Wood v. Richmond*, 148 Va. 400, 138 S.E. 560 (1927) (closing one service station’s curb cut to a public street is a non-compensable act of the police power)).

⁴⁰ *Id.* at 203, 207 S.E.2d at 875.

⁴¹ *PEPCO*, 211 Va. at 749-50, 180 S.E.2d at 660.

⁴² *See* VA. CODE ANN. §§ 15.2-1901 through 15.2-1907.1 (2008).

⁴³ *Hoffman*, 272 Va. at 274, 634 S.E.2d at 722.

⁴⁴ *Id.* at 285, 634 S.E.2d at 728.

⁴⁵ *Id.* at 286, 634 S.E.2d at 728 (quoting *Carneal*, 129 Va. at 395, 106 S.E. at 406).

⁴⁶ *Id.* at 287, 634 S.E.2d at 729 (citation omitted).

⁴⁷ *Id.*

⁴⁸ *See* 2011 Va. Acts ch. 757 (emphasis added).

⁴⁹ *See, e.g., Sansom v. Bd. of Suprvs.*, 257 Va. 589, 594-95, 514 S.E.2d 345, 349 (1999); *Commonwealth v. Orange-Madison Coop. Farm Serv.*, 220 Va. 655, 658, 261 S.E.2d 532, 533-34 (1980).

⁵⁰ MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 925, 1301 (10th ed. 1994).

⁵¹ VA. CODE ANN. § 1-219.1(D) (2011).

OP. NO. 12-036

CONSTITUTION OF VIRGINIA: CONSERVATION

General Assembly may delegate Baylor grounds boundary determinations and boundary adjustments to the Virginia Marine Resources Commission, provided the law delegating the authority establishes specific policies and fixes definite standards to guide the VMRC in making its determinations.

THE HONORABLE RALPH S. NORTHAM
MEMBER, SENATE OF VIRGINIA
SEPTEMBER 7, 2012

ISSUES PRESENTED

You inquire whether the General Assembly may delegate to the Virginia Marine Resources Commission the authority to make adjustments to boundaries of the Baylor grounds. You also ask, if this is permitted, under what conditions the delegation could be made.

RESPONSE

It is my opinion that the General Assembly may delegate Baylor grounds¹ boundary determinations and boundary adjustments to the Virginia Marine Resources Commission (“VMRC”), provided the law delegating the authority establishes specific policies and fixes definite standards to guide the VMRC in making its determinations.

APPLICABLE LAW AND DISCUSSION

The *Constitution of Virginia* provides that

The authority of the General Assembly shall extend to all subjects of legislation not herein forbidden or restricted; and a specific grant of authority in this Constitution upon a subject shall not work a restriction of its authority upon the same or any other subject. The omission in this Constitution of specific grants of authority heretofore conferred shall not be construed to deprive the General Assembly of such authority . . . unless such purpose plainly appear.^[2]

Accordingly, Virginia courts look to the Constitution of Virginia for limitations of legislative power, not for grants of power.³ As the Virginia Supreme Court has explained, the Constitution of Virginia is to be looked to, not to ascertain whether a power has been conferred to the General Assembly, but whether it has been taken away.⁴ Unless a provision of the Virginia Constitution compels the legislature to act or operates to prohibit it from acting, the General Assembly is free to legislate as its judgment dictates.⁵

The Constitution of Virginia vests the legislative power of the Commonwealth in the General Assembly.⁶ Article XI, § 3 recognizes the General Assembly’s authority to define and determine Virginia’s oyster grounds; it expressly provides, in pertinent part, that “the General Assembly may, from time to time, define and determine such natural beds, rocks, or shoals by surveys or otherwise.”⁷ This language does not prohibit the General Assembly from delegating its authority here. In fact, when the General Assembly authorized the original Baylor survey in 1892, it delegated to the Board on the Chesapeake and its Tributaries responsibility for overseeing “a true and accurate survey of the natural oyster beds, rocks and shoals of the commonwealth.”⁸ Furthermore, the General Assembly subsequently delegated its authority to re-determine the boundaries of the Baylor grounds to a predecessor of the VMRC.⁹

The Virginia Constitution does not prohibit the General Assembly from delegating the definition and determination of the oyster grounds to the VMRC. Rather, it states that the General Assembly may define and determine the oyster grounds by survey or otherwise. Additionally, the General Assembly has made this delegation in the past.

Accordingly, it is my opinion that delegating this authority to the VMRC is permissible.

Nevertheless, for this delegation to remain within Constitutional limits, the laws delegating this authority must establish specific policies and fix definite standards to guide the VMRC in making its determinations.¹⁰ The Supreme Court of Virginia has recognized that delegating authority to administrative agencies “is essential to carry out the legitimate functions of government[, for] [i]f nothing could be left to the judgment and discretion of administrative officers, government could not be efficient and the legislation itself would become ‘either oppressive or inefficient.’”¹¹ Nonetheless, the Virginia Supreme Court has held that the General Assembly cannot delegate its legislative power when the delegation is accompanied only by a broad statement of general policy.¹² While statutes enjoy the presumption of constitutionality, delegations of legislative power are valid only if they establish specific policies and fix definite standards to guide the official, agency, or board in the exercise of the power.¹³ Delegations of legislative power that lack such policies and standards are unconstitutional and void.¹⁴

Whether the legislative delegation is constitutional depends on the specific provisions of the statute.¹⁵ The Supreme Court has held that delegations of authority are adequately limited where the terms or phrases employed in the statute have a well understood meaning and prescribe sufficient standards to guide the administrator.¹⁶ As such, any statutory scheme delegating Baylor grounds determinations to the VMRC must be adequately limited in that the terms or phrases employed in the statutes have a well understood meaning and prescribe sufficient standards to guide the VMRC in making Baylor grounds determinations.

CONCLUSION

Accordingly, it is my opinion that the General Assembly may delegate Baylor grounds boundary determinations and boundary adjustments to the Virginia Marine Resources Commission, provided the law delegating the authority establishes specific policies and fixes definite standards to guide the VMRC in making its determinations.

¹ The terms “Baylor grounds” and “Baylor survey” are not defined in the *Code of Virginia*. In the 1890s, James Bowen Baylor, a Virginia native, campaigned for and initiated a survey that was conducted throughout Virginia’s tidal waters to locate and map the naturally productive oyster beds, rocks, and shoals. This has become known as the Baylor survey. See PROCEEDINGS AND DEBATES OF THE VIRGINIA HOUSE OF DELEGATES PERTAINING TO AMENDMENT OF THE CONSTITUTION 548-49 (Ex. Sess. 1969) (historical account by Delegate Walther B. Fidler of Warsaw, Virginia). Within Virginia case law, the terms “Baylor grounds,” “Baylor survey,” “oyster grounds” and “natural oyster rocks, beds and shoals” are synonymous. See, e.g., *Comm’n of Fisheries v. Hampton Rds. Oyster Packers & Planters Ass’n*, 109 Va. 565, 64 S.E. 1041 (1909) (using the terms “Baylor survey,” “public oyster grounds” and “natural oyster rocks, beds and shoals” interchangeably).

² VA. CONST. art. IV, § 14.

³ *City of Richmond v. Va. Ry. & Power Co.*, 141 Va. 69, 91, 126 S.E. 353, 359 (1925).

⁴ *Pine v. Commonwealth*, 121 Va. 812, 822, 93 S.E. 652, 655 (1917).

⁵ *Id.* See also *Dean v. Paolicelli*, 194 Va. 219, 227, 72 S.E.2d 506, 511 (1952) (“The Constitution is not a grant of power, but only the restriction of powers otherwise practically unlimited, and except as far as

restrained by the Constitution of this State and the Constitution of the United States, the legislature has plenary power”).

⁶ VA. CONST. art. IV, § 1.

⁷ VA. CONST. art. XI, § 3. In making this declaration, the Virginia Constitution simply recognizes existing law and does not confer any authority that the General Assembly did not already possess. *Pine*, 121 Va. at 825, 93 S.E. at 655-56. *See also* 1973-74 Op. Va. Att’y Gen. 85, 85 (noting that, notwithstanding the protections afforded to these oyster grounds under Article XI, § 3, i.e., the prohibition of leasing, renting and selling the oyster grounds and the requirement that these be held in trust for the benefit of the people of the Commonwealth, the Constitution of Virginia grants the General Assembly the authority to redefine the limits of these oyster grounds).

⁸ 1892 Va. Acts ch. 511.

⁹ *Blake v. Marshall*, 152 Va. 616, 624, 148 S.E. 789, 791 (1929) (citing § 3233 of the Code of Virginia of 1919, which delegated to the Commission of Fisheries the duty to resurvey the oyster grounds). *See also Hampton Rds. Oyster Packers & Planters Ass’n*, 109 Va. at 568, 64 S.E. at 1041 (explaining that the Board of Fisheries, after a hearing on a report and survey, entered an order relocating and re-establishing the lines of the Baylor survey).

¹⁰ *See Dickerson v. Commonwealth*, 181 Va. 313, 322-26, 24 S.E.2d 550, 555-56 (1943) (upholding General Assembly’s delegation to the Alcoholic Beverage Control Board to regulate transportation of alcoholic beverages), *aff’d*, *Carter v. Virginia*, 321 U.S. 131 (1944); *Bd. of Spvsrs. v. State Milk Comm’n*, 191 Va. 1, 4-7, 60 S.E.2d 35, 37-38 (1950) (upholding delegation of legislative power to the State Milk Commission to set minimum prices of milk), *aff’d*, 340 U.S. 881 (1950). In *Dickerson*, the Virginia Supreme Court observed, “[t]he delegation of power to make administrative rules and regulations for the purpose of carrying out the policy of the lawmaking body, within the standard set by it, is exemplified in the grants to ... commissions charged with the duty of carrying out statutes ... and many other boards and agencies charged with the duty of promoting the public welfare.” 181 Va. at 323, 24 S.E.2d at 555.

¹¹ *Bell v. Dorey Elec. Co.*, 248 Va. 378, 379-80, 448 S.E.2d 622, 623 (1994) (citing and quoting *Thompson v. Smith*, 155 Va. 367, 379, 154 S.E. 579, 584 (1930)).

¹² *See Chapel v. Commonwealth*, 197 Va. 406, 415, 89 S.E.2d 337, 343 (1955) (Dry Cleaners Act held invalid, in part, because General Assembly delegated unlimited discretion to an administrative agency to promulgate rules “without fixing any standard or test to guide and control the exercise of such discretion”). *See also Andrews v. Bd. of Spvsrs.*, 200 Va. 637, 640-41, 107 S.E.2d 445, 448 (1959) (county zoning ordinance section struck down for merely setting out a policy with “no uniform rule or set of standards to guide the Board of Zoning Appeals in the exercise of its duties”).

¹³ *Bell*, 248 Va. at 380, 448 S.E.2d at 623.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.* at 382, 448 S.E.2d at 624. *See also Volkswagen of Am. v. Smit*, 279 Va. 327, 339-40, 689 S.E.2d 679, 686 (2010) (“A statute, ordinance, or regulation which delegates discretionary authority to an administrative officer to determine its application does not satisfy due process if it lacks standards which are sufficiently clear to guide the officer, and inform those subject to his jurisdiction, of how that discretion is to be exercised.”).

OP. NO. 11-144

CONSTITUTION OF VIRGINIA: LEGISLATURE

CONSTITUTION OF VIRGINIA: EDUCATION

Limitations on the General Assembly’s appropriation powers contained in Article IV, § 16 and Article VIII, § 10 of the Constitution of Virginia do not preclude the enactment of

statutes allowing tax credits that Virginia taxpayers may claim for making contributions to sectarian entities, nonprofit organizations not controlled by the Commonwealth or to private schools not owned or controlled by the Commonwealth or one of its political subdivisions.

THE HONORABLE SCOTT A. SUROVELL
MEMBER, HOUSE OF DELEGATES
MAY 25, 2012

ISSUES PRESENTED

You inquire whether the constitutional limitations on the General Assembly's power to appropriate funds to specified entities preclude the offering of certain income tax credits. Specifically, you ask whether the restrictions imposed by Article IV, § 16 and Article VIII, § 10 of the Constitution of Virginia apply to statutes permitting Virginia taxpayers to claim tax credits for making contributions to sectarian entities, nonprofit organizations not controlled by the Commonwealth, or to private schools not owned or controlled by the Commonwealth or one of its political subdivisions.

RESPONSE

It is my opinion that that the limitations on the General Assembly's appropriation powers contained in Article IV, § 16 and Article VIII, § 10 of the Constitution of Virginia do not preclude the enactment of statutes allowing tax credits that Virginia taxpayers may claim for making contributions to sectarian entities, nonprofit organizations not controlled by the Commonwealth or to private schools not owned or controlled by the Commonwealth or one of its political subdivisions.

BACKGROUND

You identify three legislative proposals that would provide tax credits for certain taxpayers. The first tax credit would be available to taxpayers who contribute funds to an entity that is exempt from federal taxation pursuant to Section 501(c)(3) of the Internal Revenue Code ("IRC") but that is not controlled by the Commonwealth. The second credit, proposed by H.B. 1046 in the 2010 General Assembly Session, grants a tax credit to those taxpayers who make a donation to charitable nonprofit organizations that use the donation to construct, purchase, or lease Energy Star qualified products in their headquarters.¹ Finally, the third credit, as proposed by H.B. 2314 in the 2011 General Assembly Session, establishes a credit for businesses that donate to scholarship foundations.² The amount of each credit would be based on the amount that the taxpayer donated to one of the identified entities.

APPLICABLE LAW AND DISCUSSION

Article IV, § 16 of the Constitution of Virginia provides, in part:

The General Assembly shall not make any appropriation of public funds, personal property, or real estate to any church or sectarian society, or any association or institution of any kind whatever which is entirely or partly, directly or indirectly, controlled by any church or sectarian society. Nor

shall the General Assembly make any like appropriation to any charitable institution which is not owned or controlled by the Commonwealth....^[3]

Article VIII, § 10 of the Constitution of Virginia provides, in part:

No appropriation of public funds shall be made to any school or institution of learning not owned or exclusively controlled by the State or some political subdivision thereof....^[4]

The proposed income tax credits you identify would be available in specified circumstances to be claimed by taxpayers who made monetary contributions to: (1) churches, sectarian and non-sectarian schools or nonprofit organizations exempt from federal taxation under IRC § 501(c)(3); (2) sectarian and non-sectarian nonprofit organizations using “Energy Star qualified products;”⁵ or (3) approved scholarship foundations, which can include private schools.⁶

In your inquiry, you refer to precedent of the Supreme Court of Virginia and to a prior opinion of this Office. Based on the analysis contained therein, you suggest that by providing state income tax credits for private donations to sectarian entities, private schools and nonprofit organizations not controlled by the Commonwealth, the General Assembly would transgress the noted constitutional prohibitions.⁷ The enactments addressed in that case and opinion, however, are distinguishable from the proposed legislation you present.

In *Almond v. Day*,⁸ the Supreme Court analyzed Item 210 of the Appropriation Act of 1954. That Item authorized payments from the Commonwealth’s General Fund Revenues to the parents, guardians or custodians of children attending public and private schools and otherwise eligible for benefits under that Act.⁹ An argument advanced in defense of that appropriation was that the general fund payments in question went to private individuals, *i.e.*, parents, guardians or custodians of school age children, and not to private schools.¹⁰ Finding that argument unpersuasive, the Supreme Court held that payments from the general fund for the specific purpose of reimbursing tuition and educational fees benefited the private schools that collected the payments. Because the entities receiving the benefit of the appropriation were not owned or controlled by the Commonwealth, the enactment violated the constitutional prohibition.¹¹

The 2011 Opinion of the Attorney General you cite involved proposed amendments to the state budget to allocate specific sums to charitable organizations that are not owned or controlled by the Commonwealth.¹² This Office, upon review of the legislation, which would have set aside a specific sum of funding for a specific recipient within a specific budget cycle, concluded that such amendments ran afoul of the constitutional prohibition.¹³

What distinguishes the previously addressed legislation from the proposed enactments you put forward is the nature of the legislative action at issue. By their terms, the restrictions of Article IV, § 16 and Article VIII, § 10 apply only to “appropriation[s] of public funds[.]” Absent an appropriation, the constitutional limitations you identify do not apply.¹⁴

“[E]very word employed in the Constitution is to be expounded in its plain, obvious, and common sense[.]”¹⁵ In the context of public law, an “appropriation” is a “specific ... act of the legislature by which a named sum of money has been set apart in the treasury and devoted to the payment of a particular demand.”¹⁶ The formal act of appropriation takes place when the General Assembly actually sets aside a specific sum for a specific use.¹⁷ As the *Almond* court noted, “appropriation” is defined as “[m]oney set aside by formal action to a specific use.”¹⁸ Moreover, an element .. of ‘appropriation’ is that [it comes] ... out of the general revenues of the state”¹⁹ In contrast, because income tax credits offset dollar for dollar the tax obligation a taxpayer would otherwise incur, the benefit derived from a tax credit does not flow out of the state’s general fund; rather, it reduces the tax revenues that would otherwise go into the general fund.

Legislation providing for tax credits does not set aside a sum certain in the treasury upon its passage, nor does it identify each individual who will benefit from its passage. Moreover, it does not allocate a specific credit amount to any particular claimant since each qualifying taxpayer will not necessarily be entitled to the maximum allowable credit for any specific year. Also, given that most tax credits are nonrefundable,²⁰ available but unused credits can be carried over to subsequent tax years and can be taken throughout additional periods generally ranging from three to five years. Thus, unlike an appropriation, the availability of a tax credit often extends beyond a single budget cycle. Based on these distinctions, I conclude that none of the tax credits you present is the equivalent of an “appropriation” for purposes of Article IV, § 16 and Article VIII, § 10 of the Constitution of Virginia.²¹

Significantly, if the meaning of “appropriation” were extended as you suggest, charitable donations to churches would not be deductible for Virginia income tax purposes, for by allowing deductions for sectarian causes, the General Assembly has decreased the tax revenues that otherwise would flow into the general fund. Similarly, the tax benefits available in statutory schemes such as the Neighborhood Assistance Act Tax Credit²² would be subject to challenge to the extent the donations from which the credits derive benefit sectarian entities or nonprofit organizations not controlled by the Commonwealth.

CONCLUSION

Accordingly, it is my opinion that the limitations on the General Assembly’s appropriation powers contained in Article IV, § 16 and Article VIII, § 10 of the Constitution of Virginia do not preclude the enactment of statutes allowing tax credits that Virginia taxpayers may claim for making contributions to sectarian entities, nonprofit organizations not controlled by the Commonwealth or to private schools not owned or controlled by the Commonwealth or one of its political subdivisions.

¹ See H.B. 1046, 2010 Reg. Sess. (Va. 2010), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=101&typ=bil&val=hb1046>. The bill defines the terms “qualifying” and “Energy Star qualified products.”

² See H.B. 2314, 2011 Reg. Sess. (Va. 2011), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=111&typ=bil&val=hb2314>. I note that the General Assembly in its 2012 regular session enacted legislation on the same subject, namely to provide a tax credit for monetary donations made

to certain qualified scholarship foundations. The Governor signed that legislation, and it will become law effective July 1, 2012, with the tax credit available for taxable years beginning on or after January 1, 2013, but before January 1, 2018. 2012 Va. Acts. chs. 731, 842. *See also* H.B. 321, 2012 Reg. Sess. (Va.), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=121&typ=bil&val=hb321>; S.B. 131, 2012 Reg. Sess. (Va.), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=121&typ=bil&val=sb131>.

³ In addition to the above quoted portion, Article IV, § 16 of the Virginia Constitution provides exceptions to the prohibition that are not relevant in resolving your questions.

⁴ In addition to the above quoted portion, Article VIII, § 10 of the Virginia Constitution provides exceptions to the prohibition that are not relevant in resolving your questions.

⁵ *See supra*, note 1.

⁶ *See* H.B. 2314, 2011 Reg. Sess. (Va. 2011) (defining “approved scholarship foundation”).

⁷ Because you did not ask if the credit schemes would violate either the First Amendment of the U.S. Constitution or Article I, § 16 of the Virginia Constitution, this Opinion does not address those issues.

⁸ 197 Va. 419, 89 S.E.2d 851 (1955).

⁹ *Id.* at 420, 89 S.E.2d at 852.

¹⁰ *Id.* at 424, 89 S.E.2d at 854.

¹¹ *Id.* at 426, 89 S.E.2d at 856.

¹² *See* 2011 Op. Va. Att’y Gen. 52.

¹³ *Id.*

¹⁴ “[I]n construing the Constitution[,]” it is necessary “to give effect to an express provision, rather than to an implication.” *Lipscomb v. Nuckols*, 161 Va. 936, 945-56, 172 S.E. 886, 889 (1934).

¹⁵ *Id.* at 945, 172 S.E. at 889 (1934) (quoting *Quesinberry v. Hull*, 159 Va. 270, 274-75, 165 S.E. 382, 383 (1932) (internal quotation marks and further citation omitted)).

¹⁶ BLACK’S LAW DICTIONARY 131 (4th ed. 1968).

¹⁷ 2010 Op. Va. Att’y Gen. 120, 121; 1982-83 Op. Va. Att’y Gen. 407, 409.

¹⁸ *Almond*, 197 Va. at 426, 89 S.E.2d at 855-56 (quoting WEBSTER’S NEW INTERNATIONAL DICTIONARY (2d ed.)).

¹⁹ *See supra*, note 15.

²⁰ A credit is nonrefundable if the amount claimed in any tax year cannot exceed the tax due. H.B. 2314 as introduced in 2011 included a refundable credit but that bill did not become law. If the General Assembly were to enact a refundable credit, that legislation also would not constitute an appropriation because it would not set aside in the treasury a specific sum for general fund payments. I do not address whether, in instances where a refundable credit benefited sectarian entities, nonprofit organizations or private schools and a subsequent appropriation act authorized payments from the general fund for the refundable portions of those credits, such subsequent appropriation would run afoul of the constitutional prohibitions.

²¹ *See* *MEA-MFT v. McCulloch*, Case No. BDV-2011-961, 2012 Mont. Dist. LEXIS 20 at 5-6 (March 14, 2012) (determining tax credit initiative did not violate state constitutional provision prohibiting appropriations by referendum) (citing *Tax Equity Alliance for Mass., Inc. v. Comm’r of Rev.*, 516 N.E.2d 152, 155 (Mass. 1987) (“The granting of an income tax credit is not an appropriation according to any understood sense of the word.”)).

²² VA. CODE ANN. §§ 58.1-439.18 through 58.1-439.24 (2009 & Supp. 2011).

OP. NO. 12-041

COUNTIES, CITIES AND TOWNS: GENERAL POWERS

COUNTIES, CITIES AND TOWNS: JOINT ACTIONS BY LOCALITIES

Locality may provide funds to either the Virginia Association of Counties or the Virginia Municipal League.

THE HONORABLE MARK L. COLE
MEMBER, HOUSE OF DELEGATES
JUNE 29, 2012

ISSUE PRESENTED

You inquire whether localities have the authority to provide funds raised through taxation to nonprofit organizations like the Virginia Association of Counties and the Virginia Municipal League.

RESPONSE

It is my opinion that a locality may provide such funds to either the Virginia Association of Counties or the Virginia Municipal League. There is nothing in the Virginia Constitution that would prohibit a locality from doing so, and the General Assembly has provided ample statutory authority for a locality to do so.

BACKGROUND

According to its mission statement, the Virginia Association of Counties (“VACO”), whose origins spring from the early 1930s, “exists to support county officials and to effectively represent, promote and protect the interests of counties to better serve the people of Virginia.” VACO represents its membership of 95 localities at the state and national levels in legislative and regulatory processes; its legislative steering committees monitor state and national legislative activities for changes affecting local governments and recommend an annual legislative program. VACO, which also seeks to serve as a valuable resource network for planning and implementing new ideas and technologies, publishes a periodic newsletter and legislative bulletin and offers educational seminars.¹

The Virginia Municipal League (“VML”) describes itself as “a statewide, nonprofit, nonpartisan association of city, town and county governments established in 1905 to improve and assist local governments through legislative advocacy, research, education and other services.” The membership includes all 39 cities in the state, 156 towns and 10 counties. VML is governed by an executive committee made up of local government officials. VML’s policy and steering committees recommend positions for the league on issues of concern through development of annual policy statements, while a legislative committee recommends a legislative program for adoption at the annual conference.²

APPLICABLE LAW AND DISCUSSION

In your letter, you refer to a previous opinion of this Office addressing the application of the state constitutional provision against appropriations to charitable organizations not owned or controlled by the Commonwealth.³ That opinion, and the constitutional provision, concern only funds appropriated by the General Assembly and expended from the state treasury and therefore do not apply to your inquiry involving expenditures by local governments.⁴ Rather, as the prior opinion relates, Article IV, §

16 provides that the General Assembly may “authorize counties, cities, or towns to make appropriations to any charitable institution or association.” The opinion then notes that the General Assembly has enacted enabling legislation permitting such donations.⁵ The question thus becomes whether the contributions you posit fall within the purview of that enabling legislation.

The power of a local governing body, unlike that of the General Assembly, “must be exercised pursuant to an express grant[.]”⁶ Localities have “only those powers which are expressly granted by the state legislature, those powers fairly or necessarily implied from expressly granted powers, and those powers which are essential and indispensable.”⁷ Further, any doubt as to the existence of the power must be resolved against the locality.⁸

Generally, a “locality may make appropriations for the purposes for which it is empowered to levy taxes and make assessments, for the support of the locality, for the performance of its functions, and the accomplishment of all other lawful purposes and objectives”⁹ In addition, the General Assembly has specified several entities which, in certain circumstances, may receive gifts and donations from the local fisc.¹⁰ A locality further is authorized to “make appropriations of public funds, of personal property or of any real estate and donations . . . to any charitable institution or association, located within their respective limits or outside their limits if such institution or association provides services to residents of the locality[.]”¹¹

Furthermore, localities are empowered to “form and maintain associations for the purpose of promoting, through investigation, discussion and cooperative effort, the interest and welfare of the several political subdivisions of the Commonwealth, and to promote a closer relation between the several political subdivisions of the Commonwealth. . . .”¹² They also are authorized to join regional organizations and “to appropriate funds to such organization or to provide goods and services to such organization, all for the purpose of advancing the welfare and economic interests of such locality and the citizens thereof.”¹³ Finally, a “locality may, in its discretion, expend funds from the locally derived revenues of the locality for the purpose of promoting the resources and advantages of the locality.”¹⁴

Although these statutes do not specifically reference either VACO or VML, the authority the General Assembly has granted localities through these statutes permits a locality to provide funds to VACO and VML, regardless of whether VACO or VML could be classified as charities. Given the lack of a constitutional prohibition and the statutory grants of authority referenced above, I conclude that localities may provide funds to these organizations.

CONCLUSION

Accordingly, it is my opinion that a locality may provide funds to either the Virginia Association of Counties or the Virginia Municipal League.

¹ <http://www.vaco.org/What.html>.

² <http://www.vml.org/About%20the%20league.html>.

³ 2011 Op. Va. Att’y Gen. 52. *See also* 2011 Op. Va. Att’y Gen. 55 (applying the constitutional prohibition to conservation grants).

⁴ Article IV, § 16 provides:

The General Assembly shall not make any appropriation of public funds, personal property, or real estate to any church or sectarian society, or any association or institution of any kind whatever which is entirely or partly, directly or indirectly, controlled by any church or sectarian society. Nor shall the General Assembly make any like appropriation to any charitable institution which is not owned or controlled by the Commonwealth; the General Assembly may, however, make appropriations to nonsectarian institutions for the reform of youthful criminals and may also authorize counties, cities, or towns to make such appropriations to any charitable institution or association.

⁵ 2011 Op. Va. Att’y Gen. at 55 n.9 (citing VA. CODE ANN. § 15.2-953 (Supp. 2010)).

⁶ Nat’l Realty Corp. v. Va. Beach, 209 Va. 172, 175, 163 S.E.2d 154, 156 (1968).

⁷ Arlington Cnty. v. White, 259 Va. 708, 712, 528 S.E.2d 706, 708 (2000) (alteration in original) (quoting City of Va. Beach v. Hay, 258 Va. 217, 221 (1999)).

⁸ City of Richmond v. Bd. of Supvrs., 199 Va. 679, 684, 101 S.E.2d 641, 645 (1958).

⁹ VA. CODE ANN. § 15.2-950 (Supp. 2011).

¹⁰ Section 15.2-953 (Supp. 2011). Among these are chambers of commerce, industrial development authorities, state colleges and universities, organizations commemorating historical events, foundations supporting parks, libraries and law enforcement, and certain organizations providing energy efficiency services. Other eligible organizations include those serving senior citizens, providing emergency services, or providing recreational or community beautification services.

¹¹ Section 15.2-953(A).

¹² Section 15.2-1303.

¹³ Section 15.2-1304.

¹⁴ Section 15.2-940.

OP. NO. 12-043

COUNTIES, CITIES AND TOWNS: GENERAL PROVISIONS

Any zoning ordinance that places heavier burdens or greater restrictions on temporary political signs than are placed on any other classification of temporary sign is pre-empted by state law, thereby rendering any such ordinance invalid.

THE HONORABLE DAVID RAMADAN
MEMBER, HOUSE OF DELEGATES
JUNE 1, 2012

ISSUE PRESENTED

You inquire regarding the validity of ordinances governing the posting of campaign signs on private property. Specifically, you ask whether ordinances imposing stricter size limitations on political signs than on other temporary signs are permissible in light of § 15.2-109 of the *Code of Virginia*.¹

RESPONSE

It is my opinion that any zoning ordinance that places heavier burdens or greater restrictions on temporary political signs than are placed on any other classification of temporary sign is pre-empted by state law, thereby rendering any such ordinance invalid.

BACKGROUND

You state that political campaigns routinely use 4 x 8, 4 x 4, and 2 x 2 foot signs during campaigns. You also state that various localities seek to limit political signs to 2 x 2 feet while permitting larger signs for other categories of temporary signs. According to your description, the zoning regulations implicated in your question require the permitting of political signs along with other temporary signs.

APPLICABLE LAW AND DISCUSSION

The power of a local governing body, unlike that of the General Assembly, “must be exercised pursuant to an express grant”² because “the powers of boards of supervisors are fixed by statute and are limited to those conferred expressly or by necessary implication.”³ Conversely, “[a]n ordinance in conflict with a state law of general character and state-wide application is universally held to be invalid.”⁴

Generally, pursuant to its zoning powers, “[a]ny locality may, by ordinance, . . . regulate, restrict, permit, prohibit, and determine . . . [t]he size, height, area, bulk, location, erection, construction, reconstruction, alteration, repair, maintenance, razing, or removal of structures . . . ,”⁵ including signs. Nonetheless, irrespective of this broad authority, the General Assembly specifically has provided in § 15.2-109 that

No locality shall have the authority to prohibit the display of political campaign signs on private property if the signs are in compliance with zoning and right-of-way restrictions applicable to temporary nonpolitical signs, if the signs have been posted with the permission of the owner. The provisions of this section shall supersede the provisions of any local ordinance or regulation in conflict with this section.

“When a statute is clear and unambiguous, the rules of statutory construction dictate that the statute is interpreted according to its plain language;”⁶ and “[t]he manifest intention of the legislature, clearly disclosed by its language, must be applied.”⁷ I therefore conclude that localities may regulate temporary political signs under zoning ordinances only in the same manner as other temporary signs. Any ordinance that places heavier burdens or greater restrictions on temporary political signs than are placed on any other temporary signs is invalid.

CONCLUSION

Accordingly, it is my opinion that any zoning ordinance that places heavier burdens or greater restrictions on temporary political signs than are placed on any other classification of temporary sign is pre-empted by state law, thereby rendering any such ordinance invalid.

¹ Because it is not within the scope of your request, I express no opinion on the constitutionality of a permit requirement for placing political signs on private property absent some compelling government interest.

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

³ Bd. of Supvrs. v. Horne, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975).

⁴ Hanbury v. Commonwealth, 203 Va. 182, 185-86, 122 S.E.2d 911, 913-14 (1961) (internal quotation marks and citations omitted).

⁵ VA. CODE ANN. § 15.2-2280 (2008).

⁶ Va. Polytechnic Inst. & State Univ. v. Interactive Return Serv., Inc., 271 Va. 304, 309, 626 S.E.2d 436, 438 (2006).

⁷ 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)).

OP. NO. 11-100

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

HEALTH: ENVIRONMENTAL HEALTH SERVICES

Virginia locality can adopt standards and requirements for alternative onsite sewage systems that are in addition to or more stringent than those promulgated in regulations by the Board of Health, provided such standards or regulations do not relate to maintenance issues.

THE HONORABLE L. SCOTT LINGAMFELTER

MEMBER, HOUSE OF DELEGATES

MARCH 9, 2012

ISSUE PRESENTED

You ask whether, pursuant to § 15.2-2157, a locality may adopt requirements and standards other than maintenance requirements for alternative onsite sewage systems that are in addition to or more stringent than those set forth by the Board of Health in the Sewage Handling and Disposal Regulations and the Emergency Regulations for Alternative Onsite Sewage Systems.

RESPONSE

It is my opinion that a Virginia locality can adopt standards and requirements for alternative onsite sewage systems that are in addition to or more stringent than those promulgated in regulations by the Board of Health, provided such standards or regulations do not relate to maintenance issues.

APPLICABLE LAW AND DISCUSSION

Alternative onsite sewage systems, as well as conventional systems, are regulated by the Virginia Department of Health. Section 32.1-163 defines a conventional onsite sewage system as, “a treatment works consisting of one or more septic tanks with gravity, pumped, or siphoned conveyance to a gravity distributed subsurface drainfield.”¹ An alternative onsite sewage system is defined as, “a treatment works that is not a conventional onsite sewage system and does not result in a point source

discharge.”² Alternative systems are often utilized in circumstances where soils are unsuitable for conventional septic systems, there are too many conventional septic systems in one area, or the systems are too close to groundwater or surface waters.³

Pursuant to § 15.2-2157(A), a locality “may require the installation, maintenance and operation of, regulate and inspect onsite sewage systems” in order to protect public health.⁴ Further, while a county or town also has the general authority to deny applications for onsite sewage systems when the locality has adopted a master plan for sewers,⁵ § 15.2-2157(C) specifically prohibits any locality from otherwise banning, “[w]hen sewers or sewerage disposal facilities are not available, . . . the use of alternative onsite sewage systems that have been approved by the Virginia Department of Health”⁶ Additionally, subsection (D) provides that localities “shall not require maintenance standards and requirements for alternative onsite sewage systems that exceed those allowed under or established by the State Board of Health pursuant to § 32.1-164.”⁷

In your opinion request, you specifically refer to a county ordinance that requires a bond, letter of credit or cash escrow to be paid by the owner prior to the issuance of an operation permit for an alternative onsite sewage system, in order to provide for the maintenance, repair or replacement of the system. The Department of Health’s regulations applicable to maintenance of onsite sewage systems do not include a provision for a requirement of posting such a bond. You therefore ask whether a locality can adopt such an ordinance, in light of the restriction set forth in § 15.2-2157(D). The example you provide clearly involves a maintenance requirement, so based on the express prohibition against a locality’s adoption of maintenance standards and requirements exceeding those established by the Board of Health, I conclude that the locality is precluded from enforcing such a bond requirement.

Your inquiry, nonetheless, is broader in scope. You ask whether the restriction on local regulation applies solely to maintenance standards or whether it also limits a locality’s ability to impose additional requirements of any nature. You seek the proper construction of the phrase “maintenance standards and requirements” as used in § 15.2-2157(D).

The primary objective in statutory construction is to give effect to the legislature’s intent,⁸ as manifested through the plain language of the statute.⁹ Rules of construction or extrinsic aids are resorted to only when the words of the statute are ambiguous.¹⁰ Words and phrases should be construed according to the rules of grammar and common usage,¹¹ nonetheless, they must be read in context and not in isolation.¹² Further, statutes are to be interpreted *in pari materia*,¹³ and interpretations rendering part of an enactment superfluous are unreasonable.¹⁴

First I note that, generally, absent evidence of a contrary legislative intent, courts construe adjectives that precede more than one noun to modify each of the nouns that immediately follow the adjective.¹⁵ Applying this rule, and because there are no intervening commas or other modifiers and no “or” to indicate that “requirements” is to be treated separately,¹⁶ I conclude that “maintenance” modifies both “standards” and “requirements” so that a locality may impose additional requirements on

alternative onsite sewage systems, provided those requirements do not concern the maintenance of such systems.

This construction is bolstered by reading §15.2-2157(D) in conjunction with other provisions relating to onsite systems. Section 15.2-2157(A) expressly authorizes localities to “regulate and inspect onsite sewage systems;” and § 32.1-163.6, in establishing a scheme for the Department of Health’s review of permit applications by professional engineers, explicitly provides in subsection H that “[t]his section shall not be construed to prohibit any locality from adopting or enforcing any ordinance duly enacted pursuant to Chapter 21 [] of Title 15.2[,]” which includes § 15.2-2157. Clearly, the General Assembly intended the localities to be able to play a role in the regulation of alternative onsite systems. Reading § 15.2-2157(D) to restrict local governments from imposing *any* requirement in excess of the Department of Health’s regulations thus not only controverts the language of the statute, but also strips these other provisions of most of their meaning.

Furthermore, these provisions were amended in 2009. The restrictions on localities contained in subsections (C) and (D) were added to § 15.2-2157,¹⁷ and § 32.1-163.6 was amended to require treatment works designs permitted under it to conform to certain Board of Health regulations.¹⁸ While the legislature, with its enactment of the these amendments, clearly intended to establish certain statewide minimums and to limit the areas in which a locality could impose its own, different regulations, §§ 15.2-2157(A) and 32.1-163.6(H) remain.¹⁹ Had the legislature wanted to establish a single, statewide set of standards or requirements it could have done so. Instead, the General Assembly chose to retain the provisions granting localities general authority to regulate onsite sewage systems, limiting this authority only in the field of maintenance.²⁰

In your letter, you relate that a locality has adopted an ordinance that requires horizontal and vertical setback requirements as well as reserve area requirements that are in excess of those found in the Board of Health’s regulations. Such requirements do not pertain to maintenance as defined by the Code. Therefore, provided they do not function so as to in effect ban use of an alternative system where the state regulations would allow for its operation,²¹ the locality is free to impose them pursuant to § 15.2-2157(A).

CONCLUSION

Accordingly, it is my opinion that a Virginia locality can adopt standards and requirements for alternative onsite sewage systems that are in addition to or more stringent than those promulgated in regulations by the Board of Health, provided such standards or regulations do not relate to maintenance issues.

¹ VA. CODE ANN. § 32.1-163 (2011).

² *Id.* “‘Treatment works’ means any device or system used in the storage, treatment, disposal or reclamation of sewage or combinations of sewage and industrial wastes, including but not limited to pumping, power and other equipment and appurtenances, septic tanks, and any works, including land, that are or will be (i) an integral part of the treatment process or (ii) used for ultimate disposal of residues or effluents resulting from such treatment.” Section 32.1-163.

³ For further discussion of the mechanics of an alternative onsite sewage system, see 2010 Op. Va. Att’y Gen. 53 and technical documents cited therein.

⁴ See also, e.g., § 15.2-2126 (2008) (requiring notice and public hearing for the establishment or extension of sewer systems to serve three or more connections); § 15.2-2127 (2008) (authorizing localities to disapprove sewage systems if the locality finds for certain reasons that the sewage system is not capable of serving the proposed number of connections); and § 15.2-2128, *infra*.

⁵ See § 15.2-2128 (2008) (“Notwithstanding any other provision of general law relating to the approval of sewage systems, the governing body of any county or town which has adopted a master plan for a sewage system is authorized to deny an application for a sewage system if such denial appears to it to be in the best interest of the inhabitants of the county or town”).

⁶ Section 15.2-2157(C).

⁷ Section 32.1-164 provides that the regulations of the State Board of Health may include “[s]tandards for the design, construction, installation, modification and operation of sewerage systems” as well as “[p]erformance requirements for nitrogen discharged from alternative onsite sewage systems that protect public health and ground and surface water quality.” The Board’s Emergency Regulations, which supplement its Sewage Handling and Disposal Regulations, 12 VA. ADMIN. CODE §§ 5-610-20 through 5-610-1170, provide a definition of maintenance and prescribe certain maintenance and performance standards and horizontal setback requirements which must be met by the owner and designer of the sewage system. See 12 VA. ADMIN. CODE § 5-613-10 (defining “maintenance” as “performing adjustments to equipment and controls and in-kind replacement of normal wear and tear parts such as light bulbs, fuses, filters, pumps, motors, or other like components. Maintenance includes pumping the tanks or cleaning the building sewer on a periodic basis. Maintenance shall not include replacement of tanks, drainfield piping, distribution boxes, or work requiring a construction permit and an installer”); see also 12 VA. ADMIN. CODE § 5-613-200 (providing specific horizontal setback requirements dependent upon system design and site and soil conditions). The Sewage Handling and Disposal Regulations also provide for minimum reserve area requirements for the design of a system. See 12 VA. ADMIN. CODE § 5-610-710.

⁸ *Conger v. Barrett*, 280 Va. 627, 630, 702 S.E.2d 117, 118(2010) (quoting *Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983)).

⁹ *Vaughn, Inc. v. Beck*, 262 Va. 673, 677, 554 S.E.2d 88, 90 (2001).

¹⁰ See *Davis v. County of Fairfax*, 282 Va. 23, 28, 710 S.E.2d 466, 468 (2011) (“When the language of a statute is unambiguous, we are bound by the plain meaning of that language”) (internal citation omitted).

¹¹ See *Hilfiger v. Transamerica Occidental Life Ins. Co.*, 256 Va. 265, 274, 505 S.E.2d 190, 195 (1998) (“As a general rule, ‘proper grammatical effect will be given to the arrangement of words in a sentence of a statute’”) (quoting *Harris v. Commonwealth*, 142 Va. 620, 624, 128 S.E. 578, 579 (1925)).

¹² See *Herndon v. St. Mary’s Hosp., 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.”).

¹³ See *Prillaman v. Commonwealth* 199 Va. 401, 405-06, 100 S.E.2d 4, 7-8 (1957).

¹⁴ See *Epps v. Commonwealth*, 59 Va. App. 71, 80, 717 S.E.2d 151, 155 (2011); see also *Cook v. Commonwealth*, 268 Va. 11, 114, 597 S.E.2d 84, 86 (2004).

¹⁵ See, e.g., *Washington-Virginia Ry. Co. v. Fisher*, 121 Va. 229, 235, 92 S.E.2d 809, 811 (1917) (“In the sentence in which the words ‘every county road or highway’ are found, ‘county’ . . . modifies or limits both ‘road’ and ‘highway;’ and from their collocation those words are the equivalent of ‘county road or county highway.’”); *S & P Consulting Engineers, PLLC v. Baker*, 334 S.W.3d 390, 402 (Tex. App. 2011) (acknowledging, generally, “authority preferring that a single adjective preceding a list of nouns modifies each of the nouns”); *Long v. United States*, 199 F.2d 717 (4th Cir. 1952) (holding “forcibly” in a statute modified each of the verbs following it); *Milner v. Dep’t of the Navy*, 131 S. Ct. 1259 (2011) (applying, without discussion, “personnel” in the phrase “personnel rules and practices” to both “rules” and “practices”).

¹⁶ The use of the comma or the disjunctive “or” indicates items are to be considered alternatively, or as independent. *See, e.g.*, 1990 Op. Va. Att’y Gen. 209, 210; 1997 Op. Va. Att’y Gen. 16, 17; 2008 Op. Va. Att’y Gen. 41.

¹⁷ 2009 Va. Acts chs. 786, 846.

¹⁸ 2009 Va. Acts chs. 220, 296.

¹⁹ The General Assembly restricted that broad authority by its 2009 amendments by adding subsections C and D to § 15.2-2157.

²⁰ *Prillaman*, 199 Va. at 405-06, 100S.E.2d at 7 (“as 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.”) (quoting 50 Am. Jur., Statutes, § 349 at 345-47).

²¹ *See* 2010 Op. Va. Att’y Gen. 53.

OP. NO. 12-045

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

HEALTH: ENVIRONMENTAL HEALTH SERVICES

Virginia locality cannot adopt requirements and standards for alternative onsite sewage systems that are in addition to or more stringent than those enacted by the Board of Health and administered through the Virginia Department of Health when the conditions set forth in § 15.2-2157(C) exist, namely that (i) there is no sewer or sewerage disposal facility available and (ii) the alternative onsite sewage system has been approved by the Virginia Department of Health for use in the particular circumstances and conditions in which the proposed system is to be operating.

THE HONORABLE STEPHEN H. MARTIN

MEMBER, SENATE OF VIRGINIA

NOVEMBER 9, 2012

ISSUE PRESENTED

You ask whether a Virginia locality may adopt and apply any ordinance, standard or other requirement to an alternative onsite sewage system that is more stringent than, in addition to, or otherwise exceeds the regulations, standards and requirements of the Virginia Department of Health, where the failure to satisfy the local ordinance, standard or requirement could result in the denial of the right to install such a system, when sewers or sewerage disposal facilities are unavailable and when the proposed system is of a type that has been approved by the Virginia Department of Health for use in the particular circumstances and conditions in which it is to be operating.

RESPONSE

It is my opinion that a Virginia locality cannot adopt requirements and standards for alternative onsite sewage systems that are in addition to or more stringent than those enacted by the Board of Health and administered through the Virginia Department of Health when the conditions set forth in § 15.2-2157(C) exist, namely that (i) there is no sewer or sewerage disposal facility available and (ii) the alternative onsite sewage system has been approved by the Virginia Department of Health for use in the particular circumstances and conditions in which the proposed system is to be operating.

BACKGROUND

Alternative onsite sewage systems, as well as conventional systems, are regulated by the Virginia Department of Health. In 2009, the General Assembly directed the Board of Health, by the enactment clause of § 32.1-163.6, to “adopt regulations establishing performance requirements and horizontal setbacks necessary to protect public health and the environment for alternative systems permitted pursuant to the Board’s regulations implementing this chapter. Such regulations...shall contain operation and maintenance requirements consistent with the requirements for alternative onsite sewage systems contained in § 32.1-164.”¹ Pursuant to this enactment language, the Board of Health did enact regulations for alternative onsite sewage systems.² During the same legislative session, the General Assembly also amended Virginia Code § 15.2-2157 specifically to prohibit localities from banning “the use of alternative onsite sewage systems that have been approved by the Virginia Department of Health” in areas where sewers or sewerage disposal facilities are not available.³ The amendments to § 15.2-2157 further provided in subsection (D) that localities “shall not require maintenance standards and requirements for alternative onsite sewage systems that exceed those allowed under or established by the State Board of Health pursuant to § 32.1-164.”⁴

In 2010, you asked this Office whether § 15.2-2157(C) operated to prevent a locality from requiring, by ordinance, that a landowner obtain a special exception to the zoning ordinance in order to construct an alternative onsite sewage system under the circumstances contemplated by subsection (C). In response, this Office opined that § 15.2-2157(C) precluded such a local requirement provided that (i) there was no sewer or sewerage disposal facility available and (ii) the alternative system had been approved by the Department for use in the circumstances and conditions in which the proposed system is to operate.⁵ In so opining, this Office observed the following:

Pursuant to [Va. Code § 15.2-2157(A) and (C)], the special exception requirement may be valid only if a public sewer is available and offered to the individual seeking to install the alternative onsite sewage system. The locality retains the general authority pursuant to § 15.2-2157(A) and § 15.2-2128 to regulate, inspect, and deny applications for onsite sewage systems where a public sewer or sewerage facility is available; but § 15.2-2157(C) clearly states that when “sewers or sewerage disposal systems are not available, a locality shall not prohibit the use of alternative onsite sewage systems....” To require a special exception application for an alternative

onsite sewer system that meets the conditions set forth in § 15.2-2157(C) effectively would give the local governing body the option to prohibit the system, a result not permitted by that subsection.^{16]}

Subsequently, this Office received an opinion request letter from Delegate L. Scott Lingamfelter, asking:

- 1) Are the strictures in Virginia Code Section § 15.2-2157 limited to maintenance standards and maintenance requirements as argued by the Attorney for Fauquier County?
- 2) Does the general language in Code Section § 15.2-2157(A) authorize a County to adopt requirements other than maintenance requirements in addition to or stricter than those set forth in the Department of Health regulations?^{17]}

This Office responded by letter dated March 9, 2012, opining in response to the first question that a locality may not adopt a maintenance standard that exceeds the standards set by the State Board of Health and, thus, that the specific bond requirement detailed in the facts of the letter was impermissible pursuant to § 15.2-2157(D).⁸ In response to the second question, this Office opined that a non-maintenance standard that exceeds state regulations is not a violation of § 15.2-2157(C), “provided ... [such standards] do not function so as to in effect ban the use of an alternative system where the state regulations would allow for its operation.”⁹

You indicate that certain localities have interpreted the March 9, 2012, opinion of this Office to authorize the adoption and enforcement of ordinances requiring more stringent standards for alternative onsite sewage systems than those required by the Virginia Department of Health where there is no sewer or sewerage disposal facility available. Specifically, you relate that a developer *in a locality for which sewage facilities are not available* wishes to develop his property for homesites requiring the use of alternative onsite sewage systems. Further, you state that although the proposed alternative sewage systems meet the criteria established by the Virginia Department of Health for use in the particular circumstances and conditions in which they are to be operating, the locality has informed the applicant developer that it is suspending indefinitely the disposition of his applications for alternative systems where the applications do not meet the locality’s more stringent requirements for the systems, specifically, that there be fewer than 10 inches from the water table for mound systems and fewer than 12 inches from the water table for drip systems.¹⁰ You conclude that, for this property, the application of the locality’s more stringent ordinance effectively prohibits the use of alternative onsite sewage systems.

You also report other examples of localities implementing more stringent requirements for alternative onsite sewage systems than those required by the Virginia Department of Health, with these more stringent local requirements being applied in circumstances where no sewer or sewerage disposal facility is available. You note that among such more stringent local requirements are: a larger minimum square footage for alternative drainfield size; duplex pump systems for all septic fields in residential subdivisions; and a requirement that the treatment system for a

dwelling exceeding 7,500 square feet in living area must be over-designed by 50 percent.

APPLICABLE LAW AND DISCUSSION

Pursuant to Virginia Code § 15.2-2157(A), when sewers or sewerage facilities are not available, a locality has the general authority to regulate,¹¹ inspect, and require the installation and maintenance of onsite sewage systems in order to protect public health.¹² A county or town also has the general authority to deny applications for onsite sewage systems when the locality has adopted a master plan for sewers.¹³

Although localities have the authority to regulate onsite sewage systems, § 15.2-2157(C) specifically prohibits them from banning “the use of alternative onsite sewage systems that have been approved by the Virginia Department of Health” in areas where sewers or sewerage disposal facilities are not available.¹⁴ Furthermore, in subsection (D) the legislature mandated that localities “shall not require maintenance standards and requirements for alternative onsite sewage systems that exceed those allowed under or established by the State Board of Health pursuant to § 32.1-164.” Section 32.1-164 provides that the regulations of the State Board of Health may include “standards for the design, construction, installation, modification and operation of sewerage systems” as well as “performance requirements for nitrogen discharged from alternative onsite sewage systems that protect public health and ground and surface water quality.”¹⁵ The Board’s Alternative Onsite Sewage Regulations, which are a supplement to its Sewage Handling and Disposal Regulations,¹⁶ provide a definition of maintenance and prescribe certain maintenance and performance standards, vertical separation, and horizontal setback requirements which must be met by the owner and designer of the sewage system.¹⁷ The Sewage Handling and Disposal Regulations also provide for minimum reserve area requirements¹⁸ for the design of a system.

As noted above, localities do have the general authority pursuant to § 15.2-2157(A) to regulate sewage systems within their boundaries as long as that regulation does not provide for maintenance standards or requirements in excess of those articulated in the Board of Health Regulations, as required by § 15.2-2157(D). The December 3, 2010, Opinion of this Office delineated permissible and impermissible local ordinance requirements for alternative systems. First, the Opinion found that localities may not adopt maintenance standards for alternative systems that exceed those promulgated by the Board of Health. Second, localities are authorized to regulate, inspect and deny applications for alternative systems pursuant to §§ 15.2-2128 and 15.2-2157(A), but this authorization is substantially limited by § 15.2-2157(C) in cases where public sewer facilities are unavailable. Third, where public sewer facilities are unavailable, and a property owner meets the Board of Health’s regulatory requirements, a local ordinance exceeding such standards is without authorization from the General Assembly if its enforcement could result in the denial of such an application.

The March 9, 2012, Opinion of this Office is consistent with the December 3, 2010, Opinion in that it finds that where public sewage facilities are available to a landowner, localities may indeed adopt standards and regulations for alternative

systems that exceed those promulgated by the Board of Health and implemented through the Virginia Department of Health, provided that those standards are not related to alternative system maintenance. In response to Delegate Lingamfelter's first question, the March 9, 2012, Opinion found that a locality may not adopt a maintenance standard that exceeds the standards set by the Board of Health and, thus, that the specific bond requirement detailed in the facts of the letter was impermissible pursuant to § 15.2-2157(D).¹⁹ In response to the second question, this Office opined that a non-maintenance standard that exceeded state regulations is not a violation of § 15.2-2157, "provided [such regulations] do not function so as to in effect ban the use of an alternative system where the state regulations would allow for its operation."²⁰

Delegate Lingamfelter did not ask, and the Opinion did not address, whether the local non-maintenance standards exceeding the regulations promulgated by the Board of Health contemplated in his question were permissible in cases where sewers or sewerage disposal facilities were not available. Rather, the question presented in Delegate Lingamfelter's letter was silent as to whether sewage facilities were available. Therefore, the 2012 Opinion is consistent with the findings of the 2010 Opinion, and the two can be read together as holding that localities cannot enact ordinances with standards or requirements greater than those of the state regulations where sewers or sewage facilities are not available.

The Commonwealth follows the Dillon Rule of strict construction, which "provides that municipal corporations have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable."²¹ Thus, "[w]hen a local ordinance exceeds the scope of this authority, the ordinance is invalid."²² Where sewers or sewage facilities are not available, Virginia Code §§ 15.2-2157(C) and (D) prohibit a locality from establishing standards and requirements for the use of alternative onsite systems which exceed those established by the Alternative Onsite Sewage Regulations administered by the Department of Health. Any local ordinance that requires more stringent standards than those found within the state regulations would act, in effect, to ban the use of an alternative system where the state regulations would allow for its operation.²³ Therefore, to the extent that public sewer facilities are unavailable and there are any requirements for alternative systems in a locality's ordinance which are in excess of the requirements set forth in the Board of Health's regulations, the ordinance exceeds the scope of the authority granted to localities pursuant to §§ 15.2-2157(C) and (D) and violates the Dillon Rule.

CONCLUSION

Accordingly, it is my opinion that a Virginia locality cannot adopt requirements and standards for alternative onsite sewage systems that are in addition to or more stringent than those enacted by the Board of Health and administered through the Virginia Department of Health when the conditions set forth in § 15.2-2157(C) exist, namely that (i) there is no sewer or sewerage disposal facility available and (ii) the alternative onsite sewage system has been approved by the Virginia Department of Health for use in the particular circumstances and conditions in which the proposed system is to be operating.

¹ 2009 Va. Acts chs. 220, 296.

² See 12 VA. ADMIN. CODE. §§ 5-613-10 through 5-613-210; 2009 Op. Va. Att’y Gen. 3. Pursuant to 12 VA. ADMIN. CODE. § 5-613-40, the regulations are designed to be a supplement to the Sewage Handling and Disposal Regulations, 12 VA. ADMIN. CODE. § 5-610 *et seq.* promulgated by the Virginia Department of Health, and prescribe certain requirements for alternative onsite sewage systems depending upon the designer of the system. See 12 VA. ADMIN. CODE. § 5-613-10 through 12 VA. ADMIN. CODE. § 5-613-210.

³ See 2009 Va. Acts chs. 786, 846; VA. CODE ANN. § 15.2-2157(C) (2012).

⁴ Section 15.2-2157(D).

⁵ 2010 Op. Va. Att’y Gen. 53.

⁶ *Id.* at 54-55.

⁷ A third question, which dealt with recommendations for legislation in the event either question was answered in the affirmative, is not material to this inquiry. Letter of L. Scott Lingamfelter, Member of the Virginia House of Delegates to the Honorable Kenneth T. Cuccinelli, Jr., Attorney General of Virginia (August 3, 2011).

⁸ 2012 Op. Va. Att’y Gen. No. 11-100, *available at*

<http://www.ag.virginia.gov/Opinions%20and%20Legal%20Resources/Opinions/2012opns/11-100%20Lingamfelter.pdf>.

⁹ *Id.* at 3-4.

¹⁰ See 12 VA. ADMIN. CODE. § 5-613-80. Table 2 provides the minimum vertical separation distance to a limiting feature.

¹¹ Section 15.2-2157(A) was amended in 2005 to designate the first paragraph as subsection (A), but the authorization for localities to regulate onsite sewage systems predated that amendment. 2005 Va. Acts ch. 814. That broad authority was restricted by the General Assembly’s 2009 amendments adding subsections (C), (D) and (E) to § 15.2-2157. 2009 Va. Acts chs. 786, 846.

¹² See, e.g., § 15.2-2126 (2012) (requiring notice and public hearing for the establishment or extension of sewer systems to serve three or more connections); § 15.2-2127 (2012) (authorizing localities to disapprove sewage systems if the locality finds for certain reasons that the sewage system is not capable of serving the proposed number of connections); § 15.2-2128, *infra*.

¹³ See § 15.2-2128 (2012) (“Notwithstanding any other provision of general law relating to the approval of sewage systems, the governing body of any county or town which has adopted a master plan for a sewage system is authorized to deny an application for a sewage system if such denial appears to it to be in the best interest of the inhabitants of the county or town.”).

¹⁴ Section 15.2-2157(C).

¹⁵ Section 32.1-164(B)(3) & (15) (2011).

¹⁶ 12 VA. ADMIN. CODE. §§ 5-610-20 through 5-610-1170:7.

¹⁷ See 12 VA. ADMIN. CODE. § 5-613-10 (defining “maintenance” as “performing adjustments to equipment and controls and in-kind replacement of normal wear and tear parts such as light bulbs, fuses, filters, pumps, motors, or other like components. Maintenance includes pumping the tanks or cleaning the building sewer on a periodic basis. Maintenance shall not include replacement of tanks, drainfield piping, and distribution boxes or work requiring a construction permit and an installer.”); see also 12 VA. ADMIN. CODE. § 5-613-80 (providing performance requirements for alternative systems).

¹⁸ See 12 VA. ADMIN. CODE. § 5-610-710.

¹⁹ See 2012 Op. Va. Att’y Gen. No. 11-100 at 3-4.

²⁰ *Id.* at 4.

²¹ *Marble Techs., Inc. v. City of Hampton*, 279 Va. 409, 417, 690 S.E.2d 84, 88 (2010) (quoting *Bd. of Zoning Appeals v. Bd. of Supvrs.*, 276 Va. 550, 553-54, 666 S.E.2d 315, 317 (2008)). See also *Bd. of*

Supvrs. v. Countryside Inv. Co., 258 Va. 497, 502-05, 522 S.E.2d 610, 612-14 (1999) (citing Bd. of Supvrs. v. Horne, 216 Va. 113, 117, 215 S.E.2d 453, 455-56 (1975) in applying corollary rule to counties).

²² City of Chesapeake v. Gardner Enters. Inc., 253 Va. 243, 246, 482 S.E.2d 812, 814 (1997); *see also* Bd. of Supvrs. v. Reed's Landing Corp., 250 Va. 397, 400, 463 S.E.2d 668, 670 (1995) ("If there is a reasonable doubt whether legislative power exists, the doubt must be resolved against the local governing body.").

²³ *See* 2010 Op. Va. Att'y Gen. at 53. Section 15.2-2157(D), unlike subsection (C), does not contain the language, "[w]hen sewers or sewerage disposal facilities are not available;" therefore, it is presumed that the General Assembly intended for subsection (D) to apply whether or not a sewer or sewerage disposal system is available. *See* Logan v. City Council, 275 Va. 483, 492, 659 S.E.2d 296, 301 (2008) ("We determine the General Assembly's intent from the words employed in the statutes."); *see also* City of Richmond v. Confere Club of Richmond, 239 Va. 77, 80, 387 S.E.2d 471, 473 (1990) ("Legislative intent is determined from the plain meaning of the words used.").

OP. NO. 12-059

COUNTIES, CITIES AND TOWNS: JOINT ACTIONS BY LOCALITIES

Multiple localities and school boards may create a single voluntary, self-funded trust to insure health benefits for their employees and the families of their employees as a joint exercise of power.

THE HONORABLE EMMETT W. HANGER, JR.

MEMBER, SENATE OF VIRGINIA

THE HONORABLE RICHARD P. BELL

MEMBER, HOUSE OF DELEGATES

OCTOBER 5, 2012

ISSUE PRESENTED

You ask whether multiple localities and school boards may create a single voluntary, self-funded trust to insure health benefits for their employees and the families of their employees as an authorized joint exercise of power pursuant to the "Joint Powers Act."¹

RESPONSE

It is my opinion that multiple localities and school boards may create a single voluntary, self-funded trust to insure health benefits for their employees and the families of their employees as a joint exercise of power.

BACKGROUND

You state that Augusta County and the cities of Staunton and Waynesboro, along with their respective public school systems, desire to create a self-funded trust through which they would provide health insurance to their employees. You indicate that this trust would be created by an agreement between the political subdivisions pursuant to the Joint Powers Act.

APPLICABLE LAW AND DISCUSSION

Virginia follows the Dillon Rule of strict construction regarding the powers of local governing bodies, whereby such powers are limited to those conferred expressly by law or necessarily implied from conferred powers.² The Dillon Rule also applies to schools boards.³ Once a power is conferred, § 15.2-1300(A) provides that

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

Accordingly, if localities and school divisions⁴ are afforded the authority to establish separately a self-funded employee health insurance trust, then they may do so jointly, provided no other Code provision governs such joint exercise.

Section 15.2-1517(A) expressly authorizes localities to provide health insurance programs for its officers and employees, while, pursuant to § 22.1-85, “[a]ny school board may establish a fund for the payment of hospital, medical, surgical and related services provided any of its officers, employees and their dependents” The health insurance offered by a locality “may be through a program of self-insurance, purchased insurance, or partial self-insurance and purchased insurance, whichever is determined to be the most cost effective;”⁵ and the fund established by a school board can be created “out of funds appropriated to the school board or by payroll deductions or other mode consistent with state and federal income tax law and regulations.”⁶

“Self-insurance” generally refers to any “plan under which a business sets aside money to cover any loss.”⁷ Thus, the localities’ plan to create a self-funded trust, as your inquiry presents it, comports with the authority granted them under § 15.2-1517. Further, a trust ordinarily is considered a specific type of fund;⁸ thus school divisions are authorized to create a self-funded health insurance fund under § 22.1-85. Accordingly, because each political subdivision is authorized to establish its own separate voluntary self-funded trust to insure health benefits for employees and their families, I conclude that the localities and their respective school divisions may collaborate in their exercise of such power and create such a fund jointly pursuant to the Joint Powers Act.⁹

CONCLUSION

Accordingly, it is my opinion that multiple localities and school boards may create a single voluntary, self-funded trust to insure health benefits for their employees and the families of their employees as an authorized joint exercise of power pursuant to the Joint Powers Act.

¹ VA. CODE ANN. §§ 15.2-1300 through 15.2-1310 (2012).

² See, e.g., *Commonwealth v. Cnty. Bd.*, 217 Va. 558, 573-74, 232 S.E.2d 30, 40 (1977).

³ See *id.* at 574, 232 S.E.2d at 40.

⁴ School divisions are “political subdivisions” for purposes of § 15.2-1300(A). 1985-86 Op. Va. Att’y Gen. 79 (applying predecessor statute to § 15.2-1300 to proposed activity to be exercised by localities in concert with school board) (citing 1976-77 Op. Va. Att’y Gen. 99).

⁵ Section 15.2-1517.

⁶ VA. CODE ANN. § 22.1-85 (2011).

⁷ BLACK’S LAW DICTIONARY 807 (7th ed. 1999).

⁸ *See id.* at 682 (“fund”) and 1520 (“trust fund”). *See also* VA. CODE ANN. § 6.2-1094 (employing the term “trust fund” throughout the statute).

⁹ The joint exercise of power pursuant to the Joint Powers Act is limited “where an express statutory procedure is otherwise provided for the joint exercise.” Section 15.2-1300(A). There is no statutory procedure provided for the joint exercise of power in creating a self-funded trust to pay for health insurance programs for employees. Although political subdivisions are granted the additional power to contract with one another to form a group self-insurance pool for accident and health coverage, § 15.2-2703(A)(3), the provisions governing such pools establish the pools as separate bodies and do not relate to or specify any process to be used in setting up a self-funded trusts to insure health benefits.

OP. NO. 11-129

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

Phrase “agricultural products,” as stated in § 15.2-2288, is not defined by the definitions set forth in § 3.2-6400.

THE HONORABLE THOMAS K. NORMENT, JR.

MEMBER, SENATE OF VIRGINIA

JANUARY 6, 2012

ISSUE PRESENTED

You inquire whether the phrase “agricultural products,” as stated in § 15.2-2288, is defined by the definitions set forth in § 3.2-6400?

RESPONSE

It is my opinion that the phrase “agricultural products,” as stated in § 15.2-2288, is not defined by the definitions set forth in § 3.2-6400.

APPLICABLE LAW AND DISCUSSION

Section 15.2-2288 provides that a local zoning ordinance shall not require a special exception or special use permit for any production agriculture or silviculture activity in an area zoned as an agricultural district or classification.¹ The section further explains that this activity is “the bona fide production or harvesting of agricultural or silviculture products.” The Code does not provide a definition for “agricultural products” as the phrase is used in § 15.2-2288 is not defined by statute. In the absence of a statutory definition, the plain and ordinary meaning of a term is controlling, given the context in which it is used.²

The General Assembly has set forth elsewhere in the Code several statutory definitions of the phrase “agricultural products” but has confined the applicability of

each such definition to the specific subject matter of the chapter or article involved. For example, § 3.2-6400 expressly provides that the definitions set forth therein are “[a]s used in this chapter, unless the context requires a different meaning.”³ When statutory language is clear and unambiguous, the plain meaning of the language used should determine the legislative intent, unless such a literal construction would lead to a manifest absurdity.⁴ Therefore, the definition of “agricultural products” found in § 3.2-6400 only applies to the use of that phrase in Chapter 64, relating to agritourism activity liability, of Title 3.2.

For comparison, “agricultural product” is defined differently in § 3.2-4300,⁵ for use of that phrase in Article 1 of Chapter 43, relating to grades, marks and brands, of Title 3.2, than it is defined in § 3.2-6400.⁶ Yet another definition of “agricultural products” is found in the Agricultural Cooperative Association Act in Title 13.1.⁷ Likewise, yet another definition for the term “agricultural products” is set forth in Title 15.2 for use in the Agricultural and Forestal Districts Act.⁸ Given the various definitions of “agricultural products” and the express limitations on their application established in the Code, I conclude that the General Assembly did not intend the definition of “agricultural products” provided by § 3.2-6400 to serve as the definition of the phrase as used in § 15.2-2288.⁹

CONCLUSION

Accordingly, it is my opinion that the phrase “agricultural products,” as stated in § 15.2-2288, is not defined by the definitions set forth in § 3.2-6400.

¹ VA. CODE ANN. § 15.2-2288 (2008).

² See *Sansom v. Bd. of Supvrs.*, 257 Va. 589, 594-95, 514 S.E.2d 345, 349 (1999); *Hubbard v. Henrico Ltd. P’ship*, 255 Va. 335, 340, 497 S.E.2d 335, 338 (1998); *Commonwealth v. Orange-Madison Coop. Farm Serv.*, 220 Va. 655, 658, 261 S.E.2d 532, 533-34 (1980). See also 1987-88 Op. Va. Att’y Gen. 423, 426-27 (referring to Black’s Law Dictionary’s definition of “agricultural product” in construing “nonagricultural and nonforestry product” for purposes of a statute requiring certain truck loads to be covered because the phrase was not otherwise defined by statute in order to give it “its usual, commonly understood meaning, with the primary objective being to give effect to the legislative intent behind its enactment.”).

³ See VA. CODE ANN. § 3.2-6400 (2008).

⁴ See *HCA Health Svcs. of Va., Inc. v. Levin*, 260 Va. 215, 220, 530 S.E.2d 417, 419-20 (2000). See also *Wright v. Commonwealth*, 278 Va. 754, 759, 685 S.E.2d 655, 657 (2009).

⁵ The term “agricultural product” is defined in § 3.2-4300 (2008) to mean “any horticultural, viticulture, dairy, livestock, poultry, bee, or other farm or garden product.”

⁶ The term “agricultural products” is defined in § 3.2-6400 to mean “any livestock, aquaculture, poultry, horticultural, floricultural, viticulture, silvicultural, or other farm crops.”

⁷ Agricultural Cooperative Association Act, §§ 13.1-312 through 13.1-345 (2011). As used in this act, the term “agricultural products” is defined in § 13.1-313 to include “livestock and livestock products, dairy products, poultry and poultry products, wine and viticultural products, seeds, nuts, ground stock, horticultural, floricultural, forestry, bee and any and all kinds of farm products.”

⁸ Agricultural and Forestal Districts Act, §§ 15.2-4300 through 15.2-4314 (2008). As used in this act, the term “agricultural products” is defined in 15.2-4302 to mean “crops, livestock and livestock products, including but not limited to: field crops, fruits, vegetables, horticultural specialties, cattle, sheep, hogs, goats, horses, poultry, furbearing animals, milk, eggs and furs.” This same definition also is set forth in

§ 15.2-4402 (2008) for use in the Local Agricultural and Forestal Districts Act, §§ 15.2-4400 through 15.2-4407 (2008 & Supp. 2011).

⁹ Nonetheless, the statutory definitions of “agricultural products” found elsewhere in the Code, while not defining what the phrase means in § 15.2-2288, may be looked to as interpretative guides for determining the plain and ordinary meaning of the phrase as it is used in § 15.2-2288. *See* First Nat’l Bank of Richmond v. Holland, 99 Va. 495, 504, 39 S.E. 126, 129-30 (1901) (examining various sections of Code and history of legislation to determine whether terms “goods or chattels” were intended to embrace “choses in action” and stating that the “Code is one act, prepared and adopted as such, and therefore in construing section 2414 we are not confined to the language of that section, but can look to other sections of the Code where the same terms are employed.”). *See also* 1975-76 Op. Va. Att’y Gen. 3, 4-5 (the statutory definition of law-enforcement officer, while limited for use in Chapter 16, Title 9 of the Code, “does provide assistance in defining the term ‘law-enforcement officer’ in other sections of the Code”).

OP. NO. 12-029

COUNTIES, CITIES AND TOWNS: PUBLIC FINANCE ACT

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT

County may not apply proceeds of general obligation bonds issued by the county for one project to a different project unless the resolution or ordinance adopted by the county and submitted to the qualified voters authorizes the application of the bond proceeds to the other project.

JOHN R. ROBERTS, ESQUIRE

COUNTY ATTORNEY FOR LOUDOUN COUNTY

SEPTEMBER 28, 2012

ISSUE PRESENTED

You inquire whether Loudoun County (“County”) may apply proceeds of general obligation bonds issued by the County for one project, but no longer needed for that project, to a different project, when each project has been approved at referendum by the qualified voters of the County.

RESPONSE

It is my opinion that a county may not apply proceeds of general obligation bonds issued by the county for one project to a different project unless the resolution or ordinance adopted by the county and submitted to the qualified voters authorizes the application of the bond proceeds to the other project.

BACKGROUND

You relate that the County has a Capital Improvement Program (“CIP”) for a series of projects extending over a number of years. To fund that CIP, the County conducts a bond referendum each year to ask the voters to consider whether to approve the issuance of general obligation debt for specified projects. You also note that the County is very specific in its bond resolutions, typically reciting a specific amount to be authorized for each project listed in the referendum. In each fiscal year, the County projects the anticipated funding needed to construct approved projects and

determines the amount of general obligation debt to be issued. In some instances, a project will be completed under budget, and the County may have issued more debt than needed for that project. You also indicate that the County can use the leftover funds to pay debt service on the bonds or use the funds to call or defease the bonds.

APPLICABLE LAW AND DISCUSSION

The Constitution of Virginia provides that:

[n]o debt shall be contracted by or on behalf of any county or district thereof or by or on behalf of any regional government or district thereof except by authority conferred by the General Assembly by general law. The General Assembly shall not authorize any such debt ... unless in the general law authorizing the same, provision be made for submission to the qualified voters of the county or district thereof or the region or district thereof, as the case may be, for approval or rejection by a majority vote of the qualified voters voting in an election on the question of contracting such debt. Such approval shall be a prerequisite to contracting such debt.^[1]

The authority of a county to contract debt is set forth in general law pursuant to the Public Finance Act of 1991 (“Public Finance Act”).² The Public Finance Act provides that “any locality may ... contract debts for any project, borrow money for any project and issue bonds to pay all or any part of the cost of acquiring, constructing, reconstructing, improving, extending, enlarging and equipping any project.”³ As the constitutional provision requires, however, this authority is limited in that, generally, “no county has the power to contract any debt or to issue its bonds unless a majority of the voters of the county voting on the question at an election held in accordance with §§ 15.2-2610 and 15.2-2611 approve contracting the debt, borrowing the money and issuing the bonds.”⁴

The Public Finance Act establishes the procedures a county must follow to contract debt and issue general obligation bonds. First, the county “shall adopt an ordinance or resolution setting forth in brief and general terms *the purpose or purposes for which the bonds are to be issued* and the maximum amount of the bonds to be issued.”⁵ When voter approval is required, the ordinance or resolution must also “request the circuit court to order an election to be held pursuant to §§ 15.2-2610 and 15.2-2611 on the question of contracting the debt and issuing the proposed bonds.”⁶ Once certified by the clerk of the governing body, a copy of such resolution or ordinance is to be filed with the circuit court serving the locality.⁷ Then, “[t]he circuit court shall order a special election . . . [to] take the sense of the voters of the locality on the question of contracting the debt and issuing bonds *for the purpose or purposes set forth in the resolution or ordinance.*”⁸ Finally, “[i]f a majority of the voters of the locality voting on the question approve the bond issue . . . [t]he locality may then proceed to prepare, issue and sell its bonds up to the amount so authorized”⁹

Once the bond has been approved, the governing body is bound by the terms of the ordinance or resolution it submitted to the voters. The Supreme Court of Virginia has declared that “[t]he issuance of bonds pursuant to an election [by the voters of the respective county] must be in conformity with the terms and conditions of the

submission [to such voters,]”¹⁰ which, as noted above, is required to set forth “*the purpose or purposes for which the bonds are to be issued* and the maximum amount of the bonds to be issued.”¹¹ As this office consistently has opined, the proceeds of a bond issue may be used only for the purpose for which the bonds were issued¹² as expressed in the submission to voters.¹³ Although the question submitted to voters may be worded specifically or generally,¹⁴ a board of supervisors is bound by that language and, therefore, may not use bond proceeds for any use other than that expressly approved by the voters, as set forth in the bond referendum.¹⁵ Thus, if the resolution or ordinance approved by the voters sets forth a separate authorization amount for each project listed therein without language to permit the use of leftover bond funds authorized for one of the listed projects to be applied to another project listed in the resolution or ordinance, the governing body is bound by the language used and cannot reallocate those proceeds.

CONCLUSION

Accordingly, it is my opinion that a county may not apply proceeds of general obligation bonds issued by the county for one project to a different project unless the resolution or ordinance adopted by the county and submitted to the qualified voters authorizes the application of the bond proceeds to the other project.

¹ VA. CONST. art. VII, § 10(b).

² VA. CODE ANN. §§ 15.2-2600 through 15.2-2663 (2012).

³ VA. CODE ANN. § 15.2-2604(2). *See* § 15.2-2602 (defining “cost” and “project” broadly).

⁴ Section § 15.2-2638(A) (2012). There are specific exceptions to the general requirement, but none of the exceptions are germane to the facts set forth underlying the question presented. *See* § 15.2-2638(B).

⁵ Section 15.2-2640 (2012) (emphasis added).

⁶*Id.*

⁷ Section 15.2-2610.

⁸ *Id.* (emphasis added).

⁹ Section 15.2-2611.

¹⁰ *Miller v. Ayres*, 211 Va. 69, 78, 175 S.E.2d 253, 259 (1970).

¹¹ Section 15.2-2640 (emphasis added).

¹² *See* *Ops. Va. Att’y Gen.*: 1950-51 at 31; 1960-61 at 260; 1956-57 at 225; 1964-65 at 293.

¹³ *See* 1956-57 *Op. Va. Att’y Gen.* 225; 2001 *Op. Va. Att’y Gen.* 44, 45 n.3 and citations therein.

¹⁴ *See* 1960-61 *Op. Va. Att’y Gen.* 260, 263 (if question submitted to voters uses specific language, even if not required, school board’s use of bond proceeds is confined by the specific language used).

¹⁵ *Id.* *See also* 1970-71 *Op. Va. Att’y Gen.* 39, 40 (where bond referendum authorized \$7.5 million in bonds for construction of two high schools and two elementary schools, school board may use bond proceeds for three of the voter-approved school buildings, although funds are insufficient to construct all four schools authorized); 2001 *Op. Va. Att’y Gen.* at 44 (where bond record indicated that a different site could be a possibility, the locality was authorized to build approved library on an alternate site).

OP. NO. 11-079

COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURT

District court clerk may file an abstract of judgment with the circuit court for the costs assessed against the parents for legal services provided for a juvenile by appointed counsel or guardian ad litem.

When a juvenile is found to be delinquent and restitution is ordered, the restitution order cannot be docketed pursuant to § 8.01-446.

Victim named in a restitution order, but not the clerk, can release a restitution order once it is paid.

THE HONORABLE DWIGHT D. JOHNSON, JR.
JUDGE, FLUVANNA COUNTY COMBINED DISTRICT COURT
JUNE 18, 2012

ISSUES PRESENTED

You inquire whether, for certain accounts, a district court clerk may file an abstract of judgment with the circuit court for docketing in the circuit court's judgment book. Specifically, you ask whether the district court clerk may do so for unpaid assessments of costs related to court-appointed guardians ad litem or counsel, or for court-ordered restitution for damages caused by a juvenile's delinquent act. You also ask, once restitution has been paid in full, who can release the judgment, the clerk or the victim.

RESPONSE

It is my opinion that a district court clerk may file an abstract of judgment with the circuit court for the costs assessed under § 16.1-267 against the parents for legal services provided for a juvenile by appointed counsel or guardian ad litem. It is my further opinion that when a juvenile under the jurisdiction of a juvenile and domestic relations court is found to be delinquent and restitution is ordered, the restitution order cannot be docketed pursuant to § 8.01-446. Finally, it is my opinion that the victim named in a restitution order, but not the clerk, can release a restitution order once it is paid.

APPLICABLE LAW AND DISCUSSION

Juvenile and domestic relations district court judges, for certain cases, are required to appoint guardians ad litem or counsel to represent the interests of the minors over whom they are exercising jurisdiction.¹ In these cases, upon finding the parents financially able to pay, the court is directed to assess against the parents the costs for such legal services based on the amount the court awarded the appointed attorney.² This assessment, as part of a court order, constitutes a judgment against the parents.³ Additionally, a juvenile and domestic relations district court is expressly authorized to order a juvenile to pay restitution for damages caused by a delinquent act.⁴

There is no express authority permitting district courts to have docketed with the circuit court orders for the payment of costs or decrees ordering restitution. Nonetheless, pursuant to § 8.01-446,

The clerk of each court of every circuit shall keep in his office, in a well-bound book,...a judgment docket, in which he shall docket, without delay,...upon the request of any person interested therein, any such judgment rendered by a district court judge whose book has been filed in this office under the provisions of Title 16.1 or of which a legible abstract is delivered to him certified by the district court judge who rendered it....

Applying the plain language of the statute, a prior Opinion of this Office concluded that “[s]ection 8.01-446 does not permit a clerk of the circuit court to docket a judgment rendered in a court not of record unless docketing is requested by an interested person....”⁵

With regard to orders for the payment of costs, I conclude that the district court is an interested party authorized to present such a judgment to the circuit court clerk for docketing. The payment of such costs is controlled by § 19.2-163,⁶ which provides that, “[a]ll fees^[7] collected by the judge, substitute judge, clerk or employees, ...of a general district court or juvenile and domestic relations district court shall be paid promptly to the clerk of the circuit court who shall pay the same into the state treasury.” Moreover, district court clerks generally are charged with “keep[ing] the records and accounts of the court”⁸ while the “judge of each district court shall have management responsibility over the collection and distribution of all funds received by such court[.]”⁹ Based on these statutory duties, I conclude that district courts and their clerks are interested persons under § 8.01-466 for purposes of enforcing assessments for fees and costs, and that a district court clerk may file an abstract of judgment with the circuit court for the costs assessed pursuant to § 16.1-267 against parents for legal services provided a juvenile by appointed counsel or guardian ad litem.¹⁰

Section 8.01-446 also expressly provides for docketing restitution orders as judgments; however, the provision is limited to restitution ordered pursuant to Title 19.2.¹¹ There is no similar provision referencing restitution ordered pursuant to § 16.1-278.8(10), the section authorizing a district court to order restitution for damages caused by an act of delinquency by a juvenile. Moreover, restitution is to be made “to the aggrieved party or parties;” and is not assessed as costs. The victim, therefore, and not the district court, qualifies as a person interested in such a decree.¹² The district court’s role, when the order so provides, is limited to serving as a repository for any payments made pursuant to the restitution order. I therefore conclude that, because the district court is not a person interested in the satisfaction of restitution orders issued pursuant to § 16.1-278.8(10), there is no authority by which the circuit court clerk can docket the order as a judgment when presented to him by the district court clerk.¹³

You express concern regarding the potential for violating any rules pertaining to confidentiality in juvenile matters. The confidentiality of juvenile files and records is governed by § 16.1-305. It provides, in pertinent part, that “[a]ll other juvenile

records, including the docket, petitions, motions, and other papers filed with a case, transcripts of testimony, findings, verdicts, orders, and decrees shall be open to inspection only by those persons and agencies designated [by law.]” Nonetheless, the Code clearly contemplates that judgments rendered by district courts will be presented to and accepted by the circuit court for docketing;¹⁴ and the law permits any person having a legitimate interest in a case to inspect the file.¹⁵ Further, an abstract of judgment is at most an abbreviation or synopsis of a judgment prepared by the court following the court’s issuing an order to pay. An abstract of judgment contains the (1) date and amount of the judgment, (2) the time from which it bears interest, (3) the costs, (4) the full names of all the parties thereto, including the address, date of birth and the last four digits of the social security number, if known, of each party against whom judgment is rendered, (5) the alternative value of any specific property recovered by it, (6) the date and the time of docketing it, (7) the amount and date of any credits thereon, (8) the court by which it was rendered and the case number, and (9) when paid off or discharged in whole or in part, the time of payment or discharge and by whom made when there is more than one defendant.¹⁶ Notably, in cases involving orders assessing guardian ad litem and counsel fees, it is the parents’ information, and not the minor’s that would be pertinent. Accordingly, I conclude that confidentiality concerns do not bar a district court clerk from docketing, pursuant to § 8.01-446, an order for the payment of guardian ad litem and counsel fees.¹⁷

Finally, you ask whether a victim or the district clerk court can release a docketed restitution order once it is paid. As stated above, it is the victim, and not the court that is a person interested in the satisfaction of a restitution order. As a prior opinion of this Office concluded:

[I]f restitution is docketed as a judgment, the named victim is the judgment creditor for the purpose of releasing a satisfied judgment pursuant to §§ 8.01-453 and 8.01-454 and that such judgment may be released by the named victim, his agent or attorney.^[18]

Thus, it is my opinion that the victim named in a restitution order, but not the clerk, can release a restitution order once it is paid.

CONCLUSION

Accordingly, it is my opinion that a district court clerk may file an abstract of judgment with the circuit court for the costs assessed under § 16.1-267 against the parents for legal services provided for a juvenile by appointed counsel or guardian ad litem. It is my further opinion that when a juvenile under the jurisdiction of a juvenile and domestic relations court is found to be delinquent and restitution is ordered, the restitution order cannot be docketed pursuant to § 8.01-446. Finally, it is my opinion that the victim named in a restitution order, but not the clerk, can release a restitution order once it is paid.

¹ VA. CODE ANN § 16.1-266 (2010) (requiring appointment of guardian ad litem for cases involving a child who is: alleged to be abused or neglected, the subject of an entrustment agreement or a petition seeking termination of residual parental rights, awaiting a detention hearing, or otherwise before the court.)

² VA. CODE ANN. § 16.1-267(A) (2010) (compensation of counsel appointed under § 16.1-266). *See also* § 19.2-163 (2004).

³*See* VA. CODE ANN. § 8.01-426 (2007) (“Judgment” includes a “decree or order requiring the payment of money”); *see also* VA. CODE ANN. § 19.2-341(2008) (“costs taxed...shall constitute a judgment and,...execution may issue thereon in the same manner as upon any other monetary judgment”).

⁴ Section 16.1-278.8(10) (2010).

⁵ 1980-81 Op. Att’y Gen. 53, 53.

⁶ *See* VA. CODE ANN. § 16.1-267(A) and (B) (2010) (referencing § 19.1-2-163 regarding payment of costs assessed by a district court under § 16.1-266).

⁷ Section 16.1-69.48 (2010) (defining fees to “include all moneys from every source”).

⁸ Section 16.1-69.40 (2010) (prescribing the duties and powers of district court clerks).

⁹ Section 16.1-69.40:3 (2010). Although responsibility over funds is vested in the judge, the General Assembly clearly contemplated that clerks also would have a role in handling the court’s receipts, for the statute also limits a clerk’s, as well as the judge’s, personal liability for shortages in funds. *Id.*

¹⁰ *See* Commonwealth v. Zamani, 256 Va. 391, 395 507 S.E.2d 608, 609 (1998) (“The primary objective of statutory construction is to ascertain and give effect to legislative intent.”). *See also* Goble v. Commonwealth, 57 Va. App. 137, 153, 698 S.E.2d 931, 939 (2010) (quoting Mayhew v. Commonwealth, 20 Va. App. 484, 489, 458 S.E.2d 305, 307 (1995)) (“[W]hen statutory construction is required, [the courts] construe a statute to promote the end for which it was enacted, if such interpretation can reasonably be made from the language used.”)

¹¹ Section 8.01-446 specifically provides that “[a]n order of restitution docketed pursuant to § 19.2-305.2 shall have the same force and effect as a specific judgment for money....” Section 19.2-305.2(A) limits the application of this section to restitution ordered “pursuant to §19.2-305.1.” Section 19.2-305.1 covers restitution ordered against “a person convicted of a crime in violation of any provision in title 18.2.” *See* VA. CODE ANN. § 19.2-305.1(A), (B), and (B1) (2004).

¹² *See* 1987-88 Op. Va. Att’y Gen. 305.

¹³ Whether a restitution order entered by a district court pursuant to § 16.1-278.8(10) could docketed in the circuit court when presented by the victim of the delinquent act does not relate to your duties and is beyond the scope of this opinion.

¹⁴ Sections 8.01-446 (Supp. 2011); 16.1-96 (2010).

¹⁵ Section 16.1-305(A)(4).

¹⁶ *See* VA. CODE ANN. § 8.01-449 (2007). Section 16.1-96 provides that “[a]n abstract of judgment rendered in a court not of record shall contain the information required by § 8.01-449 for entry in the judgment dockets of courts not of record”

¹⁷ Because I previously determined that the district court may not present for docketing with the circuit court an order for restitution entered pursuant to § 16.1-278.8(10), I do not address the application of confidentiality to the docketing of such orders. *See supra*, note 13.

¹⁸ 1987-88 Op. Va. Att’y Gen. at 307.

OP. NO. 12-027

COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURT

Applicable statutes do not require the issuance of a subpoena to a local department of social services, because the department, as a non-party, is not required to attend any proceeding under those statutes.

Should a court want the local department to be present for such proceedings, then a subpoena or other court order can be issued to compel the local department to appear.

THE HONORABLE GAYL BRANUM CARR
JUDGE, JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT
MAY 25, 2012

ISSUE PRESENTED

You ask whether certain statutes in Title 16.1 of the *Code of Virginia* require the court to issue a subpoena to the local department of social services when the court is considering placing a child in the custody of that local department and the local department is not a party to the proceedings.¹

RESPONSE

It is my opinion that §§ 16.1-278.2, 16.1-278.3, 16.2-278.4, 16.1-278.5, 16.1-278.6 and 16.1-278.8 do not require the issuance of a subpoena to a local department of social services, because the department, as a non-party, is not required to attend any proceeding under those statutes. It is further my opinion that, should a court want the local department to be present for such proceedings, then a subpoena or other court order can be issued to compel the local department to appear.

APPLICABLE LAW AND DISCUSSION

As you note in your letter, there are a various types of cases before the juvenile and domestic relations district courts where one of the dispositional alternatives is transferring the custody of the child to the local board of social services.² These statutes require the local board to “accept the juvenile for care and custody, provided that it has been given reasonable notice of the pendency of the case and an opportunity to be heard.”³

Although the statutes require that the local board be given notice and an opportunity to be heard, the manner in which that is done is not prescribed in the statutes. Notice is not equivalent to a summons or subpoena.⁴ Although a subpoena could provide notice to the local board, one is not required to comply with the statutory notice requirement. Regardless of form, the notice must be timely and provide a description of the nature of the proceeding and the date and time it will take place.

Further, the opportunity to be heard is not the same as a requirement to attend. Nowhere in these statutes is there a provision requiring the local board to appear at the proceedings. As a non-party to the proceeding, the local board, absent a command of the court, is not obligated to attend and may choose not to appear. Thus, there is no requirement that a subpoena or other court order be issued to ensure the local department appear at the proceeding. Rather, provided proper notice has been given, the local department’s opportunity to be heard obviates the need for the subpoena by entitling the local department to be present at the proceeding and offer testimony on the matter before the court. Nonetheless, if the court wishes to have the local department present for these type of proceedings, then a subpoena or other court order can be issued to compel the local department to appear.⁵

CONCLUSION

Accordingly, it is my opinion that the specified statutes do not require the issuance of a subpoena to a local department of social services because the department is not required to attend any proceeding under those statutes. It is further my opinion that, should a court want the local department to be present for such proceedings, then a subpoena or other court order can be issued to compel the local department to appear.

¹ Each of the code sections you cite in your letter authorizes the court to make certain dispositions in proceedings involving juveniles. Those dispositions include transferring custody to “[t]he local board of social services of the county or city in which the court has jurisdiction or, at the discretion of the court, to the local board of the county or city in which the child has residence if other than the county or city in which the court has jurisdiction.” VA. CODE ANN. §§ 16.1-278.2(A)(4)(c), 16.2-278.4(6)(c), 16.1-278.6 and 16.1-278.8(A)(13)(c) (2010). Three other disposition statutes incorporate the dispositions set out in these statutes by reference: § 16.1-278.3 authorizes the court to make orders of disposition pursuant to §§ 16.1-278.2 and 16.1-278.3(C), and §§ 16.1-278.5 and 16.1-278.6 authorize the court to “[e]nter any order of disposition authorized by § 16.1-278.4.”

² The local board of social services is the legal entity authorized to accept the custody of children and make foster care placements. VA. CODE ANN. § 63.2-900 (Supp. 2011). Local departments of social services in essence are the staff for the local boards and carry out the administration of various programs in Title 63.2. Sections 63.2-324, 63.2-325, and 63.2-332 (2007). This opinion recognizes the common practice of referring to these two entities as one and the same.

³ Sections 16.1-278.2(A)(4)(c), 16.2-278.4(6)(c), 16.1-278.6, and 16.1-278.8(A)(13)(c).

⁴ *See, e.g.*, § 16.1-283 (2010).

⁵ VA. CODE ANN. § 8.01-407 (Supp. 2011). I note that failing to subpoena the local board does not prevent the court from exercising its authority to place the child in the custody of the local board. Although the subpoena may be the means by which the local board is compelled to appear at the hearing, courts still may transfer custody to the local board in the board’s absence, provided notice and an opportunity to be heard were given. Failing to appear at a hearing for which it received proper notice cannot be used by a local board as an attempt to avoid receiving custody of a child. Furthermore, the various dispositional statutes clearly allow for emergency placements that are made without notice and an opportunity to be heard: “in an emergency in the county or city in which the court has jurisdiction, the local board may be required to accept a child for a period not to exceed fourteen days without prior notice or an opportunity to be heard if the judge entering the placement order describes the emergency and the need for such temporary placement in the order.” Sections 16.1-278.2(A)(4)(c), 16.2-278.4(6)(c), 16.1-278.6, and 16.1-278.8(A)(13)(c).

OP. NO. 12-028

COURTS OF RECORD: CLERKS, CLERKS’ OFFICES AND RECORDS

Clerk cannot collect a returned check fee in a civil case.

THE HONORABLE EUGENE C. WINGFIELD
CLERK OF COURT, LYNCHBURG CIRCUIT COURT
JUNE 8, 2012

ISSUE PRESENTED

You inquire whether the clerk of a circuit court can assess a returned check fee in civil cases.

RESPONSE

It is my opinion that the clerk cannot collect a returned check fee in a civil case.

APPLICABLE LAW AND DISCUSSION

Three sections of the *Code of Virginia* are applicable to your inquiry. First, § 2.2-614.1 provides, in pertinent part:

A. Subject to § 19.2-353.3, any public body^[1] 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.

* * *

C. If any check or other means of payment tendered to a public body in the course of its duties is not paid by the financial institution on which it is drawn, . . . and the check or other means of payment is returned to the public body unpaid, the amount thereof shall be charged to the person on whose account it was received, and his liability and that of his sureties, shall be as if he had never offered any such payment. A penalty of \$35 or the amount of any costs, whichever is greater, shall be added to such amount. This penalty shall be in addition to any other penalty provided by law, except the penalty imposed by § 58.1-12 shall not apply.

Second, § 17.1-275 sets forth which fees shall be collected by circuit court clerks. It provides, in relevant part:

A. A clerk of a circuit court shall, for services performed by virtue of his office, charge the following fees:

* * *

28. For the return of any check unpaid by the financial institution on which it was drawn or notice is received from the credit card issuer that payment will not be made for any reason, the clerk shall collect, if allowed by the court, a fee of \$20 or 10 percent of the amount to be paid, whichever is greater, *in accordance with § 19.2-353.3*.

(Emphasis added). This statute contains no other reference to fees for returned checks.

Lastly, § 19.2-353.3, which both § 2.2-614.1 and § 17.1-275 reference, provides that:

[P]ersonal checks and credit cards shall be accepted in lieu of money to collect and secure all fees, fines, restitution, forfeiture, penalties and costs collected for offenses tried in a district court, including motor vehicle violations, committed against the Commonwealth or against any county, city or town. . . . [P]ersonal checks shall be accepted in lieu of money to collect and secure all fees, fines, restitution, forfeiture, penalties and costs collected for offenses tried in a circuit court, including motor vehicle

violations, committed against the Commonwealth or against any county, city or town. . . .

If a check is returned unpaid by the financial institution on which it is drawn or notice is received from the credit card issuer that payment will not be made, for any reason, the fees, fine, restitution, forfeiture, penalty or costs shall be treated as unpaid, and the court may pursue all available remedies to obtain payment. The clerk of the court to whom the dishonored check or credit card was tendered may impose a fee of twenty dollars or ten percent of the value of the payment, whichever is greater, in addition to the fine and costs already imposed.

(Emphasis added). There is no equivalent provision in Titles 8.01, 16.1 or 17.1, which govern, generally, civil procedure, courts not of record and circuit courts, respectively.

Statutes are to be construed according to their plain language,² and those dealing with the same subject matter should be construed together to achieve a harmonious result, resolving conflicts to give effect to legislative intent.³ The phrases “subject to § 19.2-353.3” and “in accordance with § 19.2-353.3” as found in §§ 2.2-614.1 and 17.1-275, respectively, evince an intent by the General Assembly that the collection of fees for returned checks by clerks of circuit court is to be governed by § 19.2-353.3, rather than by the more generally applicable fee provisions. Moreover, in instances where it is not clear which of a number of statutes is applicable, or when statutes provide different procedures on the same subject matter, the more specific prevails over the more general.⁴ By its terms, § 19.2-353.3 is limited to the collection of fees by the clerk for “offenses . . . committed against the Commonwealth or against any county, city or town” I therefore conclude that there is no authority for a clerk of a circuit court to collect a returned check fee in a civil case.

CONCLUSION

Accordingly, it is my opinion that in a civil case, after a check received in the course of the clerk’s duties is returned, the clerk of a circuit court cannot assess a fee related to the returned check.

¹ This Office has opined that “[t]he clerk of the circuit court is a ‘public body’ subject to The Virginia Freedom of Information Act,” based on § 2.2-3701, which establishes that “constitutional officers shall be considered public bodies.” 2004 Op. Va. Att’y Gen. 88, 89. Further, in determining whether the Virginia State Bar was a public body under § 2.2-614.1, this Office, in the absence of a definition in that provision, looked to § 2.2-3701; for “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.’” 2008 Op. Va. Att’y Gen. 6, 7 (quoting *King v. Commonwealth*, 2 Va. App. 708, 710, 347 S.E.2d 530, 531 (1986)).

² *Signal Corp. v. Keane Fed. Sys.*, 265 Va. 38, 46-47, 574 S.E.2d 253, 257 (2003).

³ *See, e.g.*, 2009 Op. Va. Att’y Gen. 115, 118 (citing 2B NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 46:5 (West 7th ed. 2008)).

⁴ *See, e.g.*, 2009 Op. Va. Att’y Gen. 12, 15 and citations therein.

OP. NO. 12-080

CRIMES AND OFFENSES GENERALLY: CRIMES AGAINST ADMINISTRATION OF JUSTICE

CONSTITUTION OF VIRGINIA: EXECUTIVE/FRANCHISE AND OFFICERS

Restoration of the right to vote removes the disability to hold office imposed by § 18.2-434.

THE HONORABLE RONALD K. ELKINS

COMMONWEALTH'S ATTORNEY, WISE COUNTY & CITY OF NORTON

NOVEMBER 16, 2012

ISSUE PRESENTED

You inquire whether, in light of the language of § 18.2-434, a person convicted of perjury may seek election to public office after his political rights have been restored by the governor.

RESPONSE

It is my opinion that such a person is eligible to hold elective office.

APPLICABLE LAW AND DISCUSSION

Section 18.2-434 provides, in relevant part, that “[u]pon the conviction of any person for perjury, such person thereby shall be adjudged forever incapable of holding any office of honor, profit or trust under the Constitution of Virginia, or of serving as a juror.” You ask whether “forever” encompasses any time after any such person has his political rights restored by the governor.

Acts of the General Assembly are to be harmonized with the Constitution of Virginia.¹ Article II, § 5 of the Constitution of Virginia, which governs qualifications to hold elective office, provides that

the **only** qualification to hold any office of the Commonwealth or of its governmental units, elective by the people, shall be that a person must have been a resident of the Commonwealth for one year next preceding his election and be qualified to vote for that office, except as otherwise provided in this Constitution. [Emphasis added.]

Section 5 authorizes the General Assembly to impose stricter residence requirements and further limitations based on conflicts of interests.² In applying these provisions, the Supreme Court of Virginia has stated, “it is a well established rule of construction . . . that when the constitution defines the qualifications for office, the specification is an implied prohibition against legislative interference to change or add to the qualifications so defined.”³ Prior opinions of the Attorney General also have concluded that the General Assembly may not impose requirements on candidates for election to a governing body beyond those specified in the Virginia Constitution.⁴

Article II, § 1 provides that “[n]o person who has been convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor or other appropriate authority.” Article V, § 12 in turn grants the Governor the authority to

“to remove political disabilities,” which includes the ability to restore a felon’s right to vote. Because the right to vote is the sole qualification for a Virginia resident to hold office, the restoration of that right to a person convicted of a felony, including perjury, renders that person constitutionally eligible to hold office. Moreover, the authority conferred on the Governor by Article V, § 12 “to remove political disabilities consequent upon conviction for offenses” is broad enough to include those imposed by § 18.2-434.

I therefore conclude that the word “forever,” as used in § 18.2-434, is to be construed in conformity with the aforementioned authorities, so that it is limited to the time before a person convicted of perjury has his political rights restored by the governor.

CONCLUSION

Accordingly, it is my opinion that the restoration of the right to vote removes the disability to hold office imposed by § 18.2-434.

¹ “No act of the legislature should be . . . so construed as to bring it into conflict with constitutional provisions unless such a construction is unavoidable.” *Dean v. Paolicelli*, 194 Va. 219, 227, 72 S.E.2d 506, 511 (1952).

² Article II, § 5 expressly provides:

(a) the General Assembly may impose more restrictive geographical residence requirements for election of its members, and may permit other governing bodies to impose more restrictive geographical residence requirements for election to such governing bodies;

(b) the General Assembly may provide that residence in a local governmental unit is not required for election to designated local offices, other than the governing body; and

(c) the section does not limit the power of the General Assembly to prohibit certain conflicts of interest, dual officeholding or other incompatible activities by elective or appointive officials.

³ *Black v. Trower*, 79 Va. 123, 125-26 (1884).

⁴ See 1993 Op. Va. Att’y Gen. 44, 45-46, (Article II, § 5 prohibits General Assembly from amending city’s charter to provide that, in popular election of mayor, only elected members of city council or candidates for election to city council are eligible to be candidates for separate election as mayor); 1997 Op. Va. Att’y Gen. 36, 36-37 (a condition imposed by board of supervisors, when appointing a replacement member to the board, prohibiting the appointed replacement from later seeking election to the board is unconstitutional and void); 1991 Op. Va. Att’y Gen. 53, 54-55 (statute imposing a limit of two terms on members of local governing body imposes an additional qualification in violation of Virginia Constitution); 2010 Op. Va. Att’y Gen. 44 (locality not authorized to enact ordinance preventing spouses from concurrently holding interrelated offices). See also 1 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 394-95 (1974) (qualifications for elective office prescribed in Virginia Constitution can neither be added to nor subtracted from except as expressly provided in Virginia Constitution).

OP. NO. 12-096

CRIMES AND OFFENSES GENERALLY: CRIMES AGAINST ADMINISTRATION OF JUSTICE

CONSTITUTION OF VIRGINIA: EXECUTIVE

Restoration of political rights removes the bar from jury service imposed by § 18.2-434.

THE HONORABLE J. JACK KENNEDY, JR.
CLERK OF THE CIRCUIT COURT, WISE COUNTY & CITY OF NORTON
NOVEMBER 16, 2012

ISSUE PRESENTED

You inquire whether, in light of the language of § 18.2-434, a person convicted of perjury may serve as a juror after his political rights have been restored by the governor.

RESPONSE

It is my opinion that such a person is eligible to serve on a jury.

APPLICABLE LAW AND DISCUSSION

Section 8.01-338 expressly disqualifies from jury service persons convicted of a felony. In addition, § 18.2-434 specifically provides, in relevant part, that “[u]pon the conviction of any person for perjury, such person thereby shall be adjudged forever incapable of holding any office of honor, profit or trust under the Constitution of Virginia, or of serving as a juror.” You ask whether “forever” encompasses any time after any such person has his political rights restored by the governor, so that the Governor must specifically remit the prohibition imposed on a perjurer in order for such person again to be eligible to serve on a jury.

A recent opinion of this Office addressed § 18.2-434 in regard to its restriction on the ability to hold elective office. It concluded, based on the Constitution of Virginia, that the provision could not be construed to allow the prohibition to continue to apply to persons convicted under the statute who subsequently have their political rights, namely the right to vote, restored by the governor.¹ Unlike the qualifications to hold elective office, the ability to serve on a jury is not governed by any constitutional provisions or tied to the right to vote. Thus, the General Assembly generally is able to impose limitations on jury service as it deems appropriate.²

Nonetheless, Article V, § 12 of the Virginia Constitution grants the Governor the authority “to remove political disabilities.” The right to serve on a jury is generally considered a political right subject to restoration under this provision.³ A separate remittance of the penalty therefore is not necessary, for, as stated in the prior opinion, the authority conferred on the Governor “to remove political disabilities consequent upon conviction for offenses” is broad enough to include those imposed by § 18.2-434. Moreover, while the governor is also authorized “to remit fines and penalties under such rules and regulations as may be prescribed by law,”⁴ his power to remove political disabilities is not subject to limitation by law. Thus, because Acts of the General Assembly are to be harmonized with the Constitution of Virginia,⁵ I conclude that the word “forever,” as used in § 18.2-434, is to be construed so that it is limited to the time before a person convicted of perjury has his political rights restored by the governor.⁶

CONCLUSION

Accordingly, it is my opinion that the restoration of political rights removes the bar from jury service imposed by § 18.2-434.

¹ 2012 Op. Va. Att’y Gen. No. 12-080, *available at*

<http://www.ag.virginia.gov/Opinions%20and%20Legal%20Resources/Opinions/2012opns/12-080%20Elkins.pdf>.

² *See, e.g.*, VA. CODE ANN. §§ 8.01-337 through 8.01-341.2 (2007 & Supp. 2012) (establishing, among other things, qualifications and exemptions for jury service). The power of the General Assembly is plenary, limited only by the Constitutions of the United States and Virginia. *See* VA. CONST. art. IV, § 14 (“The authority of the General Assembly shall extend to all subjects of legislation not herein forbidden or restricted; and a specific grant of authority in this Constitution upon any subject shall not work a restriction of its authority upon the same or any other subject.”). *See also* *Dean v. Paolicelli*, 194 Va. 219, 227, 72 S.E.2d 506, 511 (1952) (“The Constitution is not a grant of power, but only the restriction of powers otherwise practically unlimited, and except as far as restrained by the Constitution of this State and the Constitution of the United States, the legislature has plenary power.”) (quoting *Newport News v. Elizabeth City County*, 189 Va. 825, 831, 55 S.E.2d 56, 60 (1949)).

³ Generally, a “political right” involves “[t]he right to participate in the establishment or administration of government . . . [.]” BLACK’S LAW DICTIONARY 1323 (7th ed. 1999); serving on a jury constitutes participation in the administration of the judicial branch of government. *See* *Prichard v. Battle*, 178 Va. 455, 464, 17 S.E.2d 393 (1941) (“a pardon ‘restores one to the customary civil rights which ordinarily belong to a citizen of the State, which are generally conceded or recognized to be the right to hold office, to vote, to serve on a jury, to be a witness[.]’”) (citing *Page v. Watson*, 192 So. 205 (Fla. 1938). *Compare* *Gallagher v. Commonwealth*, 284 Va. 444, 732 S.E.2d 22 (2012) (“We construe the term ‘power to . . . remove political disabilities’ not to include the power to restore firearm rights. . . . Thus, the Governor is empowered to remove political disabilities, not to restore all rights lost as result of a felony conviction.”).

⁴ VA. CONST. art. V, §12.

⁵ “No act of the legislature should be . . . so construed as to bring it into conflict with constitutional provisions unless such a construction is unavoidable.” *Paolicelli*, 194 Va. at 227, 72 S.E.2d at 511.

⁶ Notably, the Secretary of the Commonwealth states that “[t]he restoration of rights restores the rights to vote, to run for and hold public office, to serve on juries and to serve as a notary public.” Moreover, “perjury” is expressly listed among those felony offenses that require only a short 2-year, rather than the long 5-year application to be filed by a person seeking restoration of rights. *See* <http://www.commonwealth.virginia.gov/judicialsystem/clemency/restoration.cfm>.

OP. NO. 11-111

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY

Provided handgun is properly secured in a container or compartment within the vehicle, persons who may lawfully possess a firearm but have not been issued a concealed weapons permit may possess, in a vehicle, a handgun that is loaded and the handgun may remain within reach of a driver or passenger under such conditions.

For a handgun to be “secured in a container or compartment,” such storage tool need not be locked.

Individual may not keep a firearm stored in his vehicle at a place of employment if there is a company policy or signage prohibiting firearms on the premises.

THE HONORABLE STEPHEN D. NEWMAN
MEMBER, SENATE OF VIRGINIA
MAY 25, 2012

ISSUES PRESENTED

You present several questions related to the possession and storage of firearms in vehicles by persons who may lawfully possess a firearm but have not been issued a concealed weapons permit. You first ask whether a handgun can be loaded inside a vehicle and under what conditions. Your second inquiry concerns whether a handgun can be within the reach of a driver or a passenger inside a vehicle. You next ask whether a center console, glove compartment or any other “container or compartment must be locked to constitute a “secured container or compartment.” Finally, you ask whether an individual can keep a firearm in their vehicle at their place of employment even if there is a company policy or signage stating it is not allowed.

RESPONSE¹

It is my opinion that, provided the handgun is properly secured in a container or compartment within the vehicle, persons who may lawfully possess a firearm but have not been issued a concealed weapons permit may possess, in a vehicle, a handgun that is loaded and the handgun may remain within reach of a driver or passenger under such conditions. It further is my opinion that, for a handgun to be “secured in a container or compartment,” such storage tool need not be locked. Finally, it is my opinion that an individual may not keep a firearm stored in his vehicle at a place of employment if there is a company policy or signage prohibiting firearms on the premises.

APPLICABLE LAW AND DISCUSSION

Section 18.2-308(A) of the *Code of Virginia* prohibits the carrying of a concealed weapon without a permit. Prior to 2010, unless a limited exception applied, this restriction precluded the transportation of a handgun in a concealed manner in a vehicle, including instances where the firearm was stored in a glove compartment or center console.² In 2010, the General Assembly amended § 18.2-308 to add § 18.2-308(B)(10),³ which carves out a further exception for “any person who may lawfully possess a firearm and is carrying a handgun while in a personal, private motor vehicle or vessel and such handgun is secured in a container or compartment in the vehicle or vessel.” You inquire regarding the application of this exception.

Several principles of statutory construction apply to the questions you pose. First, statutes are to be construed according to their plain language.⁴ Further, statutes are not to be read in isolation;⁵ rather, sections related to the same subject matter are to be read *in pari materia*.⁶ Also, where a statute specifies certain things, the intention to exclude that which is not specified may be inferred,⁷ and “[courts] may not add to a statute language which the legislature has chosen not to include.”⁸ Finally, criminal statutes are to be strictly construed.⁹

You first ask whether the handgun must be unloaded for the exception of § 18.2-308(B)(10) to apply. The other provisions of § 18.2-308 pertaining to the

transportation of firearms in a motor vehicle set forth additional limited exceptions “provided that the weapons are unloaded and securely wrapped while being transported.”¹⁰ Section 18.2-308(B)(10) does not include similar language. Had the General Assembly intended to condition the application of § 18.2-308(B)(10) by requiring the transported handgun to be unloaded, it clearly knew how to do so.¹¹ I therefore conclude that, provided that the handgun is stored in a manner as prescribed in § 18.2-308(B)(10), a handgun can be kept loaded inside a vehicle when possessed by someone who may lawfully possess a firearm but has not been issued a concealed weapons permit.

You next ask whether a handgun that is being transported in a motor vehicle may be within reach of the driver or a passenger. Section 18.2-308(A) makes it a Class 1 misdemeanor for any person without a permit to carry a firearm “about his person, hidden from common observation.” Under the statute, “about his person” contemplates “the accessibility of a concealed weapon for prompt and immediate use”¹² and therefore such weapon may not be within reach. Nonetheless, § 18.2-308(B)(10) provides an exception to the prohibition when carrying a handgun in a vehicle. That exception applies when the handgun is “secured in a container or compartment in the vehicle[.]” There is no further condition placed on the exception. Thus, provided the handgun is stored accordingly, it can be within the reach of a driver or a passenger inside the vehicle.

You also ask whether a center console, glove compartment or any other “container or compartment” must be locked to constitute a “secured container or compartment.” The legislative history of the 2010 amendment shows that the container or compartment storing the handgun need not be locked for the exception to apply. When § 18.2-308 was amended to include § 18.2-308(B)(10), “locked in a container or compartment” was considered as possible statutory language;¹³ however, “secured in a container or compartment” was the wording that was ultimately adopted.¹⁴ By choosing “secured” instead of “locked,” the General Assembly evinced its intention that a handgun may be carried in a vehicle without requiring the container or compartment storing it to be locked.¹⁵

With respect to your final inquiry, an employer can ban firearms on its property if it so chooses. The Constitution of Virginia protects the right to bear arms, but it also recognizes the importance of property rights.¹⁶ Moreover, the Second Amendment acts as a restraint on government, not private parties. Employers can, like any other owner of private property, restrict or ban the carrying of weapons onto their property.¹⁷

CONCLUSION

Accordingly, it is my opinion that, provided the handgun is properly secured in a container or compartment within the vehicle, persons who may lawfully possess a firearm but have not been issued a concealed weapons permit may possess, in a vehicle, a handgun that is loaded and the handgun may remain within reach of a driver or passenger under such conditions. It further is my opinion that, for a handgun to be “secured in a container or compartment,” such storage tool need not be locked. Finally, it is my opinion that an individual may not keep a firearm stored in

his vehicle at a place of employment if there is a company policy or signage prohibiting firearms on the premises.

¹ My response is limited to the application of Virginia law. Federal law may have different requirements governing the transportation of firearms in motor vehicles across state lines. See 18 U.S.C. § 926A.

² See *Pruitt v. Commonwealth*, 274 Va. 382, 388, 650 S.E.2d 684, 686-87 (2007); *Leith v. Commonwealth*, 17 Va. App. 620, 420 S.E.2d 152 (1994); *Watson v. Commonwealth*, 17 Va. App. 124, 435 S.E.2d 428 (1993); 1993 Op. Va. Att’y Gen. 113.

³ 2010 Va. Acts ch. 841.

⁴ *Signal Corp. v. Keane Fed. Sys.*, 265 Va. 38, 46-47, 574 S.E.2d 253, 257 (2003).

⁵ See *Prillaman v. Commonwealth*, 199 Va. 401, 405-06, 100 S.E.2d 4, 7 (1957).

⁶ *Id.*

⁷ See 2A NORMAN J. SINGER & J.D SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 47:23 (7th ed. 2007) (explaining maxim of statutory construction “*expressio unius est exclusio alterius*”). See also, e.g., 2008 Op. Va. Att’y Gen. 126, 127 and citations therein.

⁸ *County of Amherst v. Brockman*, 224 Va. 39, 397 297 S.E.2d 805, 808 (1982).

⁹ *Robinson v. Commonwealth*, 274 Va. 45, 51, 645 S.E.2d 470, 473 (“When construing penal statutes, a court must not add to the words of the statute, nor ignore its actual words, and must strictly construe the statute and limit its application to cases falling clearly within its scope.”) (citations omitted).

¹⁰ VA. CODE ANN. § 18.2-308(B)(3) to 18.2-308(B)(5) (Supp. 2011). See § 18.2-308.1(C)(vi).

¹¹ See 2007 Op. Va. Att’y Gen. 69, 71 and n.14 (noting and explaining that “when the General Assembly includes specific language in one section of an Act but omits language from another section, courts presume that the omission was intentional.”)

¹² *Pruitt*, 274 Va. at 388, 650 S.E.2d at 687; see *Watson*, 17 Va. App. at 124, 435 S.E.2d at 428 (both decided prior to the enactment of § 18.2-308(B)(10)).

¹³ Visit <http://leg1.state.va.us/cgi-bin/legp504.exe?101+sum+HB885> to view the legislation as introduced and with its suggested amendments.

¹⁴ Compare 2010 Va. Acts ch. 740 with 2010 Va. Acts ch. 841.

¹⁵ The legislature is presumed to have chosen with care the words it used when it enacted a statute. *Barr v. Town & Country Props., Inc.* 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990).

¹⁶ VA. CONST. art. I, § 1 (recognizing the right of “acquiring and possessing property” as one of the inherent rights of mankind).

¹⁷ 2011 Op. Va. Att’y Gen. 104. See also § 18.2-308(O).

OP. NO. 11-080

CRIMINAL PROCEDURE: WARRANT AMENDMENTS

Prosecutor is permitted to move to amend a misdemeanor charge alleging a violation of a municipal ordinance to the equivalent misdemeanor charge alleging a violation of state law when such an arrest or summons was made by an officer of a local police department or a deputy for a local sheriff’s department.

Amendment is subject to judicial review and may be made only by an appropriate judicial officer.

THE HONORABLE RICHARD K. NEWMAN
COMMONWEALTH ATTORNEY FOR THE CITY OF HOPEWELL
FEBRUARY 17, 2012

ISSUES PRESENTED

You ask whether a prosecutor may amend a misdemeanor charge alleging a violation of a municipal ordinance to the equivalent misdemeanor charge alleging a violation of state law when such an arrest or summons was made by an officer of a local police department or a deputy for a local sheriff's department. You also inquire, if a prosecutor is permitted to make such an amendment, whether the amendment is subject to judicial review.

RESPONSE

It is my opinion that, while a prosecutor is permitted to move to amend a misdemeanor charge alleging a violation of a municipal ordinance to the equivalent misdemeanor charge alleging a violation of state law when such an arrest or summons was made by an officer of a local police department or a deputy for a local sheriff's department, any such an amendment is subject to judicial review and may be made only by an appropriate judicial officer.

APPLICABLE LAW AND DISCUSSION

You note your questions arise from a previous Opinion of this Office.¹ That opinion addressed whether § 46.2-1308 prohibits a prosecutor from amending a misdemeanor charge alleging a violation of state law to the equivalent municipal ordinance in the situation where the arrest or summons was issued by an officer of the Department of State Police for offenses found in titles other than Title 46.2. The opinion concluded that the restriction on prosecutorial discretion contained in § 46.2-1308 is expressly limited to violations under Title 46.2, so that a prosecutor remains otherwise free to exercise his discretion in bringing and amending charges for violations of other provisions outside Title 46.2.²

With respect to your inquiry, § 46.2-1308 is silent regarding a prosecutor's discretion to amend a misdemeanor charge alleging a violation of a municipal ordinance to the equivalent state charge alleging a violation of state law when such an arrest or summons is issued by a local police department or deputy for a local sheriff's department. Thus, as explained in the earlier opinion,³ because § 46.2-1308 does not refer to arrests or summons issued other than those brought under Title 46.2 and issued by an officer of the Department of State Police or any other division of state government, the exclusion of all other arrests or summons outside of Title 46.2 and issued by the Department of State Police is presumed to be intentional.⁴ Additionally, § 46.2-1308 does not place any limitation on arrest warrants or summonses if issued by a local police department or local sheriff's department. Accordingly, I find no limitation on a prosecutor's discretion that prohibits him from amending a misdemeanor charge alleging a violation of a municipal ordinance being amended to the equivalent misdemeanor charge alleging a violation of state law when such an

arrest or summons was made by an officer of a local police department or a deputy for a local sheriff's department.

Turning to your second question, § 19.2-71 provides that process for the arrest of a person charged with a criminal offense may be issued by a judge, clerk of court, or any magistrate. Section 16.1-129.2 provides that, upon the trial of a warrant, the general district court may, on its own motion or at the request of counsel for either side, "amend the form of the warrant in any respect in which it appears to be defective." Also, a prior Opinion of this Office concluded that neither a chief of police nor a Commonwealth's attorney has the authority to unilaterally withdraw or dismiss a lawfully issued arrest warrant or summons.⁵

It is an accepted principle of statutory construction that a statute stating the manner in which something may be done, or the entity that may do it, also evinces the legislative intent that it not be done otherwise.⁶ The Code clearly establishes that it is the court, rather than the prosecutor, who ultimately has authority to amend a warrant. Because the relevant statutes indicate, and prior Opinions of this Office conclude, that changes or corrections to warrants should be regarded as amendments,⁷ logic dictates that those same procedures govern making amendments to a lawfully issued arrest warrant or summonses.

I therefore conclude that amending an arrest warrant or summons is subject to judicial review, and may only be made by an appropriate judicial officer. Nonetheless, this conclusion does not limit the long-standing and well-recognized doctrine of prosecutorial discretion, an inherently executive function.⁸ The institution of criminal charges, as well as their order and timing, are matters of prosecutorial discretion.⁹ Once an arrest warrant or summons is issued, however, the charges become the province of the judicial branch, and are no longer within the unfettered purview of the Commonwealth's Attorney.

CONCLUSION

Accordingly, it is my opinion that, while a prosecutor is permitted to move to amend a misdemeanor charge alleging a violation of a municipal ordinance to the equivalent misdemeanor charge alleging a violation of state law when such an arrest or summons was made by an officer of a local police department or a deputy for a local sheriff's department, any such an amendment is subject to judicial review and may be made only by an appropriate judicial officer.

¹ 2011 Op. Va. Att'y Gen. No. 11-036, *available at* <http://www.ag.virginia.gov/Opinions%20and%20Legal%20Resources/Opinions/2011opns/11-036-vener.pdf>.

² *Id.* at 2. Section 46.2-1308 provides:

In counties, cities, and towns whose governing bodies adopt the ordinances authorized by §§ 46.2-1300 and 46.2-1304, all fines imposed for violations of such ordinances shall be paid into the county, city, or town treasury. Fees shall be disposed of according to law.

In all cases, however, in which an arrest is made or the summons is issued by an officer of the Department of State Police or of any other division of the state government, for violation of the motor vehicle laws of the Commonwealth, the person arrested or summoned shall be charged

with and tried for a violation of some provision of this title and all fines and forfeitures collected upon convictions or upon forfeitures of bail of any person so arrested or summoned shall be credited to the Literary Fund.

Willful failure, refusal or neglect to comply with this provision shall constitute a Class 4 misdemeanor and may be grounds for removal of the guilty person from office. Charges for dereliction of the duties here imposed shall be tried by the circuit court of the jurisdiction served by the officer charged with the violation.

³*Id.*

⁴ The maxim of statutory construction *expressio unius exclusio alterius* is applicable here. Where a statute speaks in specific terms, an implication arises that omitted terms were not intended to be included within the scope of the statute. *See, e.g.,* Turner v. Wexler, 244 Va. 124,127, 418 S.E.2d 886, 887 (1992). *See* Smith Mountain Lake Yacht Club, Inc. v. Ramaker, 261 Va. 240, 246, 542 S.E.2d 392, 395 (2001). *See also* NORMAN J. SINGER & J.D. SHAMBLE SINGER, 2A SUTHERLAND STATUTORY CONSTRUCTION § 47.23 (7th ed. 2007); MITCHIE’S JURISPRUDENCE, Statutes § 45 (2006).

⁵ 2003 Op. Va. Att’y Gen. 73 (noting that a former Commonwealth’s attorney who amended an arrest warrant without the knowledge or consent of the court by reducing the felony charge to a misdemeanor, in contravention of the Rules of the Supreme Court, was directed to write a letter of apology to the court in *Morrissey v. Va. State Bar*, 260 Va. 472, 479, 538 S.E. 677, 680-81 (2000)).

⁶ *Id.*; *see also* Grigg v. Commonwealth, 224 Va. 356, 297 S.E.2d 799 (1982); Town of Christiansburg v. Montgomery Cnty., 216 Va. 654, 222 S.E.2d 513 (1976); 1986-87 Op. Va. Att’y Gen. 130, 131.

⁷ 1990 Op. Va. Att’y Gen. 132, 133; *see also* 1975-76 Op. Va. Att’y Gen. 87A; 1954-55 Op. Va. Att’y Gen. 220.

⁸ *See* Barrett v. Commonwealth, 268 Va. 170, 178, 597 S.E.2d 104, 107-08 (2004) (“It is well established that the choice of offenses for which a criminal defendant will be charged is within the discretion of the Commonwealth’s Attorney.”).

⁹ Bradshaw v. Commonwealth, 228 Va. 484, 492, 323 S.E.2d 567, 572 (1984).

OP. NO. 12-033

DRAINAGE, SOIL CONSERVATION, SANITATION AND PUBLIC FACILITIES DISTRICTS: SANITATION DISTRICTS LAW OF 1946-NONTIDAL WATERS

SOVEREIGN IMMUNITY

Warm Springs Sanitation Commission is entitled to governmental immunity under Virginia law.

THE HONORABLE R. CREIGH DEEDS
MEMBER, SENATE OF VIRGINIA
MAY 18, 2012

ISSUE PRESENTED

You inquire whether the Warm Springs Sanitation Commission is entitled to governmental immunity.

RESPONSE

It is my opinion that, in certain circumstances, the Warm Springs Sanitation Commission is entitled to governmental immunity under Virginia law.

APPLICABLE LAW AND DISCUSSION

The doctrine of “sovereign immunity is ‘alive and well’ in Virginia.”¹ “Thus, the Commonwealth is immune from tort liability for the acts or omissions of its agents and employees unless an express statutory or constitutional provision waives that immunity.”² Counties, as integral parts of the State, also enjoy full immunity in such cases.³ Cities and municipal corporations, on the other hand, are entitled to immunity only in situations involving governmental, rather than proprietary functions.⁴

Based on a review of case law and prior opinions addressing other bodies,⁵ I conclude that the Warm Springs Sanitation Commission is a municipal corporation, and therefore afforded sovereign immunity for its governmental actions. As the Supreme Court of Virginia has explained,

in categorizing a particular entity, the first inquiry is “how many attributes of a municipal corporation does the entity in dispute possess?” We have identified six attributes pertinent to that inquiry:

- (1) Creation as a body corporate and politic and as a political subdivision of the Commonwealth;
- (2) Creation to serve a public purpose;
- (3) Power to have a common seal, to sue and be sued, to enter into contracts, to acquire, hold and dispose of its revenue, personal and real property;
- (4) Possession of the power of eminent domain;
- (5) Power to borrow money and issue bonds which are tax exempt, with interest on such bonds enjoying the same status under tax laws as the interest on bonds of other political subdivisions of the state;
- (6) Management of the corporation vested in a board of directors or a commission.^[6]

The Warm Springs Sanitation Commission overwhelmingly satisfies these criteria. The Commission administers the Warm Springs Sanitation District, which was created pursuant to the Sanitation Districts Law of Nineteen Hundred and Forty-Six.⁷ This law provides that “[i]n and for each district . . . created pursuant to this chapter or pursuant to a special act of the General Assembly, a *commission is hereby created as a body corporate*, invested with the rights, powers and authority and charged with the duties set forth in this chapter.”⁸ “Commission,” in turn, “means *the body corporate or politic* comprising a [sanitation] district and its inhabitants”⁹ Thus, the Commission clearly possesses the first and last elements.¹⁰

The Commission’s enabling legislation sets forth its public purpose: “the relief of the waters of the district for public health and the consequent improvement of conditions affecting the public health.”¹¹ The law further grants the Commission the following powers:

1. To adopt and have a common seal and to alter the same at pleasure;
2. To sue and to be sued;

3. In the name of the commission and on its behalf, to acquire, hold and dispose of its fees, rents and charges and other revenues;
4. In the name of the commission . . . to acquire, hold, and dispose of other personal property for the purposes of the commission;
5. In the name of the commission . . . to acquire by purchase, gift, *condemnation* or otherwise, real property or rights or easements therein, necessary or convenient for the purposes of the commission, . . . provided that the *right of condemnation* granted herein shall be subject to the same provisions as are provided in § 25.1-102 concerning the condemnation of any property belonging to a corporation possessing the power of eminent domain by another public service corporation;
6. To borrow money for the purposes of the commission and to issue therefor its bonds ...
7. To accept gifts or grants or real or personal property, money, material, labor or supplies for the purposes of the commission and to make and perform such agreements and contracts as may be necessary or convenient in connection with the procuring or acceptance of such gifts or grants; . . .
9. To make and enforce rules and regulations for the management and regulation of its business and affairs and for the use, maintenance and operation of its facilities and properties, and to amend the same^[12]

Accordingly, because a preponderance of applicable factors are met¹³ and based on the application of immunity in similar instances,¹⁴ I conclude that the Warm Springs Sanitation Commission is a municipal corporation entitled to sovereign immunity.

I reiterate however that the sovereign immunity afforded municipal corporations arises only for governmental and not proprietary activities.¹⁵ Because no bright line rule exists to distinguish between governmental and proprietary functions, whether the exercise of any particular power by the Warm Springs Sanitation Commission would be governmental or proprietary would turn on facts not presented. In addition, the Attorney General refrains from issuing opinions on matters of fact.¹⁶ It should also be kept in mind that individual commission members or employees can lose the protection of sovereign immunity through intentional misconduct or gross negligence, and depending on the facts and circumstances, may not enjoy such protection at all.¹⁷

CONCLUSION

Accordingly, it is my opinion that the Warm Springs Sanitation Commission would be found, in a proper case, to enjoy the protections of sovereign immunity.

¹ Gray v. Sec'y of Transp., 276 Va. 93, 101, 662 S.E.2d 66, 70 (2008) (quoting Messina v. Burden, 228 Va. 301, 307, 321 S.E.2d 657, 660 (1984) (internal quotation marks omitted)). I do not address Eleventh Amendment sovereign immunity in this opinion; however, such immunity does not usually apply to such entities, because they are independently financed, have considerable autonomy, and are too localized to be considered an alter ego of the Commonwealth. See Ram Ditta v. Maryland Nat'l Capital Park & Planning Comm'n., 822 F.2d 456 (4th Cir. 1987).

² Ligon v. Cnty. of Goochland, 279 Va. 312, 316, 689 S.E.2d 666, 668 (2000).

³ *Id.* See also, e.g., *Mann v. Cnty. Bd.*, 199 Va. 169, 173-74, 98 S.E.2d 515, 518 (1957).

⁴ See, e.g., *Va. Electric & Power Co. v. Hampton Redev. & Hous. Auth.*, 217 Va. 30, 34, 225 S.E.2d 364, 368 (1976); *Taylor v. City of Newport News*, 214 Va. 9, 10, 197 S.E.2d 209, 210 (1973); 2006 Op. Va. Att’y Gen. 95, 96.

⁵ See *Hampton Rds. Sanitation Dist. Comm’n v. Smith*, 193 Va. 371, 68 S.E.2d 497(1954) (finding the Hampton Roads Sanitation District Commission to be a municipal corporation for jurisdictional purposes); *Cnty. of York v. Peninsula Airport Comm’n*, 235 Va. 477 369 S.E.2d 665 (1988) (finding the Peninsula Airport Commission to be a municipal corporation for taxation purposes); *Va. Electric & Power Co.*, 217 Va. at 30, 225 S.E.2d at 364 (affording limited immunity to local housing authority upon determining the authority to be a municipal corporation); *Robertson v. W. Va. Water Auth.*, Case No. CL07-1316, City of Roanoke Cir. Ct. (Va. Cir. 2011) (deciding water authority is a municipal corporation and therefore entitled to limited immunity). See also *Hampton Rds. Sanitation Dist. v. McDonnell*, 234 Va. 235, 360 S.E.2d 841 (1987) (addressing whether particular activity of similarly created sanitation district was intentional so as to remove entity from protection of immunity when assertion of such entitlement otherwise was uncontested). Further, this Office previously has concluded that a fire company, 1985-86 Op. Va. Att’y Gen. 173; a county department of social services, 1986-87 Op. Va. Att’y Gen. 45; a county/county school board consolidated services administration, 1995 Op. Va. Att’y Gen. 72; the Lake Anna Advisory Commission, 1997 Op. Va. Att’y Gen. 123; and a water authority, 2006 Op. Va. Att’y Gen. 95, are protected by sovereign immunity.

⁶ *Peninsula Airport Comm’n*, 235 Va. at 480-81, 369 S.E.2d at 666-67 (quoting *Smith*, 193 Va. at 376, 68 S.E.2d at 500 and citing *City of Richmond v. Richmond Metro. Auth.*, 210 Va. 645, 647, 172 S.E.2d 831, 832 (1970)).

⁷ See 1983-84 Op. Va. Att’y Gen. 301. The law is codified at VA. CODE ANN. §§ 21-224 through 21-290 (2008).

⁸ Section 21-237 (emphasis added).

⁹ Section 21-225(2) (emphasis added).

¹⁰ Although the statute does not expressly designate the Commission as a “political subdivision,” “municipal corporations are ‘political subdivisions of the State’” and such designation is not critical to an entity’s classification as a municipal corporation when the essential attributes of a municipal corporation are present. *Short Pump Town Ctr. Cmty. Dev. Auth. v. Hahn*, 262 Va. 733, 744-45, 554 S.E.2d 441 (2001) (explaining and affirming *Peninsula Airport Comm’n*, 235 Va. at 477, 369 S.E.2d at 665). See also *Richmond, Fredericksburg & Potomac R.R. Co. v. Richmond*, 145 Va. 225, 238, 138 S.E. 800, 803-04 (1926).

¹¹ Section 21-249.

¹² Section 21-248 (emphasis added).

¹³ It is unclear whether the bonds hold tax exempt status, and such inquiry is beyond the scope of this Opinion. Further, in my view, such inquiry is unnecessary, for the question posed by the Supreme Court, “how many attributes of a municipal corporation does the entity in dispute possess?” does not require that each attribute be present. See *Smith*, 193 Va. at 377, 68 S.E.2d at 501 (“the more attributes of a municipal corporation an agency has the more likely it is to be treated as a municipal corporation . . .”).

¹⁴ See *supra*, note 5.

¹⁵ See *supra*, note 4. Further, this immunity is available only for actions sounding in tort, and not contract. See *Wiecking v. Allied Med. Supply Corp.*, 239 Va. 548, 551, 391 S.E.2d 258, 260 (“we have never extended th[e] defense [of sovereign immunity] to actions based upon valid contracts entered into by duly authorized agents of the government”).

¹⁶ 2004 Op. Va. Att’y Gen., 48 n.16; 2002 Op. Va. Att’y Gen. 96, 99 and opinions cited at 101 n.27.

¹⁷ *James v. Jane*, 221 Va. 43, 53, 282 S.E.2d 864, 869 (1980).

OP. NO. 12-001**ELECTIONS: CAMPAIGN FUNDRAISING, LEGISLATIVE SESSIONS**

Member of the General Assembly is not precluded from raising funds for a candidate for federal office while the General Assembly is in session.

THE HONORABLE JEFFREY L. MCWATERS
MEMBER, SENATE OF VIRGINIA
JANUARY 25, 2012

ISSUE PRESENTED

You ask whether, during the General Assembly legislative session, a member of the General Assembly may continue to raise funds for a candidate for federal office.

RESPONSE

It is my opinion that a member of the General Assembly is not precluded from raising funds for a candidate for federal office while the General Assembly is in session.

APPLICABLE LAW AND DISCUSSION

As you note, a previous opinion of this Office addressed the question of whether a member of the General Assembly could solicit funds for *his own* campaign for federal office.¹ You ask whether a member may solicit funds for *another* candidate for federal office.

The prior opinion concluded that the restrictions imposed by § 24.2-954 of the *Code of Virginia* are expressly limited to campaigns for state offices.² Neither the opinion nor the statute makes reference to nor distinguishes whether the member's solicitation is on behalf of his own campaign or that of another candidate for federal office. Rather, applying the plain language of the statute,³ this Office concluded "in enacting § 24.2-954[,], the intent of the General Assembly was to prohibit fundraising during a regular session of the General Assembly by persons running for state office. The General Assembly did not prohibit all fundraising. Instead, it targeted specific fundraising activities . . ." related to persons seeking or campaigning "for an office of the Commonwealth or one of its governmental units."⁴ Clearly, a candidate for President of the United States, or for any federal office, whether a member of the General Assembly or not, is not seeking "an office of the Commonwealth or one of its governmental units." Thus, the logic of the previous opinion applies to the situation you present as well. Given that, since issuance of the prior opinion, § 24.2-954 has not been amended to include candidates or campaigns for federal office, I again conclude that the statute does not prohibit fundraising for *any* candidate for federal office while the General Assembly is in session.

As the previous opinion also noted, however, the analysis does not end with § 24.2-954 because federal law regulates campaigns for federal office. The Federal Election Campaign Act of 1971⁵ ("FECA") provides that "the provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office."⁶ The Federal Election Commission

("FEC") has promulgated regulations that address fundraising, specifically providing that "[f]ederal law supersedes State law concerning the ... [l]imitation on contributions and expenditures regarding Federal candidates and political committees."⁷ I continue to find no restriction under federal law that would prevent a member of the General Assembly from soliciting or accepting contributions during a regular session of the General Assembly.

CONCLUSION

Accordingly, it is my opinion that a member of the General Assembly is not precluded from raising funds for a candidate for federal office while the General Assembly is in session.

¹ 2010 Op. Va. Att'y Gen. 131.

² *Id.* at 132-33.

³ Section 24.2-954 provides, in relevant part, that:

A. No member of the General Assembly or statewide official and no campaign committee of a member of the General Assembly or statewide official shall solicit or accept a contribution for the campaign committee of any member of the General Assembly or statewide official, or for any political committee, from any person or political committee on and after the first day of a regular session of the General Assembly through adjournment sine die of that session.

B. No person or political committee shall make or promise to make a contribution to a member of the General Assembly or statewide official or his campaign committee on and after the first day of a regular session of the General Assembly through adjournment sine die of that session.

Section 24.1-945.1 expressly excludes "a federal political action committee" from the definition of "political committee."

⁴ 2010 Op. Va. Att'y Gen. at 132.

⁵ See Pub. L. No. 92-225, 86 Stat. 3 (codified in scattered sections, as amended, at 2 U.S.C. §§ 431 to 457).

⁶ 2 U.S.C.S. § 453(a) (LexisNexis Supp. 2009).

⁷ 11 C.F.R. § 108.7(b)(3) (2009).

OP. NO. 12-042

HOUSING: HOUSING AUTHORITIES LAW

Local, regional or consolidated housing authority may not operate throughout the entire Commonwealth without first meeting the requirements of § 36-23.

MR. WILLIAM C. SHELTON

DIRECTOR, VIRGINIA DEPARTMENT OF HOUSING AND COMMUNITY DEVELOPMENT

JUNE 1, 2012

ISSUE PRESENTED

You inquire whether a local, regional or consolidated housing authority organized pursuant to the Housing Authorities Law¹ is authorized to operate throughout the entire Commonwealth without first meeting the requirements of § 36-23.

RESPONSE

It is my opinion that a local, regional or consolidated housing authority may not operate throughout the entire Commonwealth without first meeting the requirements of § 36-23.

BACKGROUND

You relate that the Virginia Department of Housing and Community Development and the Virginia Housing Development Authority are currently preparing an application to the federal Department of Housing and Urban Development (“HUD”) to serve as the Performance-Based Contract Administrator for project-based Section 8 housing assistance in Virginia. You indicate that the Notice of Funding Availability issued by HUD for this program sets forth certain eligibility criteria for applicants, including a requirement that the applicant have the legal authority to operate throughout the entire state for which it is applying for funds.

APPLICABLE LAW AND DISCUSSION

Virginia follows the Dillon Rule of strict construction that provides that municipal corporations have “only those powers which are expressly granted by the state legislature, those powers fairly or necessarily implied from expressly granted powers, and those powers which are essential and indispensable.”² Moreover, “the 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.”³

The Housing Authorities Law creates “[i]n each locality” a housing authority as a political subdivision of the Commonwealth.⁴ Any such local housing authority, however, may transact business and exercise its powers only after having received the affirmative approval of the qualified voters “of such locality” by a majority vote of such qualified voters voting in a referendum.⁵ A housing authority is generally granted enumerated powers to act within its “area of operation,” which is coextensive with the boundaries of the locality within which it was created.⁶

A housing authority may exercise any of its powers outside of its area of operation only upon compliance with the procedures for authorization of such actions as set forth in § 36-23, which includes receiving the approval of the governing body of each locality in which the housing authority is requesting to act.⁷

CONCLUSION

Accordingly, it is my opinion that a local, regional or consolidated housing authority organized pursuant to the Housing Authorities Law is not authorized to operate throughout the entire Commonwealth without first meeting the requirements of § 36-23.

¹ VA. CODE ANN. §§ 36-1 through 36-55.6 (2011).

² *Arlington Cnty. v. White*, 259 Va. 708, 712, 528 S.E.2d 706, 708 (2000) (citing *City of Va. Beach v. Hay*, 258 Va. 217, 221, 518 S.E.2d 314, 316 (1999)). *See also* *City of Richmond v. Bd. of Supvrs.*, 199 Va. 679, 684, 101 S.E.2d 641, 645 (1958).

³ *Commonwealth v. Cnty. Bd.*, 217 Va. 558, 575, 232 S.E.2d 30, 41 (1977). Any fair, reasonable doubt as to the existence of such power must be resolved against the locality. *See City of Richmond*, 199 Va. at 684, 101 S.E.2d at 645.

⁴ *See* § 36-4.

⁵ *Id.*

⁶ *See* § 36-3 (“‘Area of operation’ means an area that (i) in the case of a housing authority of a city, shall be coextensive with the territorial boundaries of the city; (ii) in the case of a housing authority of a county, shall include all of the county, except that portion which lies within the territorial boundaries of (a) any city, and (b) any town that has created a housing authority pursuant to this chapter; (iii) in the case of a housing authority of a town, shall be coextensive with the territorial boundaries of the town as herein defined.”); *see also* §§ 36-19 (enumerating powers granted to a housing authority within its area of operation); 36-19.5 (granting certain additional powers to a housing authority to acquire dwelling units within its area of operation); and 36-26 (authorizing a housing authority to borrow money or accept other financial assistance from the federal government for or in aid of any housing project within the authority’s area of operation). *See also* *Va. Electric & Power Co. v. Hampton Redev. & Hous. Auth.*, 217 Va. 30, 33, 225 S.E.2d 364, 367 (1976) (under the terms of the Housing Authorities Law, “a municipal housing authority is an entity purely local in nature and not a state agency performing a function of state government”).

⁷ *See* § 36-23. This section requires a governing body to hold a public hearing and to make certain specifically enumerated findings prior to authorizing a housing authority to operate within the locality. In addition, if a housing authority already has been established for that locality, this authority also must adopt a resolution declaring that there is a need for the other housing authority to exercise its powers within the locality.

OP. NO. 12-054

MOTOR VEHICLES: MOTOR VEHICLE AND EQUIPMENT SAFETY

Code allows for a six-axle vehicle used exclusively for hauling coal or coal byproducts to have a gross vehicle weight of 110,000 pounds, but no more than that, provided that the vehicle has a valid overweight permit, is loaded at the time and has its weight distributed over the axles as required by the statute.

Section 46.2-1143 does not “exempt” any truck from being weighed and does not create a “presumption” of weight beyond the evidentiary standard to be applied in a court of law.

THE HONORABLE JAMES W. MOREFIELD
MEMBER, HOUSE OF DELEGATES
SEPTEMBER 14, 2012

ISSUES PRESENTED

You ask several questions regarding the application of § 46.2-1143, which provides for the issuance of overweight permits for vehicles hauling coal or coal byproducts to and from coal mines to specified destinations.¹ Specifically, you first ask whether a six-axle vehicle permitted under the section is allowed to have a gross vehicle weight of 110,000 pounds. You next ask whether a permitted vehicle is exempt from being weighed if certain conditions are met. Finally, you inquire whether a vehicle is presumed to be

within prescribed gross weight limits, regardless of actual weight, if either 1) the vehicle's load clearly is within the established load size limits for the vehicle, or 2) the operator of the vehicle, when stopped by enforcement officials for a potential load violation, can shift the load contained in the bed so that the load does not rise above the truck bed or line.

RESPONSE

It is my opinion that § 46.2-1143 allows for a six-axle vehicle used exclusively for hauling coal or coal byproducts to have a gross vehicle weight of 110,000 pounds, but no more than that, provided that the vehicle has a valid overweight permit, is loaded at the time and has its weight distributed over the axles as required by the statute. It is further my opinion that § 46.2-1143 does not "exempt" any truck from being weighed and does not create a "presumption" of weight beyond the evidentiary standard to be applied in a court of law.

APPLICABLE LAW AND DISCUSSION

Section 46.2-1126 establishes generally the gross weight limitations and measuring standards for vehicles traveling on Virginia highways. Notwithstanding these general provisions, the Code allows certain otherwise overweight vehicles to operate pursuant to an appropriate permit. Particular to your inquiry, § 46.2-1143 authorizes "vehicles used exclusively for hauling coal or coal byproducts from a mine or other place of production to a preparation plant, electricity-generation facility, loading dock, or railroad . . . to operate with gross weights in excess of those established in § 46.2-1126 on the conditions set forth" therein. Permits to operate such overweight vehicles are available provided the prescribed conditions, which impose restrictions on gross weight, bed size and travel distances, are met.²

Relevant to your first inquiry is § 46.2-1143(B), which provides in pertinent part that, "vehicles with six axles may have a *maximum gross weight, when loaded, of no more than 110,000 pounds*, a single axle weight or no more than 24,000 pounds, a tandem axle weight of no more than 44,000 pounds, and a tri-axle weight or no more than 54,500 pounds."³ When a statute is unambiguous, it is to be construed according to its plain language.⁴ Section 46.2-1143(B) clearly establishes 110,000 pounds as the maximum gross weight permitted for six-axle vehicles hauling coal. The Code does not otherwise define "maximum" or "no more than," so these terms must be afforded their ordinary meaning.⁵ "Maximum" means "the greatest quantity or value attainable or attained" or "an upper limit allowed (as by a legal authority) or allowable[.]"⁶ The phrase "no more than," in this context, in turn signifies the weight limit the load can reach, but may not exceed. Therefore, the vehicle may carry a gross vehicle weight of 110,000 pounds, but it may not exceed that weight.⁷

In response to your remaining questions, as an initial matter, I provide the following statutory context. In addition to imposing the above weight restrictions, § 46.2-1143 limits the size of the load allowed to be carried by permitted vehicles. It establishes maximum load volumes dependent on the type of vehicle and expressly provides that "[n]o load of any vehicle operating under a permit issued according to this section shall rise above the top of the bed of such vehicle, not including extensions of the

bed.”⁸ “Bed” is then defined as “that part of the vehicle used to haul coal”⁹ and the law sets forth how it is to be measured.¹⁰ If a vehicle’s actual cargo bed exceeds the maximum allowable load size, the operator must paint a horizontal line on the side of the bed and cut holes in it to indicate where the uppermost limit of the bed should be.¹¹ In such instances, no load of coal shall rise above the properly measured lines.¹²

Notably, these size restrictions are distinct from the weight restrictions. Operation of permitted vehicles is subject to each of the conditions set forth in § 46.2-1143, as provided in § 46.2-1143(A). Section 46.2-1143(B) contains no exemptions from the weight requirement it establishes, nor does § 46.2-1143(C) or (D) include language indicating that compliance with load/bed size satisfies or supersedes the weight restriction. Moreover, the Code treats the penalties for weight and size violations separately: weight violations are subject to the penalties provided in §§ 46.2-1131 and 46.2-1135, while the penalties for violations relating to bed size are set forth in § 46.2-1143(D) and (E). As such, although an operator may shift his load to attempt to comply with the load restrictions of § 46.2-1143(F), this effort, whether successful or not, will have no bearing on the weight restrictions of § 46.2-1143(B).

Thus, in response to your second inquiry -- whether a vehicle used exclusively for hauling coal or coal byproducts from a mine to one of the destinations enumerated in § 46.2-1143(A) is exempt from being weighed for any potential weight violations if the load it is carrying comports with the applicable bed-size restrictions -- I conclude that the Code provides no such exemption. First, nothing in § 46.2-1143 refers to the ability of law enforcement actually to weigh any vehicle subject to its strictures. Nowhere does the General Assembly exclude any coal trucks, whether they have a load rising above or falling below the bed lines, from being weighed. Rather, the Code expressly provides that “[a]ny officer or size and weight compliance agent authorized to enforce the law under [Title 46.2], having reason to believe that the weight of a vehicle and load is unlawful, is authorized to weigh the load and the vehicle.”¹³ This authority extends to allowing the enforcement officer to require the vehicle to proceed to a nearby weighing station, if within 10 miles, or to submit to weighing the vehicle by wheel load weighers.¹⁴ Although loads appearing to exceed the permitted bed size may give rise to a reason to weigh the vehicle, a vehicle may be subject to weighing if an enforcement officer has reason to believe it is overweight, regardless of whether its load may be within the applicable size limits.

Similarly, in response to your final inquiry, § 46.2-1143 grants no “weight presumption” to permitted vehicles based on the ability of their loads to comply with size restrictions. Although § 46.2-1143(F) provides that any vehicle whose load does not rise above the top of the bed or over the line indicating the bed’s maximum size “shall be, in the absence of proof to the contrary, prima facie evidence that the load is within applicable weight limits,” such provision does not constitute an exemption from any weight requirements or a presumption that the vehicle is in compliance with them. Rather, “prima facie evidence” refers only to an evidentiary standard used in a court of law:¹⁵ it is “evidence which on its first appearance is sufficient to raise a presumption of fact or establish the fact in question unless rebutted. It imports that the evidence produces for the time being a certain result, but that the result may be repelled.”¹⁶ Thus, vehicles charged with weight violations tried in court are afforded an evidentiary standard that

provides that, if the load does not rise above the bed or the line, then a rebuttable presumption arises that the load is below the weight limits. This standard applies regardless of whether an operator was in compliance with the size restrictions, with or without an having to shift his load.

Thus, should an operator be charged with carrying an overweight load, this standard provides that during any trial of the matter, the operator is granted a rebuttable presumption that the load was not overweight. Prima facie evidence dictates that this presumption can be rebutted by other evidence. One key method of obtaining such evidence would be by actually weighing the truck. Interpreting § 46.2-1143 to find that vehicle weight enforcement officials are precluded from weighing the trucks would, in effect, create an impermissible “absurd result.”¹⁷ If there were an inability to weigh potentially overweight vehicles, there would never be any possibility of any contrary evidence in these cases and that would make the concept of “prima facie evidence” meaningless. Furthermore, it would open the door to operators carrying fraudulent loads that might contain layers of coal on top and other, heavier materials, on the bottom; thus never being detected as the loads would never be subject to any appropriate scrutiny. In sum, because “prima facie evidence” and associated presumptions concern only court proceedings, officials enforcing weight restrictions on the roadways are not bound by thereto and may weigh vehicles and issue citations for violations as circumstances dictate.

CONCLUSION

Accordingly, it is my opinion that § 46.2-1143 allows for a six-axle vehicle used exclusively for hauling coal or coal byproducts to have a gross vehicle weight of 110,000 pounds, but no more than that, provided that the vehicle has a valid overweight permit, is loaded at the time and has its weight distributed over the axles as required by the statute. It is further my opinion that § 46.2-1143 does not “exempt” any truck from being weighed and does not create a “presumption” of weight beyond the evidentiary standard to be applied in a court of law.

¹ The current version of § 46.2-1143 is in effect until January 1, 2013. The amendments that take effect on that date do not affect this opinion’s analysis or conclusion. *See* 2012 Va. Acts ch. 443.

² VA. CODE ANN. § 46.2-1143(B), (C-E), (G) (Supp. 2012) (weight, size and distance, respectively).

³ Emphasis added.

⁴ *See, e.g.,* Signal Corp. v. Keane Fed. Sys., Inc. 265 Va. 38, 46-47, 574 S.E.2d 253, 257 (2003).

⁵ *See* Grant v. Commonwealth, 223 Va. 680, 684, 292 S.E.2d 348, 350 (1982).

⁶ MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 717 (10th ed. 1998).

⁷ I further note that an operator may have a loaded six-axle vehicle that weighs 110,000 pounds, provided the operator has been issued a permit and the load complies with applicable size restrictions and is evenly distributed over all the axles as set out in the Code.

⁸ Section 46.2-1143(C).

⁹ Section 46.2-1143(D).

¹⁰*Id.* (“Bed size shall be measured by its interior dimensions with volume expressed in cubic feet.”) (Effective January 1, 2013, this provision will read: “Bed size shall be based on its interior dimensions, which may be

determined by measuring the exterior of the bed, with volume expressed in cubic feet.” 2012 Va. Acts ch. 443).

¹¹ Section 46.2-1143(D). Penalties for having an oversize truck bed or altering the measured painted horizontal line and holes required are set forth in § 46.2-1143(E).

¹² See § 46.2-1143(C).

¹³ Section 46.2-1137 (Supp. 2012).

¹⁴ *Id.*

¹⁵ Contested allegations of weight violations are to be tried as civil cases. Section 46.2-1133(7) (Supp. 2012).

¹⁶ *Babbitt v. Miller*, 192 Va. 372, 379-380, 64 S.E.2d 718, 722 (1951).

¹⁷ When interpreting a statute, courts must look to “[t]he plain language used by the legislature . . . unless that language is ambiguous or otherwise leads to an absurd result.” *Reston Hosp. Ctr., LLC v. Remley*, 59 Va. App. 96, 106, 717 S.E.2d 417, 422-23 (2011).

OP. NO. 12-008

OATHS, AFFIRMATIONS AND BONDS: OATHS AND AFFIRMATIONS

Section 49-4 authorizes the clerk of court to administer oaths requested by out of state governing bodies, provided that the oath or affirmation is “required by law” in the foreign jurisdiction.

THE HONORABLE MICHELE B. MCQUIGG
CLERK OF COURT, PRINCE WILLIAM COUNTY CIRCUIT COURT
MARCH 16, 2012

ISSUE PRESENTED

You inquire whether § 49-4 of the *Code of Virginia* authorizes the clerk of court to perform specified actions requested by out of state governing bodies. You provide two examples of these requests. First, you cite the State of Maryland’s requirement that non-residents seeking to get married in Maryland obtain an affidavit sworn before the clerk of court in the county where they reside. You also cite the requirement by Pennsylvania that the clerk’s office provide an oath of office to Commissioners who need to act in certain fiduciary matters before Pennsylvania courts. You ask whether you are authorized to fulfill these requests.

RESPONSE

It is my opinion that § 49-4 authorizes the clerk of court to administer oaths requested by out of state governing bodies, provided that the oath or affirmation is “required by law” in the foreign jurisdiction.

APPLICABLE LAW AND DISCUSSION

Section 49-4 provides:

Any oath or affidavit required by law, which is not of such nature that it must be made in court, may be administered by a magistrate, a notary, a commissioner in chancery, a commissioner appointed by the Governor, a

judge or clerk or deputy clerk of a court, a commissioner or clerk or deputy clerk of the State Corporation Commission, or clerks of governing bodies of local governments.

The first issue presented by the statute is whether the term “required by law” includes the laws of other jurisdictions. Under basic rules of statutory construction, Virginia courts determine the General Assembly’s intent from the words contained in the statute.¹ In construing a statute, Virginia courts apply the plain meaning of the words used and are not free to add language, or to ignore language, contained in the statute.²

The statute in question authorizes the clerk to administer oaths that are “required by law,” but it does not specify whether the term “required by law” is limited to the laws of the Commonwealth or includes the laws of other jurisdictions. A review of other Virginia statutes, however, shows that when the General Assembly intends to limit a statutory reference to the “laws of the Commonwealth,” it does so explicitly.³ In the absence of such language, the term “required by law” refers to the laws of the Commonwealth and the laws of other jurisdictions. To conclude otherwise would in effect add the words “of the Commonwealth” to the statute, a result that would violate basic principles of statutory construction.

It also should be noted that Virginia recognizes oaths and affidavits administered in another state or country.⁴ The Commonwealth also gives full faith and credit to the records of judicial proceedings and other official records of foreign courts.⁵ It would be inconsistent for Virginia to recognize affidavits from other jurisdictions, while at the same time prohibiting its clerks from administering affidavits for use in other jurisdictions. Statutes concerning the same subject are to be read together, and construed, wherever possible, so as to avoid conflict between them and to permit each of them to have full operation according to their legislative purpose.⁶ Accordingly, these statutes provide further support for the conclusion that § 49-4 authorizes the clerk to administer oaths required by the law of another jurisdiction.

The second issue raised by the statute is whether a clerk of court is authorized to administer oaths that, although permitted by foreign law, are not technically “required.” To answer that question, it is necessary to examine the source and scope of the clerk’s authority.

Article VII, § 4 of the Constitution of Virginia creates the office of circuit court clerk and provides that a clerk’s duties “shall be prescribed by general law or special act.” As a general rule, circuit court clerks have no inherent powers, and the applicable statutes determine the scope of the clerk’s powers.⁷ If a particular action does not fall within the express statutory authority, the clerk has no authority to perform that action.⁸

The Supreme Court of Virginia addressed this issue in *Mendez v. Commonwealth*,⁹ in which the appellant challenged the validity of a sworn statement that he affirmed under oath before the Clerk of the General District Court of Southampton County. The statement formed the basis for a perjury charge, for which the appellant was convicted by the trial court. Appellant argued on appeal that the clerk did not have

the authority to administer the affidavit, so it could not form the basis for a perjury charge.

The Court reversed the conviction, holding that the affidavit could not sustain a conviction of perjury. The Court noted that the affidavit was not “required by law” but was instead executed by agreement of the appellant and the Commonwealth’s Attorney. The Court stated that “the authority of a clerk of court to administer an oath or take an affidavit is purely a creature of statute.”¹⁰ Citing the explicit language of § 49-4, the Court held that the clerk was authorized to administer only those oaths “required by law.” Accordingly, the affidavit in question fell outside the scope of the clerk’s statutory authority, and it could not form the basis for a perjury charge.¹¹

Maryland Family Law Article 2-402 requires an applicant for a marriage license to appear before the clerk and provide, under oath, certain personal information to support the application. As an alternative to appearing in person, the statute allows non-residents to obtain an affidavit “sworn to under oath before a clerk or other comparable official in the county, state, province, or country where the party resides.”

Based on the foregoing analysis, the clerk is authorized to administer the Non-Resident Affidavit because the affirmation contained in the affidavit is required by Maryland law. Applicants for marriage licenses in Maryland are required to provide the information under oath; they simply have more than one way to provide the information. This is different from the situation in *Mendez*, where the affidavit was purely an agreement between two parties and not pursuant to any legal requirement. The Maryland statute *requires* that the information be provided under oath, and the Non-Resident Affidavit simply offers an alternative means to provide the required oath.

The clerk is also authorized to administer oaths to commissioners appearing in Pennsylvania courts. Pennsylvania law authorizes out of state commissioners to acknowledge the execution of a deed or other conveyance of land in Pennsylvania.¹² Such commissioners are also authorized to acknowledge any contract or other writing, under seal or not, to be used and recorded in Pennsylvania.¹³ Pennsylvania requires every such commissioner to “take and subscribe an oath or affirmation before a judge or clerk of one of the courts of record of the state, kingdom, or country in which said commissioner shall reside.”¹⁴ The oath is required for all out of state commissioners, so § 49-4 authorizes the clerk of a Virginia court to administer that oath.

In sum, I conclude that § 49-4 authorizes the clerk to administer oaths required by law in other jurisdictions, but it does not authorize the clerk to administer oaths or affidavits that are requested pursuant to an agreement between private parties. If a request is made pursuant to specific statutory or other legal authority from another jurisdiction, then the clerk is authorized to fulfill that request. Nonetheless, because the statute provides only that the listed officers “may” rather than “shall” administer such oaths, I note that the decision to do so remains within the sound discretion of the clerk.¹⁵

CONCLUSION

Accordingly, it is my opinion that § 49-4 authorizes the clerk of court to administer oaths requested by out of state governing bodies, provided that the oath or affirmation is “required by law” in the foreign jurisdiction.

¹ Alger v. Commonwealth, 267 Va. 255, 259, 590 S.E.2d 563, 564 (2004).

² BBF, Inc. v. Alstom Power, Inc., 274 Va. 326, 331, 645 S.E.2d 467, 469 (2007) (citing Signal Corp. v. Keane Federal Sys., Inc., 265 Va. 38, 46 (2003)).

³ See, e.g., VA. CODE ANN. §§ 6.2-892 (2010); 8.01-465.22 (2007); 38.2-2405 (2007); 49-15 (2009); 49-18 (2009); 64.1-132.2 (2007) & 64.1-132.3 (2007).

⁴ VA. CODE ANN. § 49-5 (2009).

⁵ VA. CODE ANN. § 8.01-389 (Supp. 2011). This includes the records of both sister states and other countries.

⁶ See, e.g., Hood v. Commonwealth, 280 Va. 526, 541-42 (2010).

⁷ Mendez v. Commonwealth, 220 Va. 97, 102, 255 S.E.2d 533, 535 (1979).

⁸ *Id.*

⁹ 220 Va. 97 (1979)

¹⁰ *Id.*

¹¹ *Id.* at 102.

¹² 21 P.S. § 978 (LexisNexis 2012).

¹³ *Id.*

¹⁴ 21 P.S. § 979 (LexisNexis 2012).

¹⁵ “Unless it is manifest that the purpose of the legislature was to use the word ‘may’ in the sense of ‘shall’ or ‘must,’ then ‘may’ should be given its ordinary meaning — permission, importing discretion.” Masters v. Hart, 189 Va. 969, 979, 55 S.E.2d 205, 210 (1949), *quoted in* Bd. of Supvrs. v. Weems, 194 Va. 10, 15, 72 S.E.2d 378, 381 (1952); see 2010 Op. Va. Att’y Gen. 10, 12 n.3 and opinions cited therein (noting that use of “may” in statute indicates statute is permissive and discretionary, rather than mandatory). See also 2010 Op. Va. Att’y Gen. 17 (describing discretionary authority of clerks as constitutional officers).

OP. NO. 12-068

PRISONS AND OTHER METHODS OF CORRECTION: LOCAL CORRECTIONAL FACILITIES - DUTIES OF SHERIFFS

COUNTIES, CITIES AND TOWNS: CONSTITUTIONAL OFFICERS

Virginia law does not require the funds generated from inmate telephone commissions that are received by the treasurer and deposited into the city’s funds to be reallocated back to the sheriff’s office to be used within the facility for the benefit of the inmates.

Sheriff’s office may not establish and maintain a separate fund for such commissions.

Account into which the treasurer initially deposits the funds is irrelevant; they remain allocable to city.

THE HONORABLE VANESSA R. CRAWFORD
SHERIFF, CITY OF PETERSBURG
OCTOBER 5, 2012

ISSUES PRESENTED

You present several questions regarding funds generated from inmate telephone accounts in local correctional institutions. You first inquire whether such funds may be considered property of the sheriff's office and therefore must be reallocated back into the sheriff's office budget when those monies are received by the city treasurer and then deposited into the city's general fund. You also ask whether these funds may be maintained by the sheriff's office in a separate fund that is not processed through the treasurer's office. Finally, you ask whether the funds are still considered part of the city's general fund if they are electronically deposited into an investment account at the treasurer's office without first being deposited into the city's general fund.

RESPONSE

It is my opinion that Virginia law does not require the funds generated from inmate telephone commissions that are received by the treasurer and deposited into the city's funds to be reallocated back to the sheriff's office to be used within the facility for the benefit of the inmates. Further, it is my opinion that the sheriff's office may not establish and maintain a separate fund for such commissions. Finally, it is my opinion that the account into which the treasurer initially deposits the funds is irrelevant; they remain allocable to city.

APPLICABLE LAW AND DISCUSSION

Sheriffs and treasurers are constitutional officers whose authority and duties "shall be prescribed by general law or special act."¹ Virginia follows the Dillon rule of strict construction, which dictates 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.² The Dillon rule applies to constitutional officers,³ so that their power and responsibilities also are limited by statute.

With respect to your first question, § 53.1-127.1 authorizes the establishment of stores or commissaries in local correctional facilities. This statute also delineates the manner in which the proceeds from the operation of such stores are to be used. It additionally classifies both these monies and those generated from inmate telephone services as "public funds." Specifically, § 53.1-127.1 expressly provides:

Each sheriff who operates a correctional facility is authorized to provide for the establishment and operation of a store or commissary to deal in such articles as he deems proper. The net profits from the operation of such store shall be used within the facility for educational, recreational or other purposes for the benefit of the inmates as may be prescribed by the sheriff. The sheriff shall be the purchasing agent in all matters involving the commissary and nonappropriated funds received from inmates. The funds from such operation of a store or commissary and from the inmate telephone services account shall be considered public funds.

In construing a statute, we must “ascertain and give effect to the intention of the legislature [and] that intention must be gathered from the words used.”⁴ Although § 53.1-127.1 refers to telephone service accounts, the sentence that references such accounts concerns only their treatment as public funds. This language does not expressly allocate the funds for correctional facility use. Rather, the portion of the statute dedicating any monies to such use references only “the net profits from the operation of such store[.]” with “such store” referring back to the store or commissary a sheriff may choose to operate. That the store or commissary authorized by § 53.1-127.1 is distinct from telephone services is clear from the General Assembly’s decision to name them separately in the final sentence. I therefore conclude that, because the operable language does not include inmate telephone services accounts, funds derived from such accounts are not imputable to the sheriff.⁵ Thus, absent an agreement between the sheriff’s office and the locality, such monies remain within the purview of the locality, to be appropriated as the locality deems appropriate.

Turning to your second question, § 15.2-1615(A) expressly provides that “[a]ll money received by the sheriff shall be deposited intact and promptly with the county or city treasurer or Director of Finance[.]” This section authorizes a separate account maintained by the sheriff only 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.

As discussed above, funds generated from the inmate telephone commissions are not reserved for use by the sheriff to benefit inmates. Moreover, the funds otherwise do not fall within these exceptions. Thus, the sheriff may not establish or maintain a separate account for the funds generated from the inmate telephone commissions; rather, pursuant to § 15.2-1615(A), the sheriff must promptly deposit the funds with the city treasurer.⁶

Moreover, and in response to your third question, § 58.1-3127(A) directs the treasurer to collect the “amounts payable into the treasury of the political subdivision of the Commonwealth served by the treasurer.” Upon receipt, the “treasurer shall account for and pay over the revenue received in the manner provided by law.”⁷ In general, provided public funds are properly accounted for and distributed, the manner in which they are deposited is irrelevant.⁸ Thus, funds properly attributed to the sheriff’s office, regardless of whether they are initially deposited in the city’s general fund account or a separate investment account, electronically or otherwise, remain within the purview of the sheriff’s office. Nonetheless, as discussed above, the inmate telephone commissions are monies appropriately payable to the locality, not the sheriff’s office. I therefore conclude that such funds must be submitted to the treasurer for depositing.

CONCLUSION

Accordingly, it is my opinion that Virginia law does not require the funds generated from inmate telephone commissions that are received by the treasurer and deposited into the city's funds to be reallocated back to the sheriff's office to be used within the facility for the benefit of the inmates. Further, it is my opinion that the sheriff's office may not establish and maintain a separate fund for such commissions. Finally, it is my opinion that the account into which the treasurer initially deposits the funds is irrelevant; they remain allocable to city.

¹ VA. CONST. art. VII, § 4.

² Arlington Cnty. v. White, 259 Va. 708, 712, 528 S.E.2d 706, 708 (2000) (quoting City of Va. Beach v. Hay, 258 Va. 217, 221, 518 S.E.2d 314, 316 (1999)).

³ See, e.g., 2009 Op. Va. Att'y Gen. 170, 171.

⁴ Watkins v. Hall, 161 Va. 924, 930, 172 S.E. 445, 447 (1934).

⁵ The maxim "*expressio unius est exclusio alterius*" applies here: the mention of one thing in a statute implies the exclusion of another. See Smith Mountain Lake Yacht Club, Inc. v. Ramaker, 261 Va. 240, 246, 542 S.E.2d 392, 395 (2001); Turner v. Wexler, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992).

⁶ Cf. 2008 Op. Va. Att'y Gen. 84, 85-86 (concluding that sheriff may not establish and maintain a separate account for asset forfeiture funds because such monies do not fall under § 15.2-1615(A) and therefore must be deposited with the treasurer).

⁷ Section 58.1-3127(A).

⁸ Cf. § 15.2-2501(2012) ("Every locality and school division shall establish such funds as may be required by law and as may otherwise be deemed necessary to provide appropriate accounting and budgetary control over the activities and affairs of the locality or school division. This section shall not be construed to require separate depository or investment accounts for the assets of each fund.") and 2011 Op. Va. Att'y Gen. 120, 122 (concluding that, for purposes of managing school division funds, maintaining "separate" accounts does not require treasurer to set up separate bank accounts).

OP. NO. 12-062

PRISONS AND OTHER METHODS OF CORRECTION: LOCAL CORRECTIONAL FACILITIES - PRISONER PROGRAMS AND TREATMENT

Trial court may not order a person convicted of a felony to serve any confinement in jail on weekends or nonconsecutive days.

THE HONORABLE HARVEY L. BRYANT
COMMONWEALTH'S ATTORNEY, CITY OF VIRGINIA BEACH
JULY 20, 2012

ISSUE PRESENTED

You ask whether, pursuant to § 53.1-131.1, a person convicted of a felony and sentenced to confinement in jail may serve this time on the weekends or nonconsecutive days.

RESPONSE

It is my opinion that a trial court may not order a person convicted of a felony to serve any confinement in jail on weekends or nonconsecutive days.

APPLICABLE LAW AND DISCUSSION

Section 53.1-131.1 provides, in relevant part:

Any court having jurisdiction for the trial of a person charged with a misdemeanor or traffic offense or charged with any offense under Chapter 5 (§ 20-61 et seq.) of Title 20 may, if the defendant is convicted and sentenced to confinement in jail, impose the time to be served on weekends or nonconsecutive days to permit the convicted defendant to retain gainful employment.

In construing § 53.1-131.1, the primary objective is “to ascertain and give effect to legislative intent,” as expressed by the language used in the statute.¹ You relate that some construe the statute to mean that a court may impose on felony convictions a sentence to be served on weekends or nonconsecutive days provided the court has jurisdiction over misdemeanor and traffic cases. The plain language,² however, limits the court’s authority to impose such a sentence only to convictions for misdemeanors, traffic offenses and violations of Chapter 5 of Title 20.

The dispositive portion of the statute is the phrase modifying “court”: the court must be one “having jurisdiction for the trial of a person charged with a misdemeanor or traffic offense or charged with any offense under Chapter 5 (§ 20-61 et seq.) of Title 20[.]” Note that the General Assembly did not grant the authority to a court having jurisdiction over cases involving such charges generally. Rather, a court must have jurisdiction for “*the* trial of a person” so charged who is thereafter convicted. As the Court of Appeals of Virginia has explained:

The word “the” is used grammatically in the statute as a definite article -- a word that, when used before a noun, specifies or particularizes the meaning of the noun that follows, as opposed to the indefinite article “a.” See *American Bus Ass’n v. Slater*, 231 F.3d 1, 4-5, 343 U.S. App. D.C. 367 (D.C. Cir. 2000) (explaining that “[i]t is a rule of law well established that the definite article ‘the’ particularizes the subject which it precedes. It is a word of limitation as opposed to the indefinite or generalizing force of ‘a’ or ‘an.’” (citing *Black’s Law Dictionary* 1477 (6th ed. 1990))).³

The application of § 53.1-131.1, therefore, clearly is limited to a court presiding over one of the enumerated offenses.⁴

This interpretation is further bolstered by the provision’s legislative history. Prior to 1999, the relevant portion of the statute read, “[a]ny court having jurisdiction for the trial of a person charged with a *criminal offense* or traffic offense”⁵ In 1999, the legislature changed the language, thereby limiting the provision to courts exercising jurisdiction over the specifically enumerated offenses. When the legislature amends a particular statute, it is normally presumed that “a change in law was intended.”⁶ Moreover, “it is well established that every act of the legislature should be read so as to give reasonable effect to every word and to promote the ability of the enactment to remedy the mischief at which it is directed.”⁷

Here, the legislature clearly intended to limit the applicability of this statute. By intentionally changing the language from “criminal offense” to “misdemeanor” the

intent was to limit the statute to only cases involving misdemeanors, traffic offense and violations of Chapter 5 of Title 20.⁸

CONCLUSION

Accordingly, it is my opinion that § 53.1-131.1 does not authorize a trial court to order a person convicted of a felony to serve any confinement in jail on weekends or nonconsecutive days.

¹ Commonwealth v. Amerson, 281 Va. 414, 418, 706 S.E.2d 879, 882 (2011).

² “When the language of a statute is unambiguous, [courts] are bound by the plain meaning of that language.” Ford Motor Co. v. Gordon, 281 Va. 543, 549, 708 S.E.2d 846, 850 (2011).

³ Grafmuller v. Commonwealth, 57 Va. App. 58, 65-66, 698 S.E.2d 276, 280 (2010).

⁴ Also applicable here is the principle *expressio unius est exclusio alterius*, the “mention of a specific item in a statute implies that omitted items were not intended to be included within the scope of the statute.”⁴ GEICO v. Hall, 260 Va. 349, 355, 533 S.E.2d 615, 617 (2000). As there are no felony crimes mentioned in the section, the legislature did not intend for a trial court to sentence a defendant to weekend time or nonconsecutive days for a felony conviction.

⁵ See 1999 Va. Acts ch. 9.

⁶ Wisniewski v. Johnson, 223 Va. 141, 144, 286 S.E.2d 223, 225 (1982).

⁷ Jones v. Conwell, 227 Va. 176, 181, 314 S.E.2d 61, 64 (1984).

⁸ Cf. VA. CODE ANN. § 53.1-131.2 (2011), which provides in relevant part:

Any court having jurisdiction for the trial of a person charged with a *criminal offense*, a traffic offense or an offense under Chapter 5 (§ 20-61 et seq.) of Title 20, or failure to pay child support pursuant to a court order may, if the defendant is convicted and sentenced to confinement in a state or local correctional facility, and if it appears to the court that such an offender is a suitable candidate for home/electronic incarceration, assign the offender to a home/electronic incarceration program as a condition of probation, if such program exists, under the supervision of the sheriff, the administrator of a local or regional jail, or a Department of Corrections probation and parole district office established pursuant to § 53.1-141. (emphasis added).

OP. NO. 11-131

PROPERTY AND CONVEYANCES: FORMS AND EFFECTS OF DEEDS AND COVENANTS; LIENS

Registered limited liability partnership organized under the laws of the Commonwealth may serve as a trustee under a deed of trust covered by § 55-58.1.

THE HONORABLE GREGORY D. HABEED
MEMBER, HOUSE OF DELEGATES
MARCH 23, 2012

ISSUE PRESENTED

You ask whether, under § 55-58.1, a Virginia limited liability partnership may serve as a trustee in a deed of trust on real property.

RESPONSE

It is my opinion that a registered limited liability partnership¹ organized under the laws of the Commonwealth may serve as a trustee under a deed of trust covered by § 55-58.1.²

BACKGROUND

You relate that a bank would like to appoint a law firm, organized as a limited liability partnership, as the substitute trustee under a deed of trust held by the bank.

APPLICABLE LAW AND DISCUSSION

Section 55-58.1, which relates to the recording requirements of certain deeds of trust provides, in pertinent part, that “[n]o person not a resident of this Commonwealth may be named or act, in person or by agent or attorney, as the trustee of a security trust, either individually or as one of several trustees, the other or others of which are residents of this Commonwealth.”³

Although the Code does not define the term “person” specifically for purposes of § 55-58.1, § 1-230 provides a definition to be applied generally in the construction of all provisions of the Code.⁴ It establishes that “person” means “any individual, corporation, *partnership*, association, cooperative, limited liability company, trust, joint venture, government, political subdivision, or any other legal or commercial entity and any successor, representative, agent, agency, or instrumentality thereof.”⁵ The Virginia Uniform Partnership Act,⁶ in turn, defines “partnership” as an “association of two or more persons to carry on as co-owners a business for profit [...] and includes, for all purposes of the laws of this Commonwealth, a registered limited liability partnership.”⁷

Thus, applying these definitions to § 55-58.1,⁸ and barring any contrary or limiting provision in the partnership agreement or applicable law, a partnership formed under the laws of the Commonwealth, including a registered limited liability partnership, may serve as a trustee under a deed of trust covered by § 55-58.1.

CONCLUSION

Accordingly, it is my opinion that a registered limited liability partnership organized under the laws of the Commonwealth may serve as a trustee under a deed of trust covered by § 55-58.1.

¹ For purposes of this opinion, I am assuming that the “Virginia limited liability partnership” to which you refer is a “registered limited liability partnership,” meaning a partnership formed under the laws of the Commonwealth that is registered in accordance with the requirements of § 50-73.132 (2009). See VA. CODE ANN. § 50-73.79 (2009) (defining “registered limited liability partnership”).

² For purposes of this Opinion, I am assuming that the subject deed of trust falls within the purview of § 55-58.1 (2007). See 1967-68 Op. Va. Att’y Gen. 228, 229 (stating that whether a particular deed of trust falls within the statute can only be made by an examination of such deed of trust).

³ Section 55-58.1(2).

⁴ See § 1-202 (2011) (“The rules and definitions set forth in this chapter shall be used in the construction of this Code and the acts of the General Assembly, unless the construction would be inconsistent with the manifest intention of the General Assembly”).

⁵ Section 1-230 (2011) (emphasis added). See also § 50-73.1 (Supp. 2011) (defining “person” to include a partnership for purposes of the Virginia Revised Uniform Limited Partnership Act, §§ 50-73.1 through 50-73.78); § 55-34.1 (2007) (defining “person” to include a partnership for purposes of the Uniform Custodial Trust Act, §§ 55-34.1 through 55-34.19).

⁶ VA. CODE ANN. §§ 50-73.79 through 50-73.150 (2009 & Supp. 2011).

⁷ See § 50-73.79.

⁸ Because the *Code of Virginia* constitutes a single body of law, the practice of referring to other Code sections as interpretive guides is well established and other sections may be looked to where the same phraseology is used. See *First Nat’l Bank of Richmond v. Holland*, 99 Va. 495, 504-05, 39 S.E. 126, 129-30 (1901) (examining various sections of the Code and history of legislation to determine whether terms “goods or chattels” were intended to embrace “choses in action”). See also 2001 Op. Va. Att’y Gen. 171, 172 (extending the definition of “person” in Title 1 to include limited liability companies and thereby concluding that a Virginia limited liability company may serve as a trustee in a deed of trust on real property covered by § 55-58.1).

OP. NO. 11-053

PROPERTY AND CONVEYANCES: FORMS AND EFFECTS OF DEEDS AND COVENANTS; LIENS

For purposes of § 55-58.1(2), “principal office” may be defined according to the definition of this term provided in Title 13.1 of the *Code of Virginia*. It is further my opinion that a corporation’s registered office does not satisfy the requirements of § 55-58.1(2) unless such office also meets the definition of “principal office.”

THE HONORABLE J. CHAPMAN PETERSEN
MEMBER, SENATE OF VIRGINIA
SEPTEMBER 14, 2012

ISSUES PRESENTED

You ask what constitutes a “principal office” under § 55-58.1(2) of the *Code of Virginia*. You further inquire specifically whether a “principal office” requires more than a registered office at which none of the duties of a trustee are performed or managed in order to foreclose on homes in Virginia under a deed of trust.

RESPONSE

It is my opinion that, for purposes of § 55-58.1(2), “principal office” may be defined according to the definition of this term provided in Title 13.1 of the *Code of Virginia*. It is further my opinion that a corporation’s registered office does not satisfy the requirements of § 55-58.1(2) unless such office also meets the definition of “principal office.”

APPLICABLE LAW AND DISCUSSION

Section 55-58.1(2) provides, in pertinent part, that “[n]o corporation may be named or act as the trustee or as one of the trustees of a security trust unless it is chartered under

the laws of this Commonwealth or of the United States of America, and unless its principal office is within this Commonwealth.”¹ Thus, to serve as a trustee, a corporation must meet two requirements: 1) it must be chartered either under Virginia or federal law, and 2) it must maintain its principal office within the Commonwealth.

The General Assembly does not define the term “principal office” in Title 55. In the absence of a statutory definition, the plain and ordinary meaning of a term is controlling, given the context in which it is used.² The term “principal office” is defined elsewhere in the Code, and this statutory definition may be looked to as an interpretative guide for determining the plain and ordinary meaning of the phrase as it is used in § 55-58.1(2).³ Title 13.1, which governs corporations generally, provides that a “principal office” is

the office, in or out of the Commonwealth, where the principal executive offices of a domestic or foreign corporation are located, or, if there are no such offices, the office, in or out of the Commonwealth, so designated by the board of directors. The designation of the principal office in the most recent annual report filed pursuant to § 13.1-775 shall be conclusive for purposes of this chapter.⁴

Because the *Code of Virginia* constitutes a single body of law and other sections may be looked to where the same phraseology is used,⁵ I conclude that an office in Virginia meeting this definition satisfies the requirement of § 55-58.1(2) that a corporation acting as a trustee of a security trust maintain its principal office “within this Commonwealth.”⁶

Under Virginia law, all corporations, whether chartered by or doing business in the Commonwealth, must maintain a registered office within the Commonwealth.⁷ Provided it is within the Commonwealth, a registered office “may be the same as *any* of its places of business[.]”⁸ To qualify as a trustee under § 55-58.1, on the other hand, a corporation must maintain its *principal* office in the Commonwealth. I therefore conclude that unless the corporation’s registered office is also its principal office, as defined above, it would not serve to meet the requirements of § 55-58.1(2).

Nonetheless, as a final comment, I must note that whether any particular facility or operation satisfies such criteria and thereby constitutes a principal office is a fact-specific determination beyond the scope of this Opinion.⁹

CONCLUSION

Accordingly, it is my opinion that, for purposes of § 55-58.1(2), “principal office” may be defined according to the definition of this term provided in Title 13.1 of the *Code of Virginia*. It is further my opinion that a corporation’s registered office does not satisfy the requirements of § 55-58.1(2) unless such office also meets the definition of “principal office.”

¹ A “security trust” includes “a deed of trust, mortgage, bond or other instrument, . . . under which the title to real . . . property . . . , wholly situate in and including no property situate outside of the Commonwealth of Virginia, is conveyed, transferred, encumbered or pledged to secure the payment of money or the performance of an obligation” VA. CODE ANN. § 55-58.1(1) (2007).

² See *Sansom v. Bd. of Supvrs.*, 257 Va. 589, 594-95, 514 S.E.2d 345, 349 (1999); *Hubbard v. Henrico Ltd. P'ship*, 255 Va. 335, 340, 497 S.E.2d 335, 338 (1998); *Commonwealth v. Orange-Madison Coop. Farm Serv.*, 220 Va. 655, 658, 261 S.E.2d 532, 533-34 (1980). See also 2012 Op. Va. Att'y Gen. No. 11-129, available at <http://www.ag.virginia.gov/Opinions%20and%20Legal%20Resources/Opinions/2012opns/11-129-Norment.pdf>; 1987-88 Op. Va. Att'y Gen. 423, 426-27.

³ See *First Nat'l Bank of Richmond v. Holland*, 99 Va. 495, 504, 39 S.E. 126, 129-30 (1901). See also 1975-76 Op. Va. Att'y Gen. 3, 4-5.

⁴ See VA. CODE ANN. §§ 13.1-603 (2011) (defining "principal office" for stock corporations) and 13.1-803 (2011) (for the same definition of "principal office" in the context of nonstock corporations). See also BLACK'S LAW DICTIONARY 1083 (6th ed. 1990) ("[t]he principal office of a corporation is its headquarters, or the place where the chief or principal affairs and business of the corporation are transacted. Usually, it is the office where the company's books are kept, where its meetings of stockholders are held, and where the directors, trustees, or managers assemble to discuss and transact the important general business of the company; but no one of these circumstances is a controlling test. . . . The office (in or out of the state of incorporation) so designated in the annual report where the principal executive offices of a domestic or foreign corporation are located.").

⁵ See *First Nat'l Bank of Richmond*, 99 Va. at 504, 39 S.E. at 129-30.

⁶ I note that prior opinions of this Office have concluded, based on the broad definition of "person" provided in § 2.2-230, that certain limited liability companies and limited liability partnerships may serve as trustees pursuant to § 55-58.1. See 2001 Op. Va. Att'y Gen. 171; 2012 Op. Va. Att'y Gen. No. 11-131, available at <http://www.ag.virginia.gov/Opinions%20and%20Legal%20Resources/Opinions/2012opns/11-131%20Habeeb.pdf>. Nonetheless, according to the plain terms of the statute, the principal office requirement of § 55-58.1(2), and thus this opinion, applies only to corporations. Section 55-58.1(2) separately requires that any "person" who is to be named or is to act as a trustee of a security trust must be a resident of the Commonwealth.

⁷ See §§ 13.1-634; 13.1-763; 13.1-833 (2011) (requiring all domestic stock corporations, foreign corporations, and domestic nonstock corporations, respectively, to maintain a registered office and agent).

⁸ *Id.* (emphasis added).

⁹ See, e.g., 1991 Op. Va. Att'y Gen. 122, 124 and opinions cited therein for matters that require factual determinations.

OP. NO. 12-078

PUBLIC SERVICE COMPANIES: PUBLIC PRIVATE TRANSPORTATION ACT

WATERS OF THE STATE, PORTS AND HARBORS: VIRGINIA PORT AUTHORITY

Virginia Port Authority is the responsible public entity under the PPTA for any concession of Port facilities.

VPA has authority to determine whether or not to select a preferred proposer with which to enter into negotiations for a comprehensive agreement for the concession to operate Port facilities.

Selection of the preferred proposer remains in the discretion of the VPA.

VPA may not sign a comprehensive agreement without first receiving the approval of the Secretary of Transportation.

Governor, having supervisory authority over the Secretary of Transportation, may provide appropriate coordination and guidance as the Secretary of Transportation exercises his

authority to determine whether to give final approval before the responsible public entity signs a comprehensive agreement.

THE HONORABLE FRANK W. WAGNER
THE HONORABLE RALPH S. NORTHAM, M.D.
THE HONORABLE JEFFREY L. MCWATERS
MEMBERS, SENATE OF VIRGINIA

THE HONORABLE CHRISTOPHER P. STOLLE, M.D.
THE HONORABLE BARRY D. KNIGHT
MEMBERS, HOUSE OF DELEGATES
OCTOBER 3, 2012

ISSUES PRESENTED

You present the following questions related to the Public-Private Transportation Act of 1995 (“PPTA”), the Secretary of Transportation’s PPTA Implementation Manual and Guidelines of May 21, 2012 (“PPTA Guidelines”) and the current consideration by the Governor and the Secretary of Transportation of proposals submitted by three private entities for the concession to operate Port of Virginia (“Port”) facilities owned and/or leased by the Commonwealth of Virginia through the Virginia Port Authority (“VPA”):

1. You ask who or which public entity has authority under the PPTA to review and evaluate the proposals from these three private entities;
2. You ask who or which public entity has the authority, following the vetting of the proposals, to determine whether or not to select a preferred proposer with which to enter into negotiations for a comprehensive agreement for the concession to operate Port facilities;
3. You ask who or which public entity has the authority under the PPTA, after negotiations with the preferred proposer, to reverse or override the selection of that proposer;
4. You ask who or which public entity has the authority under the PPTA (i) to approve and, (ii) to execute any final comprehensive agreement on behalf of the Commonwealth for the concession to operate Port facilities; and
5. You ask whether the Governor has the authority to reverse or override (i) the selection of a preferred proposer, or (ii) the approval of the final comprehensive agreement.¹

RESPONSE

It is my opinion that:

1. The VPA, pursuant to § 56-557, is the responsible public entity under the PPTA for any concession of Port facilities because the General Assembly has conferred on it alone the power to develop and/or operate Port facilities and, as a result, the VPA bears statutory responsibility to review and evaluate the proposals received from APMT, Carlyle and RREEF, and to do so according to any guidelines adopted by it pursuant to §§ 56-560 and 56-573.1;

2. The VPA, as the responsible public entity under the PPTA, has the authority pursuant to §§ 56-560 and 56-573.1 to determine whether or not to select a preferred proposer with which to enter into negotiations for a comprehensive agreement for the concession to operate Port facilities;²
3. The selection of the preferred proposer remains in the discretion of the VPA as the responsible public entity, but the VPA may not sign a comprehensive agreement without first receiving the approval of the Secretary of Transportation as required by § 56-573.1(2);
4. Under the PPTA, specifically §§ 56-560 and 56-573.1, the VPA, as the responsible public entity, has the authority to (i) approve entering into a comprehensive agreement, and (ii) subject to final approval by the Secretary of Transportation pursuant to § 56-573.1(2), execute a comprehensive agreement on behalf of the Commonwealth for the concession to operate Port facilities; and
5. The Governor, having supervisory authority over the Secretary of Transportation under § 2.2-200(B), may provide appropriate coordination and guidance as the Secretary of Transportation exercises his authority under § 56-573.1(2) to determine whether to give final approval before the responsible public entity signs a comprehensive agreement.

BACKGROUND

The VPA is a body corporate and a political subdivision of the Commonwealth of Virginia.³ All powers, rights and duties provided to the VPA legislatively are to be exercised by the VPA Board of Commissioners (“VPA Board”).⁴ It is the duty of the VPA, on behalf of the Commonwealth to “foster and stimulate the commerce of the ports of the Commonwealth, to promote the shipment of goods and cargoes through the ports, to seek to secure necessary improvements of navigable tidal waters within the Commonwealth, and in general to perform any act or function which may be useful in developing, improving, or increasing the commerce, both foreign and domestic, of the ports of the Commonwealth.”⁵

In 1952, the General Assembly established the VPA’s predecessor entity, and the legislature subsequently assigned to the VPA the mission of consolidating the maritime harbor and water terminals of the cities of Norfolk, Newport News, and Portsmouth and providing for the centrally directed operation of all state-owned port facilities in Hampton Roads.⁶ Pursuant to its statutory authorities,⁷ the VPA currently controls the following Commonwealth-owned Port facilities that constitute part of the Port of Virginia: Norfolk International Terminals (“NIT”); Newport News Marine Terminal (“NNMT”); Portsmouth Marine Terminal (“PMT”); and the Virginia Inland Port (“VIP”), located in Warren County, Virginia.⁸

The Secretary of Transportation (“the Secretary”) received from APMT an unsolicited conceptual proposal dated April 4, 2012, for the concession of Port facilities.⁹ APMT supplemented that proposal with additional information on April 30, 2012, and July 23, 2012.¹⁰

In May 2012, the Secretary of Transportation adopted the new PPTA guidelines¹¹ setting forth the organizational structure adopted by the Office of the Secretary of Transportation for developing, implementing and administering PPTA projects. These guidelines confer upon the Secretary overall authority respecting that entire process¹² and establish a PPTA Steering Committee. The PPTA Steering Committee, is chaired by the Commonwealth Transportation Commissioner and consists of numerous Virginia governmental transportation officials, including a VPA representative. The PPTA Steering Committee is tasked, among other responsibilities, with reviewing the recommendations of Office of Transportation Public-Private Partnerships (“OTP3”) regarding which proposers should advance in the PPTA evaluation process. The committee is directed to “[p]rovide high-level policy and procurement guidance to the OTP3 on an as-needed basis.”¹³ The OTP3 Director is supported by a “multidisciplinary program staff,” industry experts and consultants for the review process. In conjunction with representatives of the responsible public entity, the Director, subject to oversight by the PPTA Steering Committee, bears overall responsibility for conducting the PPTA process following the Secretary’s receipt of an unsolicited or solicited proposal regarding a qualifying transportation project.

In a memorandum dated May 22, 2012, to the Secretary and the Chairman of the VPA Board (“the OTP3 Memorandum”), the OTP3 Director recommended certain modifications to the review process described in the PPTA Guidelines and a proposed schedule for the review process.¹⁴ Near in time to the issuance of the OTP3 Memorandum, the Secretary accepted the APMT proposal for further consideration, citing §§ 56-560 and 56-573.1:1. The Secretary then directed OTP3 to take steps to solicit publicly additional conceptual proposals. On May 23, 2012, the Office of the Secretary of Transportation issued a Request for Alternative Proposals Relating to the Virginia Port Authority.¹⁵

On May 30, 2012, the Governor issued Executive Order 46, affirming his delegation to the Secretary of the Governor’s powers and duties under the PPTA to act as the responsible public entity on behalf of the Commonwealth for both solicited and unsolicited proposals involving VPA qualifying transportation facilities.¹⁶ In support of this delegation, Executive Order 46 cites the authority bestowed on the Governor by the Constitution of Virginia, Article V, §§ 1, 7, 8, and 10, and Virginia Code §§ 2.2-103 and 2.2-104.¹⁷

In a letter dated August 7, 2012, to the VPA Board Chairman, the Governor referenced that executive order and declared that the Secretary “is serving as the responsible public entity on my behalf for unsolicited and solicited proposals involving the Virginia Port Authority.” The Governor stated that “the VPA also can be considered a responsible public entity under the PPTA,” and he asserted that “the purpose of this letter is to clarify the respective roles of the Secretary, acting as my designee, and the VPA in the proposal review and evaluation process.” The Governor directed that the Secretary “serve as the coordinating responsible public entity,” to leverage the resources of OTP3 to manage the proposal review and evaluation process, “and to provide for a single point of contact for private entities participating in the PPTA process” for the potential concession of Port facilities. The Governor

also stated in the letter that the Commonwealth would look to the VPA “to provide input on the proposal review and evaluation process and provide subject matter expertise in support of negotiations for a comprehensive agreement.”¹⁸

Carlyle and RREEF submitted to the OTP3 their alternative conceptual proposals on August 13, 2012.¹⁹ On or about August 22, 2012, after making a presentation to the VPA Board, the Secretary also accepted these latter two proposals for further consideration in the ongoing PPTA process.²⁰

APPLICABLE LAW AND DISCUSSION

The separation of powers is one of the central tenets of Virginia’s system of government.²¹ The *Constitution of Virginia* provides that:

The legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others, nor any person exercise the power of more than one of them at the same time; provided, however, administrative agencies may be created by the General Assembly with such authority and duties as the General Assembly may prescribe.^[22]

The Virginia Constitution vests the legislative power of the Commonwealth in the General Assembly.²³ The power of the General Assembly is plenary, limited only by the Constitutions of the United States and Virginia.²⁴ In contrast, the executive power of the Commonwealth that the Virginia Constitution vests in the Governor is not nearly as extensive.²⁵ As the Supreme Court of Virginia has observed, “[u]nder our system of government, the governor has and can rightly exercise no power except such as may be bestowed upon him by the constitution and the laws.”²⁶

In an exercise of its legislative power, the General Assembly enacted the PPTA.²⁷ To further the General Assembly’s policy objective “to encourage investment in the Commonwealth by private entities that facilitates the development and/or operation of transportation facilities” by according public and private entities “the greatest possible flexibility in contracting with each other,”²⁸ the PPTA provides the authority for the Commonwealth, and any agency or authority thereof, any county, city or town and any other political subdivision of the foregoing to enter into agreements with private entities so that the private entities may develop and/or operate qualifying transportation facilities, *i.e.*, those facilities included within the legislation’s scope.²⁹

By the plain terms of the PPTA, the General Assembly assigned to the “responsible public entity” the central role in the PPTA proposal evaluation process. Any private entity seeking to develop and/or operate a transportation facility “shall first obtain approval of the responsible public entity under § 56-560.”³⁰ The responsible public entity is authorized to grant such approval only after determining that the proposed development and/or operation of the transportation facility by the private entity “serves the public purpose” of the PPTA.³¹ The responsible public entity further is charged with developing guidelines that establish the process for the acceptance and review of proposals.³² Those guidelines are intended to set forth the schedule for review of the proposal by the responsible public entity, the process for receipt and review of competing proposals, and the type and amount of information that is

necessary for adequate review of proposals at each stage of review.³³ Although § 56-560(A) enumerates the specific information required to be included in a private entity's proposal, the PPTA grants to the responsible public entity the discretion to waive any of the required information or to require additional information from the private entity.³⁴ Moreover, any agreement resulting from the established process is between the private entity and the responsible public entity.³⁵ The PPTA does not afford any entity other than the responsible public entity the authority to exercise these functions.³⁶

For purposes of the PPTA, the General Assembly defined "responsible public entity" as a "public entity, including local governments and regional authorities, that has the power to develop and/or operate the qualifying transportation facility."³⁷ The PPTA further defines a "public entity" to mean "the Commonwealth and any agency or authority thereof, any county, city, or town and any other political subdivision of any of the foregoing, but shall not include any public service company." Additionally, a "transportation facility" includes a "port facility or similar commercial facility used for the transportation of persons or goods;" to "develop" means "to plan, design, develop, finance, lease, acquire, install, construct, or expand;" and to "operate" means "to finance, maintain, improve, equip, modify, repair, or operate."³⁸

Based on these definitions, I conclude that the Virginia Port Authority is the "responsible public entity" for purposes of the consideration of proposals under the PPTA associated with the Port of Virginia. Like the PPTA process itself, the creation of the VPA as a body corporate and political subdivision is the product of legislative action.³⁹ Pursuant to its legislative power, the General Assembly vested in the VPA, through its board, oversight of the Port, which includes an extensive grant of power to the VPA to carry out its important role.⁴⁰ The VPA specifically is tasked with the duty to develop and operate the Port.⁴¹ Particularly relevant to your questions is the fact that the VPA itself may lease part or all of its real or personal property for such time period and upon such terms and conditions as the VPA may determine.⁴² This means that the General Assembly has empowered the VPA Board independently to lease or enter into a concession with another entity to operate its marine terminal facilities. Further, given that (i) the PPTA defines "transportation facility" to include "port facility" and (ii) the General Assembly has placed solely in the hands of the VPA the authority to manage the Port facilities, I must conclude that the VPA is the only public entity that meets the definition of "responsible public entity" under the PPTA respecting any proposals for the concession of Port facilities. Thus, absent a legislative change made by the General Assembly, only the VPA can effectuate a concession with a private entity to operate the Port facilities.

Although the PPTA recognizes that some projects may involve more than one interested public body, this Office cannot conclude that the Governor, or the Secretary acting as his designee, correctly meets the PPTA's definition of a "responsible public entity" under these circumstances, notwithstanding the language of Executive Order 46, the Governor's August 7, 2012, letter to the VPA Board Chairman, and the OTP3 Memorandum. In situations where a private entity submits a proposal under the PPTA "that may require approval by more than one public entity," § 56-566.2 provides that representatives of the affected public entities must meet and "determine

which public entity shall serve as the coordinating responsible public entity.” Thereafter, “the coordinating responsible public entity and the private entity shall proceed in accordance with this chapter.”⁴³ The Governor’s actions in designating the Secretary of Transportation as the “coordinating responsible public entity” do not comport with this procedure, as established by the General Assembly.⁴⁴

In response to your first two inquiries, I therefore conclude that the VPA, as the sole responsible public entity, is the only entity with authority to review and evaluate the proposals submitted by the private entities you name in your inquiry and to select a preferred proposer, if any. With regard to your next two questions, however, while the VPA remains the sole responsible public entity, the fact that the VPA nominally functions as a state agency within the meaning of § 56-573.1(2),⁴⁵ means that “the approval of the Secretary of Transportation shall be required as more specifically set forth in the guidelines before the comprehensive agreement is signed.” The responsible public entity’s “approval” of a proposal, that is, acceptance of it for further consideration pursuant to § 56-560, remains subject to subsequent negotiation and entry of a comprehensive agreement. Pursuant to §§ 56-560 and 56-573.1, as the responsible public entity for the Port facilities, VPA maintains under the PPTA the prerogative to approve entry of an interim agreement and/or a comprehensive agreement for the concession to operate Port facilities. The signing of a comprehensive agreement under the PPTA, however, is subject to the Secretary’s authority to approve execution thereof. Once the VPA Board has received the Secretary’s approval, and after having considered and approved the comprehensive agreement by passing an appropriate VPA Board resolution, VPA’s Executive Director then would execute such an agreement.⁴⁶

Lastly, in response to your final question, because the Governor has supervisory authority over the Secretary of Transportation,⁴⁷ I conclude that the Governor may provide appropriate coordination and guidance as the Secretary of Transportation exercises his authority under § 56-573.1(2), as discussed above, to determine whether to give final approval before the responsible public entity signs a comprehensive agreement.

CONCLUSION

Accordingly, it is my opinion that:

1. The VPA, pursuant to § 56-557, is the responsible public entity under the PPTA for any concession of Port facilities because the General Assembly has conferred on it alone the power to develop and/or operate Port facilities and, as a result, the VPA bears statutory responsibility to review and evaluate the proposals received from APMT, Carlyle and RREEF, and to do so according to any guidelines adopted by it pursuant to §§ 56-560 and 56-573.1;
2. The VPA, as the responsible public entity under the PPTA, has the authority pursuant to §§ 56-560 and 56-573.1 to determine whether or not to select a preferred proposer with which to enter into negotiations for a comprehensive agreement for the concession to operate Port facilities;

3. The selection of the preferred proposer remains in the discretion of the VPA as the responsible public entity, but the VPA may not sign a comprehensive agreement without first receiving the approval of the Secretary of Transportation as required by § 56-573.1(2);
4. Under the PPTA, specifically §§ 56-560 and 56-573.1, the VPA, as the responsible public entity, has the authority to (i) approve entering into a comprehensive agreement, and (ii) subject to final approval by the Secretary of Transportation pursuant to § 56-573.1(2), execute a comprehensive agreement on behalf of the Commonwealth for the concession to operate Port facilities; and
5. The Governor, having supervisory authority over the Secretary of Transportation under § 2.2-200(B), may provide appropriate coordination and guidance as the Secretary of Transportation exercises his authority under § 56-573.1(2) to determine whether to give final approval before the responsible public entity signs a comprehensive agreement.

¹ You also ask whether the unsolicited conceptual proposal received by the Secretary of Transportation from APM Terminals, Inc. (“APMT”), and the two subsequently received alternative conceptual proposals solicited from Carlyle Infrastructure Partners, L.P. (“Carlyle”) and RREEF America, L.L.C. (“RREEF”), meet the requirements of the PPTA and the PPTA Guidelines. I decline to render an opinion on this issue, however, because the sufficiency of the contents of the proposals cannot be determined. Those proposals neither were submitted to nor accepted by the responsible public entity as required by the PPTA, and the PPTA empowers only the responsible public entity to determine whether to waive any of the minimum standards for PPTA proposals enumerated in § 56-560 or to require additional information pursuant to guidelines adopted by the responsible public entity or other written instructions from the responsible public entity.

² Although your inquiry does not implicate directly the issue, I note that while the PPTA proposal process is not subject to the Virginia Public Procurement Act, VA. CODE ANN. §§ 2.2-4300 through 2.2-4377 (2011), the PPTA requires the responsible public entity to follow a procurement process that is consistent with, as appropriate, either “competitive sealed bidding” or “competitive negotiation” as those terms are defined by the Virginia Public Procurement Act. *See* § 56-573.1.

³ VA. CODE ANN. § 62.1-128 (2006). *See generally* Chapter 10 of Title 62.1, Virginia Port Authority, §§ 62.1-128 through 62.1-147.2 (2006 & Supp. 2012).

⁴ Section 62.1-129 (Supp. 2012).

⁵ Section 62.1-132.3 (2006).

⁶ *See* 1952 Va. Acts ch. 61 (creating the Virginia State Ports Authority); § 62.1-132.8 (2006).

⁷ The VPA is authorized to acquire, construct, maintain, equip, and operate marine terminals, port facilities, wharves, docks, ships, piers, quays, elevators, compressors, refrigeration storage plants, warehouses, and other structures necessary for the convenient use of the same in the aid of commerce. Section 62.1-132.18 (2006). The VPA may hold title to property in its own name and is able to issue revenue bonds for such acquisitions. *Id.* The VPA also has broad powers to rent, lease, buy, own, acquire, construct, reconstruct, and dispose of harbors, seaports, port facilities, and such property, whether real or personal, as it may find necessary or convenient and to issue revenue bonds therefor without pledging the faith and credit of the Commonwealth. Section 62.1-132.19 (2006).

⁸ In addition, the VPA leases the APM Terminals Virginia (“APMTVA”), owned by APMT and located in Portsmouth, Virginia. The VPA maintains a separate Virginia nonstock corporation, Virginia International Terminals, Inc. (“VIT”), to operate Commonwealth-controlled Port facilities under a service agreement with the VPA. The VPA also leases the Port of Richmond, a marine terminal on the James River owned by the City of Richmond and operated by PCI of Virginia, L.L.C. *See* COMPREHENSIVE ANNUAL FINANCIAL REPORT FOR THE VIRGINIA PORT AUTHORITY (Fiscal Year Ended June 30, 2011), *available at*

<http://www.portofvirginia.com/media/19260/cafr%20final%20web%20version.pdf>.

⁹ See APM TERMINALS, INC., UNSOLICITED CONCEPTUAL PROPOSAL (Apr. 4, 2012), *available at* http://www.vappta.org/resources/APM%20Unsolicited%20Conceptual%20Proposal_Web.pdf. The APMT proposal would establish a standard landlord-tenant port concession for a period of 48 years, with APMT operating the following Port facilities: NIT, APMTVA, NNMT, PMT, and VIP.

¹⁰ See APM TERMINALS, INC., ADDENDUM TO UNSOLICITED CONCEPTUAL PROPOSAL (Apr. 30, 2012), *available at* <http://www.vappta.org/resources/APMT%20Unsolicited%20Conceptual%20Proposal%20-%20April%2030%20Addendum.pdf>; and APM TERMINALS INC., SECOND ADDENDUM TO UNSOLICITED CONCEPTUAL PROPOSAL (July 23, 2012), *available at* http://www.vappta.org/resources/APMT%20Unsolicited%20Proposal_Addendum%202.pdf.

¹¹ The PPTA directs the responsible public entity “to develop guidelines that establish the process of acceptance and review of a proposal from a private entity pursuant to [the applicable provisions of the PPTA].” Section 56-560(D).

¹² See generally PPTA Guidelines, Subsection 2.1.

¹³ See PPTA Guidelines, Subsection 2.3. The PPTA Steering Committee is a creation of the PPTA Guidelines, one of a number of departures from the process set forth in the PPTA. This Office does not have information regarding any participation of the PPTA Steering Committee in the process to evaluate the proposals regarding a concession of Port facilities. Nor is it aware that the PPTA Steering Committee reviewed any recommendations of OTP3. However, in the OTP3 Memorandum, outlining modifications to the review process described in the PPTA Guidelines for use in the current process, it appears that the PPTA Steering Committee is not participating in the process. For example, that memorandum includes statements to the effect, “the Secretary determined that APM’s unsolicited conceptual proposal satisfied the minimum requirements of applicable law and the Guidelines,” “[t]he Secretary and OTP3 will be better able to review and evaluate APM’s unsolicited conceptual proposal using a modified project development and procurement process,” “[t]he Secretary will formally accept APM’s unsolicited conceptual proposal for further review based on the outcome of the policy level review,” “the OTP3 will review alternative proposals to determine compliance with the requirements of the Request and Guidelines,” and, “[t]he Secretary retains the right to terminate its evaluation of APM’s unsolicited conceptual proposal and alternative proposals at any time.”

¹⁴ On May 21, 2012, the Secretary, acting through OPT3, completed a revision of previous Secretarial PPTA Guidelines and adopted the current PPTA Guidelines. Those guidelines, at Section 1.1, state that, “[t]he Secretary of Transportation adopts this Implementation Manual for use by the commonwealth’s transportation agencies, including...the Virginia Port Authority[.]” The VPA Board thus far has not adopted the Secretary’s and OTP3’s use of the PPTA Guidelines respecting the proposals for the concession to operate Port facilities, nor has the VPA Board adopted the recommended modifications to the review process and schedule as contained in the OTP3 Memorandum.

¹⁵ See OFFICE OF THE SEC’Y OF TRANSP., REQUEST FOR ALTERNATIVE PROPOSALS RELATING TO THE VIRGINIA PORT AUTHORITY (May 23, 2012), *available at*

http://www.vappta.org/resources/Request%20for%20Alternative%20Proposals_Final.pdf.

¹⁶ See Exec. Order No. 46, 28:22 Va. Reg. Regs. 1689 (July 2, 2012).

¹⁷ *Id.*

¹⁸ Pursuant to § 2.2-200, the Governor appoints the Secretary (subject to confirmation by the General Assembly) and specifies his duties; thus, the Secretary retains at all times a subordinate position to him. See also VA. CODE ANN. § 2.2-104 (2011).

¹⁹ See CARLYLE INFRASTRUCTURE PARTNERS, L.P., ALTERNATIVE CONCEPTUAL PROPOSAL (Aug. 13, 2012), *available at* http://www.vappta.org/resources/Carlyle%20Alternative%20Proposal_web2.pdf; and RREEF AMERICA, L.L.C., ALTERNATIVE CONCEPTUAL PROPOSAL (Aug. 13, 2012), *available at* http://www.vappta.org/resources/RREEF%20Alternative%20Proposal_web2.pdf.

²⁰ To date, the VPA Board has not acted to accept any of the proposals for further consideration.

- ²¹ See I A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 468 (1974) (noting that the doctrine of separation of powers has been enshrined in the Constitution of Virginia since 1776).
- ²² VA. CONST. art. III, § 1. See also VA. CONST. art. I, § 5.
- ²³ VA. CONST. art. IV, § 1.
- ²⁴ See VA. CONST. art. IV, § 14 (“The authority of the General Assembly shall extend to all subjects of legislation not herein forbidden or restricted; and a specific grant of authority in this Constitution upon any subject shall not work a restriction of its authority upon the same or any other subject.”). See also Dean v. Paolicelli, 194 Va. 219, 227, 72 S.E.2d 506, 511 (1952) (“The Constitution is not a grant of power, but only the restriction of powers otherwise practically unlimited, and except as far as restrained by the Constitution of this State and the Constitution of the United States, the legislature has plenary power.”) (quoting Newport News v. Elizabeth City County, 189 Va. 825, 831, 55 S.E.2d 56, 60 (1949)).
- ²⁵ See VA. CONST. art. V, §§ 1, 7, 8, 10-12.
- ²⁶ Lewis v. Whittle, 77 Va. 415, 420 (1883).
- ²⁷ See Public-Private Transportation Act of 1995, Chapter 22 of Title 56, §§ 56-556 through 56-575 (2007 & Supp. 2011).
- ²⁸ See § 56-558 (2007).
- ²⁹ Section 56-557 defines a “qualifying transportation facility” as “one or more transportation facilities developed and/or operated by a private entity pursuant to this chapter.”
- ³⁰ See § 56-559 (Supp. 2011).
- ³¹ See § 56-560(C) (Supp. 2011) (the responsible public entity may approve a proposal only if it can make the following four public purpose findings: (1) there is a public need for the transportation facility; (2) in the opinion of the responsible public entity, the private entity’s plan is “reasonable and will address the needs identified in the appropriate state, regional, or local transportation plan by improving safety, reducing congestion, increasing capacity, and/or enhancing economic efficiency;” (3) the estimated cost is reasonable in relation to similar facilities; and (4) the private entity’s plan will result in timely development and/or operation of the transportation facility or its more efficient operation).
- ³² See § 56-560(D).
- ³³ *Id.*
- ³⁴ See § 56-560(A).
- ³⁵ See §§ 56-560(E); 56-566(A) (2007).
- ³⁶ The PPTA does allow for there to be more than one “responsible public entity” when conditions so require, see § 56-566.2 (2007); however, in such instances, the PPTA provides for additional procedures, *id.*, which will be discussed below.
- ³⁷ See § 56-557 (2007).
- ³⁸ *Id.*
- ³⁹ See § 62.1-128.
- ⁴⁰ See, e.g., *supra* note 7.
- ⁴¹ See §§ 62.1-128 through 62.1-147.2; Harrison v. Day, 200 Va. 764, 769, 774-75, 107 S.E.2d 594, 597-98, 601 (1959) (by creating the Virginia State Ports Authority, the immediate predecessor of the VPA, and specifying its responsibilities and duties, the General Assembly empowered that entity “to own and operate port and harbor facilities”).
- ⁴² Section 62.1-132.19.
- ⁴³ Section 56-566.2. This provision appears predicated on the assumption that each public entity is itself a responsible public entity and, thus, its solution of a coordinating responsible public entity is unavailing here.

⁴⁴ A Governor may not use an executive order to exercise any of the legislative power that is vested solely in the General Assembly. *See* Jackson v. Hodges, 176 Va. 89, 94-95, 10 S.E.2d 566, 567 (1940) (Governor cannot by executive order increase salary of Secretary of the Commonwealth for additional duties undertaken because the Constitution provided for such salary to be fixed by law, a responsibility of the General Assembly). *See also* 2006 Op. Va. Att’y Gen. 36, 38 (executive order changing the Commonwealth’s nondiscrimination policy is beyond the scope of executive authority; altering the public policy of the Commonwealth is a legislative function the authority for which rests solely with the General Assembly); 1983-84 Op. Va. Att’y Gen. 180, 183 (executive order may not be used for reorganization of executive agencies where the General Assembly has prescribed a different method of reorganization as the exclusive method to be used); 1977-78 Op. Va. Att’y Gen. 5, 8 (executive order cannot authorize council to make case decisions and promulgate regulations as those functions can only be granted by the legislature); 1952-53 Op. Va. Att’y Gen. 171 (no statutory authority for the Governor to agree that statutory limits on length and width of motor vehicles will not be strictly enforced against trucks engaged in transporting defense material without special permit); 1941-42 Op. Va. Att’y Gen. 75 (Governor does not possess power to issue and enforce a proclamation requiring observance of daylight savings time). Executive orders are appropriate whenever: (i) the *Code of Virginia* expressly confers that authority upon the Governor, *see* Boyd v. Commonwealth, 216 Va. 16, 19, 215 S.E.2d 915, 917 (1975) (emergency services and disaster law provided the statutory basis for executive order changing speed limit during acute fuel shortage); (ii) there is a genuine emergency that requires the Governor to issue an order under his constitutional responsibility to abate a danger to the public, *see* VA. CONST. art. V, § 7; and (iii) the executive order is merely administrative in nature, as opposed to legislative, *see* 1983-84 Op. Va. Att’y Gen. at 182.

⁴⁵ Section 62.1-128 establishes the VPA, “as a body corporate and as a political subdivision of the Commonwealth,” and states that it is “constituted a public instrumentality exercising public and essential governmental functions[.]” It enjoys substantial autonomy and discretion in the exercise of its powers and duties respecting the Port of Virginia. *See generally* §§ 62.1-128 through 62.1-147.2. Nonetheless, for purposes of § 56-573.1(2), the VPA functions as a state agency and thus requires this secretarial approval to enter a comprehensive agreement. This conclusion comports with the reasoning and conclusions of several previous opinions of this Office that explored the sometimes dual identities of various public bodies as state “agencies” or “public instrumentalities,” versus “political subdivisions.” *See* 1977-78 Op. Va. Att’y Gen. 454 (pertaining to the Peninsula Transportation District Commission), 1978-79 Op. Va. Att’y Gen. 305 (pertaining to the Virginia Education Loan Authority), and 1979-80 Op. Va. Att’y Gen. 5 (pertaining to the Chippokes Plantation Farm Foundation).

⁴⁶ *See* § 56-573.1(2); and §§ 62.1-129, 62.1-130 and 62.1-132.1.

⁴⁷ *See* § 2.2-200(B).

OP. NO. 11-029

TAXATION: LICENSE TAXES

Although United States government exercises exclusive jurisdiction over Naval Base of JEB, such jurisdiction does not prohibit the City of Virginia Beach from assessing a BPOL tax on activities carried out by a private company on that land.

Whether the activity of a business at a particular location is sufficient for it to become a “definite place of business” is a question of fact to be determined by the local taxing official.

RONALD S. HALLMAN, ESQUIRE
CITY ATTORNEY FOR THE CITY OF CHESAPEAKE
FEBRUARY 24, 2012

ISSUES PRESENTED

You ask whether the City of Virginia Beach has authority to assess a Business Professional and Occupation License (BPOL) Tax on an engineering company with Headquarters in Chesapeake but which carries out business at the Joint Expeditionary Base Little Creek – Fort Story (JEB Little Creek) located in the City of Virginia Beach. Specifically, you ask two questions: 1) whether the United States’ exclusive jurisdiction over JEB Little Creek prohibits assessment of a BPOL tax on activities performed at that location; and 2) whether the company, by operating a service trailer on the base, maintains such activities at JEB Little Creek as to constitute a “definite place of business” for purposes of the BPOL tax.

RESPONSE

It is my opinion that, although the United States government exercises exclusive jurisdiction over the Naval Base of JEB Little Creek, such jurisdiction does not prohibit the City of Virginia Beach from assessing a BPOL tax on activities carried out by a private company on that land. It further is my opinion that whether the activity of a business at a particular location is sufficient for it to become a “definite place of business” is a question of fact to be determined by the local taxing official, or by a trier of fact if litigated, consistent with the definitions set forth in § 58.1-3700.1 and 23 VA. ADMIN. CODE § 10-500-10.

BACKGROUND

You indicate that there is an engineering company (“the Company”) that maintains an office in Chesapeake, Virginia. The Company renders vessel maintenance, alteration and repair services to the United States Navy, often at the naval facilities, where the vessel in need of repair is located.

The Company for several years has performed its services at JEB Little Creek and maintained a trailer there to support the same. You report the following additional facts to me. This trailer is used for administrative purposes and contains desks and computers so that on-site personnel may interact with, and follow the directions of, the project manager in the Company’s Chesapeake office. The trailer does not have mail service but does have telephone service. The Company does not advertise its presence or its services from the trailer, and the Navy has not granted the Company the authority to conduct commercial solicitation activities on JEB Little Creek. The Company says that a majority of the contract costs result from work performed at its Chesapeake office, including engineering services, costing and scheduling of work, change order processing, personnel management and billing.

The Company has been reporting and paying a BPOL tax on the gross receipts earned on the vessel repair contracts to the City of Chesapeake for several years. Recently, the City of Virginia Beach has assessed a BPOL tax on the same gross receipts.

APPLICABLE LAW AND DISCUSSION

Your first inquiry is whether Virginia Beach has the authority to assess a BPOL tax on activities conducted at JEB Little Creek, which is the property of the United States

government. It is my opinion that Virginia Beach is not prohibited from assessing a BPOL tax on activities conducted there.

The first issue to determine is whether the United States indeed exercises exclusive jurisdiction over JEB Little Creek. Article I, § 8, Clause 17 of the Constitution of the United States authorizes Congress to exercise exclusive jurisdiction “over all places purchased by the consent of the legislature of the state in which the same shall be.”

In 1902, the Virginia General Assembly ceded jurisdiction to the United States over land acquired for Federal purposes (subject to the right of the Commonwealth to serve process on said lands).

The 1902 Act provides:

1. Be it enacted by the general assembly of Virginia, That the consent of the State of Virginia is hereby given, in accordance with the seventeenth clause, eighth section, of the first article of the constitution of the United States, to the acquisition by the United States, by purchase, condemnation, or otherwise, of any land in this State required for sites for custom houses, courthouses, post offices, arsenals, or other public buildings whatever, or for any other purposes of the government.
2. That exclusive jurisdiction in and over any land so acquired by the United States shall be, and the same is hereby, ceded to the United States for all purposes except the service upon such sites of all civil and criminal process of the courts of this State; but the jurisdiction so ceded shall continue no longer than the said United States shall own such lands.
3. The jurisdiction ceded shall not vest until the United States shall have acquired the title to said lands by purchase, condemnation, or otherwise; and so long as the said lands shall remain the property of the United States when acquired as aforesaid, and no longer, the same shall be and continue exempt and exonerated from all State, county, and municipal taxation, assessment, or other charges which may be levied or imposed under the authority of this State.
4. This act shall take effect and be in force from and after its passage.^[1]

In 1940, the General Assembly established the following conditions under which state jurisdiction may be reasserted:

[I]n the event that the said lands or any part thereof shall be sold or leased to any private individual, or any association or corporation, under the terms of which sale or lease the vendee or lessee shall have the right to conduct thereon any private industry or business, then the jurisdiction ceded to the United States over any such lands so sold or leased shall cease and determine, and thereafter the Commonwealth of Virginia shall have all jurisdiction and power she would have had if no jurisdiction or power had been ceded to the United States. This provision, however, shall not apply to post exchanges, officers' clubs, and similar activities on lands acquired by the United States for purposes of National defense.^[2]

Therefore, once the ceded property is sold or leased to a “private” individual, association, or corporation and the terms of the sale or lease provide the buyer or lessee with the right to conduct “any private industry or business” thereon, Virginia would regain exclusive jurisdiction over the property.

JEB Little Creek was created in 1942 and was made a permanent base of the United States Navy in 1946. Based upon the facts provided to me, the United States Navy has never sold or leased this land to a private individual as would restore Virginia’s exclusive jurisdiction over the property under the 1940 Act. JEB Little Creek, therefore, is under the exclusive jurisdiction of the United States government.

The analysis, however, does not end there. The issue is now whether or not the federal government’s exclusive jurisdiction over JEB Little Creek bars Virginia Beach from assessing a BPOL tax on activities carried out on the property.

The 1902 Act of Assembly, cited above, does exempt all *land* under federal jurisdiction from state and local taxation, as is required by the Supremacy Clause of the Constitution of the United States. Nonetheless, whether state and local governments have authority to tax *activities* carried out on federal property is a different question, one which the Supreme Court of the United States has answered clearly in the affirmative.

The Court has concluded that:

[I]mmunity cannot be conferred simply because the state tax falls on the earnings of a contractor providing services to the Government. And where a use tax is involved, immunity cannot be conferred simply because the State is levying the tax on the use of federal property in private hands, even if the private entity is using the Government property to provide the United States with goods or services.^[3]

This issue is further defined by 4 U.S.C. §§ 105-110, known as the Buck Act, which provides, in pertinent part:

No person shall be relieved from liability for any income tax levied by any State, or by any duly constituted taxing authority therein, having jurisdiction to levy such a tax, by reason of his residing within a Federal area or receiving income from transactions occurring or services performed in such area; and such State or taxing authority shall have full jurisdiction and power to levy and collect such tax in any Federal area within such State to the same extent and with the same effect as though such area was not a Federal area.^[4]

Section 110(c) of the Buck Act defines “income tax” as follows: “The term ‘income tax’ means any tax levied on, with respect to, or measured by, net income, gross income, or gross receipts.”⁵

Interpreting the Buck Act in *Howard v. Commissioners of Sinking Fund*,⁶ the Supreme Court upheld a Louisville, Kentucky occupational tax or license fee applied to employees of a plant on federal land within the boundaries of the city. The Court held that a tax or license fee imposed by the City of Louisville for the privilege of

working within the City, measured by one percent of income earned within the City, was an “income tax” within the meaning of the Buck Act, and was authorized by that Act to be applied to payments received by federal employees for services performed at the plant, even though such tax or fee was not an “income tax” under state law.⁷

This is directly analogous to the case in question. The Virginia Beach BPOL tax is assessed on the gross receipts reported by the company. Thus, based on *Howard*, it must be considered an “income tax,” which a city is authorized to assess even on income earned on federal property.⁸

You next ask whether the company, by operating a service trailer on the base, maintains such activities at JEB Little Creek as to constitute a “definite place of business” for purposes of the BPOL tax.

Section 58.1-3703.1(A)(3)(a) requires that when a license tax is based on gross receipts, the gross receipts shall be “only those gross receipts attributed to the exercise of a privilege subject to licensure at a *definite place of business* within this jurisdiction.”⁹ Section 58.1-3700.1 defines a definite place of business as “an office or a location at which occurs a regular and continuous course of dealing for thirty consecutive days or more.”¹⁰

Section 58.1-3703.1(A)(3)(a)(1) further defines a “definite place of business” for contractors:

(1) The gross receipts of a contractor shall be attributed to the definite place of business at which his services are performed, or if his services are not performed at any definite place of business, then the definite place of business from which his services are directed or controlled.^[11]

Whether a location constitutes a definite place of business is a question of fact. “This Office historically has declined to render opinions that involve determinations of fact rather than questions of law.”¹² Accordingly, I am unable to render an opinion regarding whether a particular location constitutes a definite place of business. Nevertheless, I note that the following factors might be considered in the determination: “(1) a continuous presence; (2) having an office with a phone; (3) the reception of mail; (4) having employees; (5) record keeping; (6) and advertising or otherwise holding oneself out in as engaging in business at the particular location.”¹³

CONCLUSION

It is my opinion that, although the United States government exercises exclusive jurisdiction over the Naval Base of JEB Little Creek, this jurisdiction does not prohibit the City of Virginia Beach from assessing a BPOL tax on activities carried out by a private company on that land. It further is my opinion that whether the activity of a business at a particular location is sufficient for it to become a “definite place of business” is a question of fact to be determined by the local taxing official, or by a trier of fact if litigated, consistent with the definitions set forth in § 58.1-3700.1 and 23 VA. ADMIN. CODE § 10-500-10.

¹ 1901-02 Va. Acts ch. 482, Item 565-566.

² 1940 Va. Acts ch. 422, Item 761-762 (codified at VA. CODE ANN. § 1-401(D) (2008)).

³ *United States v. New Mexico*, 455 U.S. 720, 734 (1981) (internal citations omitted).

⁴ 4 U.S.C. § 106(a).

⁵ 4 U.S.C. § 110(c).

⁶ 344 U.S. 624 (1953).

⁷ *Id.* at 627-29.

⁸ A prior opinion of this Office determined that a locality could not assess real property taxes against certain improvements on Fort Story lands owned by the federal government but leased to a limited liability company into which the Army and a private contractor invested for construction of on-post housing and rental of the same to military personnel as part of a military housing privatization initiative. 2004 Op. Va. Att’y Gen. 205, 208-10. That opinion, however, is distinguishable from, and not applicable to, the issue you raise. BPOL taxes are distinct from real property taxes in that they do not levy a tax property itself, but rather they arise from activities conducted on that property.

⁹ 23 VA. ADMIN. CODE § 10-500-150(C) clarifies this language: “Where activities are conducted outside of a definite place of business, such as during a visit to a customer location, gross receipts are attributed to the definite place of business from which such activities are initiated, directed, or controlled”. As for jurisdiction, § 1.400(E) of the Code of Virginia specifically provides that for all purposes of taxation, federal land is deemed to be part of the county or city in which the land is situated; however, this code provision applies only to lands acquired on or after July 1, 1981 (VA. CODE ANN. § 1-400(A) (2008)) and, as such, is inapplicable to JEB Little Creek.

¹⁰ 23 VA. ADMIN. CODE § 10-500-10 defines a definite place of business as “an office or a location at which occurs a regular and continuous course of dealing where one holds one’s self out or avails one’s self to the public for 30 consecutive days or more, exclusive of holidays and weekends.” In a 2002 Opinion, this Office determined that this regulation was to be applied in conjunction with § 58.1-3700.1 of the *Code of Virginia*. See 2002 Op. Va. Att’y Gen. 297, 298.

¹¹ See also 23 VA. ADMIN. CODE § 10-500-200.

¹² 2002 Op. Va. Att’y Gen. 297, 299 (“The local commissioner of the revenue is responsible for making factual determinations in matters of local BPOL taxation”).

¹³ See Tax Comm’r Priv. Ltr. Rul. Pub. Doc. 10-277 (Dec. 21, 2010); Tax Comm’r Priv. Ltr. Rul. Pub. Doc. 10-278 (Dec. 22, 2010), available at <http://www.policylibrary.tax.virginia.gov/OTP/Policy.nsf>.

OP. NO. 11-056

TAXATION: REAL PROPERTY TAX

CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE

Exemption from taxation afforded certain veterans does not apply in favor of a veteran who is a proprietary lessee in a real estate cooperative, regardless of whether the veteran otherwise satisfies all of the other requirements imposed by law to claim the exemption.

MR. JERALD D. BANAGAN
REAL ESTATE ASSESSOR, CITY OF VIRGINIA BEACH
DECEMBER 21, 2012

ISSUE PRESENTED

You ask whether the exemption from real estate taxation provided by Article X, Section 6-A, of the Virginia Constitution as implemented by § 58.1-3219.5 applies to

certain interests under the Virginia Real Estate Cooperative Act (“Act”).¹ You specifically inquire whether the cooperative interest² of a veteran in a real estate cooperative³ is exempt from taxation provided the veteran otherwise satisfies all of the requirements set forth in the Article X, Section 6-A exemption and in § 58.1-3219.5 implementing the exemption.

RESPONSE

It is my opinion that the exemption from taxation under Article X, § 6-A and § 58.1-3219.5 does not apply in favor of a veteran who is a proprietary lessee in a real estate cooperative, regardless of whether the veteran otherwise satisfies all of the other requirements imposed by law to claim the exemption.

BACKGROUND

Tax Exemption

At the general election held on November 2, 2010, the voters of the Commonwealth were presented the following referendum question related to amending the Constitution of Virginia:

Shall the Constitution be amended to require the General Assembly to provide a real property tax exemption for the principal residence of a veteran, or his or her surviving spouse, if the veteran has a 100 percent service-connected, permanent, and total disability?^[4]

With 82.4 percent of the voters answering the question in the affirmative,⁵ Article X is now amended to include a new § 6-A, which provides that:

Notwithstanding the provisions of Section 6, the General Assembly by general law, and within the restrictions and conditions prescribed therein, shall exempt from taxation the real property, including the joint real property of husband and wife, of any veteran who has been determined by the United States Department of Veterans Affairs or its successor agency pursuant to federal law to have a one hundred percent service-connected, permanent, and total disability, and who occupies the real property as his or her principal place of residence. The General Assembly shall also provide this exemption from taxation for real property owned by the surviving spouse of a veteran who was eligible for the exemption provided in this section, so long as the surviving spouse does not remarry and continues the real property as his or her principal place of residence.^[6]

As a result of the passage of this referendum question, the 2011 Session of the General Assembly enacted legislation to implement this real property tax exemption, adding into Chapter 32 of Title 58.1, a new Article 2.3, consisting of §§ 58.1-3219.5 and 58.1-3219.6.⁷ The substantive elements implementing the tax exemption provided by the Constitutional amendment are contained in § 58.1-3219.5.

Real Estate Cooperatives

The Act, adopted in 1982, contains numerous definitions in § 55-426 that are essential to understanding its many other provisions. Also, the Act contains a number of

provisions related to its applicability, including its applicability to cooperatives created prior to July 1, 1982, as primarily set forth in §§ 55-425 and 55-428E. For purposes of this opinion, I must assume that the Act applies given that your opinion request does not identify any particular cooperative. Regarding the ownership of the cooperative's real estate, the definition of a "cooperative" in § 55-426 clearly provides that the real estate comprising a cooperative is owned by an association of proprietary lessees. In fact, a cooperative is created under the Act "only by recording a declaration executed in the same manner as a deed, *and by conveying to the association the real estate subject to that declaration.*"⁸ In contrast to a condominium regime where individual units are owned separately,⁹ the cooperative, by its very nature, is owned by an association consisting of proprietary lessees.¹⁰

The Declaration¹¹ of a cooperative is the instrument or instruments that create[s] the cooperative and establishes the framework for its long-term governance and operations. In selling an interest in a cooperative, all relevant instruments forming a part of the Declaration must be disclosed in a public offering statement that meets the requirements of §§ 55-477 and 55-478.

APPLICABLE LAW AND DISCUSSION

In cases of statutory interpretation, the language of the statute is the first point of inquiry.¹² When the language of a statute is clear on its face, no further inquiry is needed.¹³ The critical language in this statute is as follows:

For purposes of this exemption, real property of any veteran includes real property (i) held by a veteran alone or in conjunction with the veteran's spouse as tenant or tenants for life or joint lives, (ii) held in a revocable inter vivos trust over which the veteran or the veteran and his spouse hold the power of revocation, or (iii) held in an irrevocable trust under which a veteran alone or in conjunction with his spouse possesses a life estate or an estate for joint lives or enjoys a continuing right of use or support. ***The term does not include any interest held under a leasehold or term of years.***^[14]

Exemptions from real property taxation are narrowly construed and, in doubtful cases, must be construed against the application of the exemption.¹⁵ Where the language is clear, the result is even more readily obtained. The cooperative interest of an otherwise qualified veteran in a real estate cooperative is "an ownership interest in the association coupled with a possessory interest in a unit under a proprietary lease."¹⁶ The real property interest of the individual living in the unit is a leasehold interest in the property. Because the definition of real property for purposes of the exemption excludes leasehold interests, the cooperative interest held in a real estate cooperative cannot qualify for the exemption.

CONCLUSION

Accordingly, it is my opinion that the exemption from taxation under Article X, § 6-A and § 55-3219.5 does not apply in favor of a veteran who is a proprietary lessee in a real estate cooperative, regardless of whether the veteran otherwise satisfies all of the other requirements imposed by law to claim the exemption.

¹ VA. CODE ANN. §§ 55-424 through 55-506 (2012).

² The Act defines “cooperative interest” as “an ownership interest in the association coupled with a possessory interest in a unit under a proprietary lease,” and further defines the term “association” as the “proprietary lessees’ association organized under § 55-458.” Section 55-426.

³ A “cooperative” is defined as “real estate owned by an association, each of the members of which is entitled, by virtue of his ownership interest in the association, to exclusive possession of a unit.” Section 55-426.

⁴ See 2010 Va. Acts chs. 358, 588.

⁵ See VIRGINIA STATE BOARD OF ELECTIONS, NOV. 2, 2010, GENERAL AND SPECIAL ELECTIONS OFFICIAL RESULTS, available at https://www.voterinfo.sbe.virginia.gov/election/DATA/2010/EB24720D-F5C6-4880-8DC5-12AE4D0C3772/official/9_s.shtml.

⁶ See 2010 Va. Acts chs. 358, 588.

⁷ See 2011 Va. Acts chs. 769, 840.

⁸ Section 55-438. (Emphasis added.)

⁹ Section 55-79.42 (2012).

¹⁰ In a prior opinion of this Office dealing with the applicability of a tax exemption for the elderly to interests in real estate cooperatives, the Attorney General determined that the cooperative association owned the real estate in the cooperative. Consequently, elderly owners of an interest in a real estate cooperative who otherwise met the criteria of the statute did not qualify for the tax exemption because they did not own the real estate as required by the statute. 1999 Op. Va. Att’y Gen. 205.

¹¹ See § 55-442.

¹² See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56 (1989) (“It is well settled that the starting point for interpreting a statute is the language of the statute itself.”)

¹³ *Wakole v. Barber*, 283 Va. 488, 495, 722 S.E.2d 238 (2012) (“Issues of statutory interpretation are pure questions of law that we review de novo. *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104, 639 S.E.2d 174, 178 (2007). ‘When the language of a statute is unambiguous, we are bound by the plain meaning of that language. Furthermore, we must give effect to the legislature’s intention as expressed by the language used unless a literal interpretation of the language would result in a manifest absurdity.’” *Id.* (internal citations omitted).)

¹⁴ VA. CODE ANN. § 58.1-3219.5(D) (Supp. 2012) (emphasis added). See 2012 Va. Acts chs. 75 & 263 (adding the language quoted and indicating that this language is declaratory of existing law).

¹⁵ *Forst v. Rockingham*, 222 Va. 270, 275, 279 S. E. 2d 400, 403 (1981); 1982-83 Op. Va. Att’y. Gen. 579, 580 (citing § 58-760.1, predecessor statute to § 58.1-3210).

¹⁶ See § 55-426.

OP. NO. 12-038

TAXATION: STATE RECORDATION TAX

Applicable federal statutes exempt Fannie Mae and Freddie Mac from the taxes levied by the Virginia Recordation Tax Act when they are the grantor or grantee on a deed, instrument or other writing in a transaction for the conveyance of an interest in real property.

THE HONORABLE JUDY L. WORTHINGTON
CLERK OF THE CIRCUIT COURT
NOVEMBER 1, 2012

ISSUE PRESENTED

You inquire whether the Federal National Mortgage Association (“Fannie Mae”) and the Federal Home Loan Mortgage Corporation (“Freddie Mac”), when they are parties to the transaction, are exempt under federal or state statutes from the collection of recordation taxes, as required by the Virginia Recordation Tax Act on documents presented for recordation in the Circuit Court’s Deed Book.

RESPONSE

It is my opinion that applicable federal statutes exempt Fannie Mae and Freddie Mac from the taxes levied by the Virginia Recordation Tax Act when they are the grantor or grantee on a deed, instrument or other writing in a transaction for the conveyance of an interest in real property.

APPLICABLE LAW AND DISCUSSION

The Virginia Recordation Tax Act requires every circuit court clerk in Virginia to collect certain recordation taxes.¹ Nevertheless, in accordance with the Supremacy Clause of the Constitution of the United States,² this Office previously has opined that “Congress may create exemptions from taxation for specific entities even if such exceptions are not memorialized in the states’ laws. Implicit in [this] opinion is the authority of the federal government to exempt specific real estate transactions from state taxation.”³

In this regard it is important to examine the language of the statutory exemptions Congress granted specifically to Fannie Mae and Freddie Mac.⁴ Fannie Mae’s federal charter provides that:

The corporation, including its franchise, capital, reserves, surplus, mortgages or other security holdings, and income, ***shall be exempt from all taxation*** now or hereafter imposed ***by any State***, territory, possession, Commonwealth, or dependency of the United States, or by the District of Columbia, ***or by any county, municipality, or local taxing authority***, except that any real property of the corporation shall be subject to State, territorial, county, municipal, or local taxation to the same extent as other real property is taxed.^[5]

In nearly identical terms, Freddie Mac’s charter states:

The Corporation, including its franchise, activities, capital, reserves, surplus, and income, ***shall be exempt from all taxation*** now or hereafter imposed by any territory, dependency, or possession of the United States or ***by any State, county, municipality, or local taxing authority***, except that any real property of the Corporation shall be subject to State, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed.^[6]

In addition, the Housing and Economic Recovery Act of 2008 (“HERA”),⁷ which created the Federal Housing Finance Agency (“FHFA”)⁸ to oversee Fannie Mae and Freddie Mac,⁹ provides that the FHFA:

including its franchise, its capital, reserves, and surplus, and its income, *shall be exempt from all taxation imposed by any State, county, municipality, or local taxing authority*, except that any real property of the Agency shall be subject to State, territorial, county, municipal, or local taxation to the same extent according to its value as other real property is taxed^[10]

Thus Congress has exempted Fannie Mae and Freddie Mac, and the FHFA, their conservator and successor in rights, powers and privileges, from “all taxation” by state and local governments. Nonetheless, Congress also has provided an exception in each of the three statutes allowing Fannie Mae, Freddie Mac, and FHFA to be taxed on “real property . . . to the same extent according to its value as other real property is taxed.”

Your opinion request references a decision of the United States District Court in the Eastern District of Michigan earlier this year.¹¹ Interpreting Michigan law, the court in that case found that the Michigan “transfer tax” is an excise tax levied on the use or transfer of real property, and not a direct tax levied on the property itself. The court held that the statutory exemptions from “all taxation” provided by Congress to Fannie Mae and Freddie Mac do not apply to excise taxes and, thus, the entities are liable for payment of the transfer tax.¹²

The *Oakland County* court found the United States Supreme Court case *Wells Fargo* to be dispositive of the case: the district court interpreted the *Wells Fargo* opinion to stand for the proposition that a statutory exemption from “all taxation” means all direct taxation and does not apply to excise taxation.¹³ This interpretation springs from the following passage in *Wells Fargo*:

[A]n exemption of property from all taxation had an understood meaning: the property was exempt from direct taxation, but certain privileges of ownership, such as the right to transfer the property, could be taxed. Underlying this doctrine is the distinction between an excise tax, which is levied upon the use or transfer of property even though it might be measured by the property’s value, and a tax levied upon the property itself. The former has historically been permitted even where the latter has been constitutionally or statutorily forbidden.^[14]

More recently, however, two other federal courts have reached the opposite conclusion in cases involving the same question.¹⁵ On August 9, 2012, the United States District Court for the District of Columbia decided *Hager v. Federal National Mortgage Association*, a case in which plaintiffs alleged Fannie Mae and Freddie Mac violated the District of Columbia False Claims Act because they claimed to be exempt from recordation taxes when they were not.¹⁶ In ruling against the plaintiffs, the judge stated his analysis of the exact statutory language at issue in this opinion:

[T]he language here is sweeping and unambiguous. Fannie Mae and Freddie Mac “shall be exempt from all taxation” imposed by D.C., with a single, narrow exception all agree is inapplicable here. The recordation tax is undoubtedly a form of taxation imposed on the Enterprises. That should be “the end of the matter.” *Good Samaritan Hosp. v. Shalala*, 508 U.S. 402,

409, 113 S. Ct. 2151, 124 L. Ed. 2d 368 (1993) (internal quotation marks omitted). True, “exemptions from taxation are not to be implied; they must be unambiguously proved,” Wells Fargo, 485 U.S. at 354, but Congress created precisely such an “unambiguous[.]” exemption here.^[17]

The court in *Hager* then refuted the rationale of the *Oakland County* court by noting that the current case involving Fannie Mae and Freddie Mac is substantively different than the case cited as precedent for the *Oakland County* decision.¹⁸ In particular, the judge noted that:

[T]he *Wells Fargo* provision exempted property from taxation....

The statutory provisions at issue in this case, on the other hand, exempt an entity from all taxation....

Wells Fargo did not mandate an atextual reading of “all taxation”; it simply considered the inherent limitations of exempting property, rather than its owner, from taxation....

[A]ccepting plaintiffs’ argument would lead to near absurdity. It would leave the statutory provisions, so sweeping in their language, virtually meaningless.”^[19]

The *Hager* court then held that Fannie Mae and Freddie Mac are statutorily exempt from paying District of Columbia recordation taxes.²⁰

On September 18, 2012, in *Hertel v. Bank of America*, the United States District Court for the Western District of Michigan granted summary judgment to defendants FHFA, Fannie Mae and Freddie Mac and dismissed an action originally brought by the Ingham County Register of Deeds seeking to recover from defendants unpaid real estate transfer taxes.²¹ After examining the statutory exemptions from state and local taxation under 12 U.S.C. §§ 1723a(c)(2) (Fannie Mae), 1452(e) (Freddie Mac) and 4617(j)(2) (FHFA), the court concluded:

There is no possible reading of the statutes other than that Fannie Mae, Freddie Mac, and the FHFA are exempt from all state taxation, regardless of whether it is termed a recording or excise tax. “All” is an inclusive adjective that does not leave room for unmentioned exceptions. Indeed, the fact that one exception is explicitly included further supports this conclusion. Each statute contains an exception for the taxation of real property. See 12 U.S.C. §§ 1723a(c)(2), 1452(e), 4617(j)(2). “Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.”^[22]

The court in *Hertel* also found plaintiffs’ reliance on *Wells Fargo* to be misplaced.²³ While the statute at issue in *Wells Fargo* exempted from all taxation certain property (specifically, project notes issued by state and local public housing agencies), the *Hertel* court noted in contrast that the Fannie Mae, Freddie Mac and FHFA statutes:

have a broader exemption. They exempt the entities, not just the property involved, [which] means that the exemption *is* triggered if the owners of the

property, [Fannie Mae, Freddie Mac and FHFA], are held liable for the [transfer tax]. While the [transfer tax] is a tax on the transfer of property, to tax the transfer is to tax the entity who has to pay the tax, and by statute, [Fannie Mae, Freddie Mac and FHFA] are exempt from all taxation.^[24]

In ruling for defendants FHFA, Fannie Mae and Freddie Mac, the court observed that “[p]laintiffs ask the Court to ignore the unambiguous language of multiple federal statutes and impose tax liability on the Enterprise Defendants under a Michigan statute, without providing a satisfying explanation as to why, after years of having no problem with the defendants’ claimed exemptions, there is an issue now.”²⁵

Virginia law is consistent with the federal decisions regarding the status of the recordation tax. The recordation tax in Virginia “is not a tax upon property ... but a tax upon a civil privilege, that is, for the privilege of availing ... of the benefits and advantages of the registration laws of the State.”²⁶ Since at least 1992, this Office has opined consistently that when a federal statute prohibits all state or local taxation on an entity created by the federal government, except for taxation on that entity’s real estate, the entity enjoys an exemption from the recordation tax whenever it is a principal to the transaction,²⁷ although not when it is merely serving as a guarantor or beneficiary in the transaction.²⁸ There is no substantive difference between the language at issue in the statutes under consideration in this opinion and those interpreted in prior opinions of the Attorney General. This position also is consistent with the rationale articulated by the courts in *Hager* and *Hertel*, and I find that this position continues to be more persuasive than the *Oakland County* rationale.

Therefore, because the recordation tax is not a tax on property similar to local assessment-based real estate taxes, but instead is a tax on the recording parties for the privilege of utilizing the land recordation system of Virginia, the federal statutory language in 12 U.S.C. §§ 1723a(c)(2), 1452(e), and 4617(j)(2) must be interpreted such that the federal exemption in each charter applies.

CONCLUSION

Accordingly, it is my opinion that applicable federal statutes exempt Fannie Mae and Freddie Mac from the taxes levied by the Virginia Recordation Tax Act when they are the grantor or grantee on a deed, instrument or other writing in a transaction for the conveyance of an interest in real property.²⁹

¹ See VA. CODE ANN. §§ 58.1-800 through 58.1-817 (2009 & Supp. 2012).

² U.S. Const. art. VI, cl. 2; see *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1, 211 (1824) (stating that act of Congress is supreme and state law must yield to it and must not interfere with or be contrary to laws enacted pursuant to Constitution). See also 2003 Op. Va. Att’y Gen. 177, 178; 1992 Op. Va. Att’y Gen. 183, 185; 1990 Op. Va. Att’y Gen. 259.

³ 2003 Op. Va. Att’y Gen. 177, 179 (citing 2002 Op. Va. Att’y Gen. 328, 329).

⁴ See *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56 (1989) (“It is well settled that the starting point for interpreting a statute is the language of the statute itself.”).

⁵ 12 U.S.C. § 1723a(c)(2) (emphasis added).

⁶ 12 U.S.C. § 1452(e) (emphasis added).

⁷ Housing and Economic Recovery Act of 2008, Pub. L. No. 110-289, 122 Stat. 2654 (2008).

⁸ See 12 U.S.C. § 4501 *et seq.* (FHFA created as a federal agency to regulate Fannie Mae and Freddie Mac).

⁹ Pursuant to the authority granted to him and to the FHFA by 12 U.S.C. § 4617, the FHFA Director placed Fannie Mae and Freddie Mac into the FHFA's conservatorship on Sept. 6, 2008. See *In re Conservatorship of Fed. Nat'l Mortg. Ass'n*, Notice Regarding Determination and Appointment of Conservator, available at <http://www.fhfa.gov/webfiles/1858/NoticeregardingconservatorFNMA.pdf>; *In re Conservatorship of Fed. Home Loan Mortg. Corp.*, Notice Regarding Determination and Appointment of Conservator, available at <http://www.fhfa.gov/webfiles/1857/NoticeregardingconservatorFHLMC.pdf>.

¹⁰ 12 U.S.C. § 4617(j)(2) (emphasis added).

¹¹ *Oakland County v. Fed. Hous. Fin. Agency ex rel. Fed. Nat'l Mortg. Ass'n*, No. 11-12666, 2012 U.S. Dist. LEXIS 40099 (E.D. Mich. Mar. 23, 2012).

¹² *Oakland County*, 2012 U.S. Dist. LEXIS 40099 at *10-14 (citing *United States v. Wells Fargo Bank*, 485 U.S. 351, 355 (1988)).

¹³ *Id.* at *16, *21.

¹⁴ *Wells Fargo*, 485 U.S. at 355 (the tax exemption set forth in the Housing Act of 1937 for state and local public housing agency obligations, known as project notes, does not exempt the value of those notes from being included in the taxable estate of a decedent who owned the notes for purposes of calculating the federal estate tax).

¹⁵ See *Hager v. Fed. Nat'l Mortg. Ass'n*, No. 11-2090, 2012 U.S. Dist. LEXIS 111709 (D.D.C. Aug. 9, 2012); *Hertel v. Bank of America, N.A.*, No. 1:11-CV-757, 2012 U.S. Dist. LEXIS 132744 (W.D. Mich. Sept. 18, 2012).

¹⁶ *Hager*, 2012 U.S. Dist. LEXIS 111709 at *3.

¹⁷ *Id.* at *11-12.

¹⁸ *Id.* at *12-16.

¹⁹ *Id.* at *13-15.

²⁰ *Id.* at *16.

²¹ *Hertel*, 2012 U.S. Dist. LEXIS 132744 at *3.

²² *Id.* at *9 (quoting *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980)).

²³ *Id.* at *13-22.

²⁴ *Id.* at *15-16 (emphasis in original).

²⁵ *Id.* at *21-22. Indeed, a veritable cottage industry of plaintiffs' attorneys has seized on this issue since the *Oakland County* decision, resulting in the filing of a spate of cases in recent months, including one here in Virginia. See, e.g., *Small v. Fed. Nat'l Mortg. Ass'n*, No. 3:12-CV-487 (E.D.Va. filed July 3, 2012). The United States Judicial Panel on Multidistrict Litigation recently declined to centralize ten transfer tax actions involving Fannie Mae and/or Freddie Mac pending in seven districts and observed that it had been notified of twenty-eight additional, potentially related actions. *In re Real Estate Transfer Tax Litigation*, MDL No. 2394, 2012 U.S. Dist. LEXIS 139742 at *1-5 (J.P.M.L. Sept. 27, 2012).

²⁶ See *Pocahontas Consol. Collieries Co., Inc., v. Commonwealth*, 113 Va. 108, 112, 73 S.E. 446, 448 (1912). See also *White v. Schwartz*, 196 Va. 316, 321, 83 S.E.2d 376, 379 (1954) (following *Pocahontas*, holding that the recording tax is not a tax on property but a tax on a civil privilege). See also 23 VA. ADMIN. CODE § 10-320-10 ("The recordation tax is not a tax on property but on a civil privilege").

²⁷ See 1992 Op. Va. Att'y Gen. 183, 185 (federal act exempts Resolution Trust Corporation from recordation tax); 1993 Op. Va. Att'y Gen. 260, 262 (grantor's tax applicable to a trustee's deed in a foreclosure sale is on the mortgagor, not on the trustee or mortgagee and, thus, is to be collected, even though the Resolution Trust Corporation as the grantee is exempt from the imposition of recordation tax).

See also 2003 Op. Va. Att’y Gen. 177, 178 regarding language in the Farm Credit Act practically identical to that found in the Fannie Mae, Freddie Mac and FHFA statutes.

²⁸ 2002 Op. Va. Att’y Gen. 328, 329 (“The tax imposed under § 58.1-803 in these loans is a cost borne by the grantor and borrower, and not the federal government and its agencies. The mere fact that the federal government is involved in some capacity, either as guarantor or beneficiary, does not exempt a transaction from the recordation tax.”).

²⁹ Because Fannie Mae and Freddie Mac are exempt from recordation taxes under the federal statutes that created them, it is not necessary to determine whether they are “federal instrumentalities” or otherwise fall within the definition of the “United States” for the purposes of the exemptions offered in §§ 58.1-811(A)(3) and 58.1-811(C)(4) (2009).

OP. NO. 11-112

WELFARE: GENERAL PROVISIONS (PUBLIC ASSISTANCE)

Personal Responsibility and Work Opportunity Reconciliation Act encompasses felony convictions for manufacturing controlled substances and for obtaining controlled substances by false pretenses.

Persons with such convictions are disqualified from receiving food stamp benefits.

THE HONORABLE GERALD E. MABE, II
COMMONWEALTH’S ATTORNEY, WYTHE COUNTY
JANUARY 27, 2012

ISSUES PRESENTED

You inquire whether the provision of the Personal Responsibility and Work Opportunity Reconciliation Act of 1996¹ that renders persons convicted of certain drug offenses ineligible for food stamp assistance applies to convictions for manufacturing drugs and obtaining drugs by false pretenses. You further ask whether § 63.2-505.2 of the *Code of Virginia* in turn operates to exempt those offenses from such application.

RESPONSE

It is my opinion that the Personal Responsibility and Work Opportunity Reconciliation Act encompasses felony convictions for manufacturing controlled substances or for obtaining controlled substances by false pretenses. It is further my opinion that those persons with such convictions are disqualified from receiving food stamp benefits because § 63.2-505.2 does not exempt such convictions from the application of the federal law.

APPLICABLE LAW AND DISCUSSION

Pursuant to the Personal Responsibility and Work Opportunity Reconciliation Act of 1996, a person becomes ineligible to receive certain public assistance once convicted of “any offense which is classified as a felony . . . and which has as an element the possession, use, or distribution of a controlled substance.”² States may opt out of this provision by enacting specific legislation to that end.³

In 2005, the General Assembly enacted § 63.2-505.2, which exempts certain food stamp applicants from the application of 21 U.S.C. § 862a. It expressly provides that a person “shall not be denied such assistance solely because he has been convicted of a felony offense of possession of a controlled substance in violation of § 18.2-250[.]”⁴ Thus, in exercising its discretion to exempt certain persons from the bar on benefits imposed by federal law, the General Assembly expressly chose only to exempt those who had been convicted under Virginia Code § 18.2-250.⁵

As a result, persons convicted under other provisions of the Code of Virginia may still fall within the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 bar to receiving benefits. The question becomes whether the conviction is an “offense which is classified as a felony . . . and which has as an element the possession, use, or distribution of a controlled substance.”⁶

You have specifically inquired regarding §§ 18.2-248 and 18.2-258.1. Section 18.2-248, among other related things, provides, “[e]xcept as authorized in the Drug Control Act . . . it shall be unlawful for any person to manufacture, sell, give, distribute, or possess with intent to manufacture, sell, give or distribute a controlled substance or an imitation controlled substance.” Pursuant to § 18.2-258, it is a Class 6 felony

for any person to obtain or attempt to obtain any drug or procure or attempt to procure the administration of any controlled substance, marijuana, or synthetic cannabinoids: (i) by fraud, deceit, misrepresentation, embezzlement, or subterfuge; or (ii) by the forgery or alteration of a prescription or of any written order; or (iii) by the concealment of a material fact; or (iv) by the use of a false name or the giving of a false address.^[7]

As you note, absent state legislation to the contrary, the federal law denies benefits for those who have been convicted of felonies involving the possession, use, or distribution of controlled substances. You ask whether the crimes stated above constitute disqualifying offenses. Manufacturing a drug is a violation of § 18.2-248, a provision that by its terms includes possession among its elements.⁸ Further, to “obtain” a drug is “to gain possession of”⁹ it. As such, provided the specific violation of either section constitutes a felony,¹⁰ then a conviction under either subjects the offender to the disqualification provision of the federal law.

CONCLUSION

Accordingly, it is my opinion that that the Personal Responsibility and Work Opportunity Reconciliation Act encompasses felony convictions for manufacturing controlled substances or for obtaining controlled substances by false pretenses. It is further my opinion that those persons with such convictions are disqualified from receiving food stamp benefits because § 63.2-505.2 does not exempt such convictions from the application of the federal law.

¹ 21 U.S.C. § 862a.

² 21 U.S.C. § 862a(a).

³ 21 U.S.C. § 862a(d)

⁴ VA. CODE ANN. § 63.2-505.2 (2007). This section sets forth additional conditions for maintaining eligibility, but they are irrelevant to the instant inquiry.

⁵Section 18.2-250 makes it “unlawful for any person knowingly or intentionally to possess a controlled substance [,]” unless obtained pursuant to a valid prescription or as authorized by the Drug Control Act.

⁶ 21 U.S.C. § 862a(a).

⁷ For first time offenders, the violation may be reduced by the court to a Class 1 misdemeanor upon the defendant’s successful completion of the terms and conditions of probation. VA. CODE ANN. § 18.2-248(H) (2009).

⁸ See § 18.2-248(C)-(D), (E1)-(E3), (G)-(H2). See also, e.g., *Patterson v. Commonwealth*, 19 Va. App. 698, 702, 454 S.E.2d 367, 369 (1995) (“A person cannot manufacture marijuana without also possessing it; therefore, the elements of possession are ‘constituent parts’ of the greater offense of manufacturing. Thus, possession of marijuana is a lesser offense included in the offense of manufacturing marijuana.”) (citations omitted); *Spear v. Commonwealth*, 221 Va. 450, 457, 270 S.E.2d 737, 742 (1980) (intentional possession of controlled substance is lesser included offense of manufacturing).

⁹ THE WEBSTER ENCYCLOPEDIA OF THE ENGLISH LANGUAGE 576 (1967). THE AMERICAN HERITAGE DICTIONARY 859 (2d coll. ed. 1982) (defining “obtain” as “[t]o succeed in gaining possession of as the result of planning or endeavor”).

¹⁰ Not every offense established by § 18.2-248 is a felony. See § 18.2-248(E) and (F). In addition, convictions under § 18.2-248(J) relate to possession of certain substances with the intent to manufacture methamphetamine, methcathinone or amphetamine, which do not appear to be controlled substances. Because these offenses do not bar a person from receiving public assistance, it is incumbent upon the local eligibility worker to determine the specific subsection or nature of the violation before deciding if the individual is ineligible.

OP. NO. 11-113

WORKERS’ COMPENSATION: COMPENSATION AND PAYMENT THEREOF

Term “regular payroll check” refers to both the timing of the check and the amount of the check.

It makes no difference whether the deduction for the new retirement contribution begins before or after the injured employee is injured.

Because neither mandated member contribution toward retirement nor deductions elected by the employee constitute an assignment of benefits or a claim of a creditor, they are not prohibited by the Act and may be deducted in appropriate circumstances.

MS. SARA REDDING WILSON

DIRECTOR, DEPARTMENT OF HUMAN RESOURCE MANAGEMENT

MR. DAVID VON MOLL

STATE COMPTROLLER

FEBRUARY 7, 2012

ISSUES PRESENTED

You pose several questions regarding application of the Virginia Workers’ Compensation Act¹ (the “Act”) and the new 5 percent member contribution toward retirement. Specifically, you ask:

1. When the employing agency issues to the injured worker a payroll check that is net of all standard deductions, including the new 5 percent member contribution toward retirement, is that payroll check a “regular payroll check” for purposes of § 65.2-524? In other words, does “regular” refer to timing of the check, or does it refer to the amount of the check?
2. Does the proposed legislative change to § 65.2-524 solve the problem; *i.e.* does it adequately define “regular payroll payment” to avoid any penalty?
3. Does it make any difference that the deduction for the new retirement contribution begins before or after the injured employee is injured?
4. Is the new 5 percent mandated member contribution toward retirement, or any other employee-elected deduction, such as a health-care premium or flexible reimbursement account deduction, considered an assignment of benefits prohibited by the Act?
5. Is the new 5 percent mandated member contribution toward retirement, or any employee-elected deduction, such as a health-care premium or flexible reimbursement account deduction, a claim of a creditor prohibited by the Act?

RESPONSE

It is my opinion that the term “regular payroll check” refers to both the timing of the check and the amount of the check, so that the proposed legislative change to § 65.2-524 adequately defines “regular payroll payment” to avoid any penalty. It is further my opinion that it makes no difference whether the deduction for the new retirement contribution begins before or after the injured employee is injured. Finally, it is my opinion that because neither the new 5 percent mandated member contribution toward retirement nor other deductions elected by the employee, including health-care premiums and flexible reimbursement account deductions, constitute an assignment of benefits or a claim of a creditor, they are not prohibited by the Act and may be deducted in appropriate circumstances.

BACKGROUND

As you relate, the General Assembly in its last session passed, and the Governor signed, legislation requiring state employees covered under the Virginia Retirement System’s Plan 1 to begin paying a 5 percent member contribution toward their retirement on a pre-tax salary reduction basis. The legislation also provided these employees a 5 percent raise. The measure was effective July 1, 2011 and was reflected in employees’ July 16 paychecks. Previous legislation was enacted in 2010 that required new employees, hired after July 1, 2010 and with no existing membership in the Virginia Retirement System, to pay the 5 percent member contribution toward their retirement on a pre-tax salary reduction basis.

You express concern that some of these affected state employees will have suffered workplace injuries compensable under the Act and will be entitled to wage loss benefits under the Act. Of those injured state employees, some will remain on agency payroll, receiving semi-monthly payroll checks, while others will transition off payroll and will receive, on a bi-weekly basis, workers’ compensation indemnity

benefits directly from the Department of Human Resource Management, the agency that administers workers' compensation benefits for claims made by state employees. Thus, your inquiry encompassed two distinct scenarios – an injured employee entitled to workers' compensation indemnity benefits remaining on agency payroll, and an injured employee entitled to workers' compensation indemnity benefits who is off payroll, receiving direct payment of benefits. As I understand your request, you are limiting your inquiry to the first scenario: injured employees who remain on an agency's payroll.²

You further note that, in an attempt to resolve any potential statutory ambiguity, the Department of Human Resource Management has submitted language to amend the Act, specifically § 65.2-524.

APPLICABLE LAW AND DISCUSSION

Your first inquiry regards the meaning of “regular” for purposes of § 65.2-524. Section 65.2-524 establishes a penalty for failure to pay workers' compensation benefits in a timely manner. Specifically, it provides:

If any payment is not paid within two weeks after it becomes due, there shall be added to such unpaid compensation an amount equal to twenty percent thereof, unless the Commission finds that any required payment has been made as promptly as practicable and (i) there is good cause outside the control of the employer for the delay or (ii) in the case of a self-insured employer, the employer has issued the required payment to the employee as a part of the next regular payroll after the payment becomes due. No such penalty shall be added, however, to any payment made within two weeks after the expiration of (i) the period in which Commission review may be requested pursuant to § 65.2-705 or (ii) the period in which a notice of appeal may be filed pursuant to § 65.2-706. No penalty shall be assessed against the Commonwealth when the Commonwealth has issued a regular payroll check to the employee in lieu of compensation covering the period of disability.

The last sentence of this Section creates an exception to the penalty provision when the Commonwealth issues a “regular payroll check” to the injured employee in lieu of compensation. You are concerned that deducting the 5 percent member contribution toward retirement might subject the Commonwealth to liability under the penalty provision of § 65.2-524. You therefore ask whether a payroll check that is net of all standard deductions,³ including the new 5 percent member contribution toward retirement constitutes a “regular payroll check” for purposes of § 65.2-524. Put another way, you ask whether “regular” refers to the timing of the check or to the amount of the check.

The Code does not provide a definition for the term “regular” as used in § 65.2-524. In the absence of a statutory definition, words in statutes are to be given their ordinary meaning within the statutory context.⁴ *The American Heritage Dictionary* defines “regular” as “[c]ustomary, usual, or normal.... [c]onforming to set procedure, principle, or discipline....[o]ccurring at fixed intervals; periodic....[c]onstant; not

varying.”⁵ *Black’s Law Dictionary* defines “regular” as “[c]onformable to law. Steady or uniform in course, practice, or occurrence; not subject to unexplained or irrational variation. Usual, customary or general.... Made according to rule, duly authorized, formed after uniform type; built or arranged according to established plan, law or principle.”⁶

Applying these definitions to the term “regular payroll check,” I conclude that the adjective “regular” refers to both the timing and the contents of the payroll check. A “regular” payroll check is a payroll check issued in the normal course of the Commonwealth’s issuance of payroll checks, and therefore uniform in occurrence and issued at fixed intervals. A “regular” payroll check is also a payroll check that is like the payroll checks issued to the injured worker prior to his injuries, *i.e.* a payroll check conforming to his pre-injury payroll checks in terms of its components, *e.g.* gross amount, deductions made, etc. Payroll checks issued in the normal course of operations, which include the 5 percent member contribution toward retirement, are still “customary, usual and normal” and conform to set procedures. Such payroll checks are issued according to an established plan, law or principle.

Indeed, had the General Assembly intended to limit the penalty exclusion to a timing issue, it could have chosen words to manifest that intention. Likewise, had the General Assembly intended to limit the penalty exclusion to payroll checks identical to pre-injury payroll checks, it could have so stated. I conclude the General Assembly, in using the term “regular payroll check,” intended to encompass both the timing and composition of the checks Commonwealth agencies normally provide their employees.⁷ I therefore further conclude that payroll checks issued to injured workers receiving workers’ compensation benefits, that now include the new 5 percent member contribution toward retirement, are “regular payroll checks” for purposes of § 65.2-524.

Relatedly, you next ask whether a proposed legislative change to § 65.2-524 would resolve the problem of a potential ambiguity in the provision, *i.e.*, whether it adequately defines “regular payroll payment” to avoid any penalty.

The proposed amendment is as follows:

If any payment is not paid within two weeks after it becomes due, there shall be added to such unpaid compensation an amount equal to twenty percent thereof, unless the Commission finds that any required payment has been made as promptly as practicable and (i) there is good cause outside the control of the employer for the delay or (ii) in the case of a self-insured employer, the employer has issued the required payment to the employee as a part of the next regular payroll after the payment becomes due. No such penalty shall be added, however, to any payment made within two weeks after the expiration of (i) the period in which Commission review may be requested pursuant to § 65.2-705 or (ii) the period in which a notice of appeal may be filed pursuant to § 65.2-706. No penalty shall be assessed against the Commonwealth when the Commonwealth has issued a regular payroll-check payment to the employee in lieu of compensation covering the period of disability; regular payroll payment issued under this provision

by the Commonwealth includes payments issued net of deductions for elected and mandatory benefits and other standard deductions.^[8]

I further understand that there is no concern related to the timing of payroll payments, so that your question is focused on the amount of the payment. As stated above, I believe that the term “regular payroll check” refers both to the timing of the payment and the amount of the payment. If the payments are processed in a uniform course or practice, are of a uniform type with other employees’ payroll checks, and are issued according to the established plan of the Commonwealth for payroll checks for all Commonwealth employees, both as to the timing and the amount, then the penalty provision does not apply. To the extent there is an argument that the General Assembly intended “regular payroll check” to refer only to timing, I believe the proposed amendment addresses that concern by expressly incorporating that element into what constitutes a “regular payroll payment.”

Your third question asks if there is any difference in whether the deduction for the new retirement contribution begins before or after the injured employee is injured.

Because the new 5 percent member contribution toward retirement applies to all employees and is instituted uniformly and consistently, it is my opinion that it makes no difference whether the new 5 percent member contribution toward retirement is instituted before or after an employee suffers a work injury.⁹ Otherwise, injured employees would have to be segregated from the main workforce and not contribute to their retirement. The 5 percent member contribution would therefore cease to be uniformly and consistently applied, contrary to the intent of the General Assembly. Again, I render no opinion as to any deductions from workers’ compensation benefits paid directly to injured employees.

Your remaining questions pertain to the application of § 65.2-531 to the new 5 percent mandated member contribution toward retirement. Section 65.2-531 provides, in pertinent part:

A. No claim for compensation under this title shall be assignable. All compensation and claims therefor shall be exempt from all claims of creditors, even if the compensation is used for purchase of shares in a credit union, or deposited into an account with a financial institution or other organization accepting deposits and is thereby commingled with other funds. However, benefits paid in compensation or in compromise of a claim for compensation under this title shall be subject to claims for spousal and child support subject to the same exemptions allowed for earnings in § 34-29.

In sum, this provision prohibits both the voluntary assignment of benefits by the injured worker, and the attachment by creditors of the injured worker’s benefits.

You ask whether the mandated contribution, when deducted from payroll, or other employee-elected deductions, such as health care premiums and flexible reimbursement account deductions, constitute an impermissible assignment under the Act. I could find no judicial opinions directly addressing the prohibition against

assignment provision of this statute; however, by its terms, the prohibition applies only to a “claim for compensation under this title.”

Neither payroll payments nor deductions from such payments are claims for compensation under the Virginia Workers’ Compensation Act,¹⁰ and thus, fall outside the scope of the prohibition. Further, unlike a classic assignment, where an assignor chooses to assign something to an assignee, the member contribution is mandated by the General Assembly. The employee cannot determine the amount of the contribution, and he cannot determine the recipient. Likewise, he cannot choose whether to participate. Thus, neither the member contribution nor other employee-elected deductions made from payroll payments are assignments prohibited by § 65.2-531. Finally, you ask whether the new 5 percent mandated member contribution toward retirement or other employee-elected deductions, such as health-care premiums and flexible reimbursement account deductions, are considered claims of a creditor and therefore prohibited.

Section 65.2-531 exempts workers’ compensation benefits from the collection efforts of employees’ creditors. This requires a creditor. The new 5 percent mandated member contribution is not claim of a creditor. The 5 percent mandated member contribution is a creation of the General Assembly, applicable to all Commonwealth employees; it does not arise from a debtor-creditor relationship and is not deducted to satisfy some other obligation to the Commonwealth or a third-party creditor. Further, as stated above, § 65.2-531 applies only to a “claim for compensation under this title.” Because payroll payments and deductions are not claims for compensation under the Virginia Workers’ Compensation Act, they fall outside the scope of the exemption. Thus, the mandated retirement contribution is not a claim of a creditor subject to the restriction of § 65.2-531. Moreover, other employee-elected deductions are requested by the employee and are instituted and terminated at his direction. They are not claims made by creditors against the employee’s payroll payments. Thus, other employee-elected deductions made from payroll payments also do not constitute “a claim of a creditor” and are not prohibited by § 65.2-531.

CONCLUSION

Accordingly, it is my opinion that the term “regular payroll check” refers to both the timing of the check and the amount of the check, so that the proposed legislative change to § 65.2-524 adequately defines “regular payroll payment” to avoid any penalty. It is further my opinion that it makes no difference whether the deduction for the new retirement contribution begins before or after the injured employee is injured. Finally, it is my opinion that because neither the new 5 percent mandated member contribution toward retirement or other deductions elected by the employee, including health-care premiums and flexible reimbursement account deductions, constitute an assignment of benefits or a claim of a creditor, they are not prohibited by the Act and may be deducted in appropriate circumstances.

¹ VA. CODE ANN. §§ 65.2-100 through 1310 (2007 & Supp. 2011).

² You advise that you are not considering applying the new 5 percent member contribution toward retirement to workers’ compensation benefits paid directly to an injured worker by the Department of

Human Resource Management in its role as administrator of workers' compensation benefits for injured state employees. You state this decision is based on your understanding that the workers' compensation benefit is not "creditable compensation" for purposes of the new 5 percent member contribution. I therefore offer no opinion as to whether the new 5 percent member contribution toward retirement, if applied to workers' compensation benefits paid directly to an injured employee of the Commonwealth, constitutes an assignment of benefits or claim of a creditor prohibited by § 65.2-531. Nor do I offer any opinion as to whether workers' compensation benefits are "creditable compensation" for purposes of the new 5 percent member contribution.

³ You define standard deductions to "include withholding, FICA, health insurance, tax levies, child and spousal support, and any deductions through the Department of Accounts that the employee has requested be made, in writing."

⁴ See *Grant v. Commonwealth*, 223 Va. 680, 684, 292 S.E.2d 348, 350 (1982); *Loyola Fed. Savings v. Herndon*, 218 Va. 803, 805, 241 S.E.2d 752, 753 (1978).

⁵ THE AMERICAN HERITAGE DICTIONARY 1041 (2d c. ed.1982).

⁶ BLACK'S LAW DICTIONARY 1155-56 (5th ed. 1979).

⁷ In interpreting statutes, we "assume that the legislature chose, with care, the words it used when it enacted the relevant statute," *Barr v. Town & Country Props., Inc.*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990), for the General Assembly knows how to express its intention, *see* 2010 Op. Va. Att'y Gen. 5, 7 n.5; 178, 179 n.10.

⁸ I understand that the proposed change from "check" to "payment" is unrelated to your questions, but is instead suggested to acknowledge the reality that Commonwealth employees are often paid electronically, without the issuance of actual checks.

⁹ I am advised that the new 5 percent member contribution toward retirement is deducted from all employees, including after workplace injuries, so long as the employee remains on agency payroll.

¹⁰ Such a claim requires a timely-filed application for benefits submitted to the Workers' Compensation Commission that includes identification of the employer, the date and location of the accident and the injuries suffered. *See Cheski v. Arlington Cnty. Pub. Schs.*, 16 Va. App. 936, 938, 434 S.E.2d 353, 355 (citing § 65.2-601 and *Trammel Crow. Co. v. Redmond*, 12 Va. App. 610, 614, 405 S.E.2d 632, 634 (1991)).

NAME INDEX

Banagan, Jerald D.	11-056	134
Bell, Richard P.	12-059	72
Bell, Robert B.	12-046	36
Bryant, Harvey L.	12-062	113
Carr, Gayl Branum.	12-027	82
Cole, Mark L.	12-041	57
Crawford, Vanessa R.	12-068	110
Deeds, R. Creigh.	12-033	96
Elkins, Ronald K.	12-080	87
Ferguson, Paul	12-030	28
Habeeb, Gregory D.	11-131	115
Hallman, Ronald S.	11-029	129
Ham, Jason J.	12-060	4
Hanger, Emmett W. Jr.	12-059	72
Johnson, Dwight D., Jr.	11-079	79
Kennedy, J. Jack Jr.	12-096	88
Knight, Barry D.	12-078	119
Lingamfelter, L. Scott	11-100	62
Mabe, Gerald E., II.	11-112	143
Marshall, Robert G.	11-004	17
Martin, Stephen H.	12-045	66
McPherson, Ida O.	12-031	3
McQuigg, Michele B.	12-008	107
McWaters, Jeffrey L.	12-001, 12-078.	100,119
Miller, Jackson H.	11-135	37
Morefield, James W.	12-054	103
Newman, Richard K.	11-080	93
Newman, Stephen D.	11-111	90
Norment, Thomas K. Jr.	11-129	74
Northam, Ralph S.	12-036, 12-078.	50,119
Petersen, J. Chapman	11-053	117
Pogge, Brenda L.	11-127	14
Ramadan, David	12-043	60
Roberts, John R.	12-029	76
Rust, Thomas Davis	11-140	31
Shelton, William C.	12-042	101
Sickles, Mark D.	12-025	9
Stiles, Mark D.	11-126	12
Stolle, Christopher P.	12-078	119
Surovell, Scott A.	11-144	53
Tyler, Roslyn C.	12-022	7
Von Moll, David	11-113	145
Wagner, Frank W.	12-078	119
Wilson, Sara Redding.	11-113	145
Wingfield, Eugene C.	12-028	84
Worthington, Judy L.	12-047,12-038	26,137

SUBJECT INDEX

ADMINISTRATION OF GOVERNMENT

Community Action Act. Community Action Act establishes and governs community action agencies to facilitate the development of social and economic opportunities for low-income persons.....7

Elected officials serving on a community action board are subject to the State and Local Conflict of Interests Act.....7

No conflict of interests precludes members of local governing bodies serving on community action boards from voting in budgetary matters of the local government when such items may affect the community action program funding 7

With limited exception, one-third of the members on a community action board shall be elected public officials who shall be selected by the local governing body of the service area.....7

Department of Law – Attorney General lacks standing to bring a Fourth Amendment claim on behalf of citizens of the Commonwealth 113

General Provisions (official opinions of Attorney General). Matters requiring a factual determination are beyond the scope of an official opinion..... 117

Attorney General will decline to opine on matters that are associated with pending litigation.....4,17

Office of the Attorney historically has declined to render opinions that involve determinations of fact rather than questions of law 129

Department of Minority Business Enterprise. Director is authorized to adopt regulations to implement certification programs for small, women- and minority-owned businesses3

Because Florida’s certification and its associated benefits are not available to small businesses in Virginia, the Department is precluded from certifying a Florida-based business as a small business in Virginia.....3

Generally, certification programs are not limited to Virginia-based enterprises.....3

Whether business based in another state is eligible for certification depends on that state’s treatment of Virginia-based firms applying for similar certification in that state.....3

Investment of Public Funds Act. Act establishes standards of care by which monies are to be invested4

Act generally permits the Commonwealth and all other public bodies to invest certain public moneys in negotiable certificates of deposit and negotiable bank deposit notes of domestic banks and domestic offices of foreign banks4

Act requires investment in safe and reliable devices4

“Domestic bank” refers to a bank located in the fifty United States or the District of Columbia4

“Foreign bank” refers to banks organized and operated outside the fifty United States and the District of Columbia4

Purpose of the act as a whole is to safeguard monies belonging to the Commonwealth and its subdivisions4

State and Local Conflict of Interests Act. Act prohibits the participation of officers and employees in transactions of their governmental agencies in which they have an interest.....7

Act requires, in the absence of an exception, governmental officers to disqualify themselves from transactions of their agencies in which they have a personal interest7

Act restricts the ability of state and local officers and employees to have personal interests in certain contracts with their own or other governmental agencies7

Elected officials serving on a community action board are subject to the State and Local Conflict of Interests Act.....7

No conflict of interests precludes members of local governing bodies serving on community action boards from voting in budgetary matters of the local government when such items may affect the community action program funding 7

Voting on budgetary matters constitutes a transaction under the Act7

Virginia Freedom of Information Act. Fact that MWAA is subject to suit in Virginia does not mean that MWAA is subject to FOIA 17

MWAA Compact does not specify the freedom of information statutes apply to MWAA 17

MWAA does not fit within the definition of “public body” 17

MWAA is not an authority of a district or agency of the Commonwealth 17

Virginia FOIA applies to public bodies 17

Virginia Public Procurement Act. Although MWAA is exempt from Section 2.2-4321.2, state agencies dealing with MWAA are not4

First step of competitive negotiation involves narrowing the number of offerers deemed fully qualified and best suited for the project; second step involves negotiating with the group selected and selecting a contractor..... 12

General Assembly expressly exempted MWAA from the provisions of the Virginia Public Procurement Act.....4

Irrespective of Section 2.2-4321.2, a granting agency can negotiate to include labor requirements as a condition for signing any commitment to provide any grants or financial assistance9

PPTA proposal process is not subject to the Virginia Public Procurement Act... 119

Public Procurement Act allows localities to adopt design-build procedures that limit the locality to the selection of no more than five offerors deemed fully qualified and best suited to the project 12

Pursuant to new enactment, a state agency issuing grants or providing financial assistance for construction of public works “shall ensure” that bid specifications and other documents issued by the recipients do not discriminate against offerors based on whether they will have an agreement with a labor organization.....9

Section 2.2-4303(D)(3) authorizes localities with populations in excess of 100,000 to use competitive negotiation when procuring a contractor for design-build construction projects..... 12

Section 2.2-4308 governs procurement of design-build contracts by localities.... 12

Section 2.2-4321.2 prohibits state agencies from providing funds until compliance with its terms is ensured4

Virginia Public Procurement Act establishes that the complete sealed bidding process is the preferred method of construction procurement for localities to follow..... 12

AGRICULTURE, ANIMAL CARE, AND FOOD

Agritourism Activity Liability. Definition of “agricultural products” found in Section 3.2-6400 only applies to the use of the phrase in Chapter 64 of Title 3.2 ... 74

Definition of “agricultural products” provided by Section 3.2-6400 does not serve as the definition of the phrase as used in Section 15.2-2288 74

Right to Farm. Aquaculture does not constitute an agricultural operation under the Virginia Right to Farm Act 14

Right to Farm Act restricts the ability of localities to regulate certain activities within particular areas 14

Virginia Right to Farm Act does not define the word “animal” 14

AVIATION

Metropolitan Washington Airports Authority. Agreements between various parties control the circumstances under which Virginia can regain control of over Dulles Road project and void MOU 17

Agreement of all MWAA Compact parties would not be required to approve MWAA’s takeover of the Dulles Toll Road..... 17

Agreements signed by Loudoun detail the scope of its obligation in connection with the Dulles Road project 17

Although MWAA is exempt from Section 2.2-4321.2, state agencies dealing with MWAA are not4

Approval of MWAA’s Board would be sufficient to confer upon MWAA authority and responsibility to operate and maintain the Dulles Toll Road..... 17

Executive statutory authority is broad enough to permit executive branch officials to negotiate MOU that transfers Commonwealth’s right of way over Dulles Toll Road to MWAA 17

Fact that MWAA is subject to suit in Virginia does not mean that MWAA is subject to FOIA 17

General Assembly expressly exempted MWAA from the provisions of the Virginia Public Procurement Act.....4

General Assembly has authorized Commonwealth Transportation Board to provide for additional improvements to the Dulles Toll Road and Dulles Access Road corridor, including but not limited to mass transit, including rail 17

Governor had authority to the Commonwealth of its interest in the Dulles Toll Road and grant it to MWAA..... 17

MWAA Compact does not specify the freedom of information statutes apply to MWAA 17

MWAA does not fit within the definition of “public body” 17

MWAA is not an authority of a district or agency of the Commonwealth 17

MWAA is a public body corporate and politic that is independent of Virginia.4

MWAA’s exemption from the Virginia Public Procurement Act does not insulate it from general laws pertaining to the enforcement of contracts4

Neither state nor federal freedom of information statute applies to MWAA 17

While no express authority authorizes the Governor the alienate the Commonwealth’s limited interest in the Dulles Toll Road, a variety of statutes provide broad flexibility to the executive branch to provide for roads and transportation 17

CIVIL REMEDIES AND PROCEDURE

Commonwealth gives full faith and credit to the records of judicial proceedings and other official records of foreign courts 107

Executions and Other Means of Recovery. Although Section 8.01-446 expressly provides for docketing restitution orders as judgments, the provision is limited to restitution ordered pursuant to Title 19.2 79

Code clearly contemplates that judgments rendered by district courts will be presented to and accepted by the circuit court for docketing.....	79
Confidentiality concerns do not bar a district court clerk from docketing an order for the payment of guardian ad litem fees	79
District courts and their clerks are interested persons under Section 8.01-446 for purposes of enforcing assessments of fees and costs.....	79
District court is not person interested in satisfaction of restitution orders issued pursuant to Section 16.1-276.8(10)	79
District court clerk may file abstract of judgment with the circuit court for costs assessed against parents for legal services provided by appointed counsel or guardian ad litem	79
No authority for circuit court clerk to docket juvenile restitution order when presented by district clerk court.....	79
Section 8.01-446 does not permit a clerk of the court to docket a judgment rendered in court not of record unless docketing is requested by an interested person	79
There is no express authority permitting district courts to have docketed with the circuit court orders for the payment of costs or decrees ordering restitution.....	79
When juvenile under jurisdiction of juvenile and domestic relations court is found to be delinquent and restitution is ordered, the restitution order cannot be docketed pursuant to Section 8.01-446.....	79
Judgments and Decrees Generally. Application of sovereign immunity for potential liability of clerk for erroneous recording of release of judgment is fact-specific question.....	26
Clerk is not empowered to enter a judgment release based solely on documentation presented by the judgment debtor	26
Code of Virginia does not permit a judgment debtor to present a circuit court clerk a release of judgment for entry without the court granting a motion made pursuant to Section 8.01-455	26
If court orders a judgment satisfied pursuant to Section 8.01-455, clerk is responding to a court order and not to documentation presented by the judgment debtor.....	26
Judgment debtor is not authorized to present judgment release directly to clerk .	26
Juries. Ability to serve on a jury is not governed by any constitutional provisions or tied to the right to vote	88
Authority of Governor to remove political disabilities consequent upon conviction for offenses is broad enough to include those imposed by Section 18.2-434 .	87, 88

For purposes of Section 8.01-341(5), a “licensed practicing attorney” is a person licensed to practice law in any state or territory of the United States, including the District of Columbia, who is engaged in the active practice of law28

“Forever” as used in Section 18.2-434 is limited to the time before a person convicted of perjury has political rights restored by the Governor.....87,88

Person convicted of perjury is eligible to serve on jury after political rights have been restored..... 88

Restoration of political rights removes the bar from jury service imposed by Section 18.2-434.....88

Section 8.01-338 expressly disqualifies from jury service persons convicted of a felony88

While Section 8.01-341(5) provides an exemption from jury service for licensed practicing attorneys, it does not bar lawyers from serving on a jury when a lawyer is willing to waive the exemption28

CLERKS OF COURT (See CONSTITUTIONAL OFFICERS)

COMMISSIONERS OF THE REVENUE (See CONSTITUTIONAL OFFICERS)

COMMONWEALTH’S ATTORNEY (See CONSTITUTIONAL OFFICERS)

CONSERVATION

Applying the doctrine of merger to extinguish a conservation easement would circumvent the purposes for establishing such easements.....31

Conservation easements are a recent creation of law31

Conservation easements are held and administered by holders not for themselves, but on behalf of the public in furtherance of state policy31

Conservation easements are not typical easements whose purposes are necessarily obviated when ownership of the easement and fee become unified.....31

Conservation easements stand in sharp contrast to conventional easements.....31

Conservation easements obtained under the Virginia Conservation Easement Act or the Open-Space Land Act are not extinguished by application of the common law doctrine of merger31

Only certain public and nonprofit entities are authorized to hold conservation easements31

Conservation easements serve a much more public purpose than conventional easements31

CONSTITUTIONAL OFFICERS

Dillon Rule applies to constitutional officers	110
Clerks of Court. Article VII, Section 4 of the Constitution of Virginia creates the office of the circuit court clerk	107
Article VII, Section 4 of the Constitution of Virginia provides that a clerk’s duties shall be prescribed by general law or special act	107
As a general rule, circuit court clerks have no inherent powers and applicable statutes determine the scope of a clerk’s powers	107
Authority of a clerk of court to administer an oath or to take an affidavit is purely a creature of statute	107
Decision to administer oath required by out-of-state law remains within sound discretion of the clerk	107
If a particular action does not fall within the express statutory authority, the clerk has no authority to perform that action	107
No authority for circuit court clerk to docket juvenile restitution order when presented by district clerk court	107
Section 49-4 authorizes the clerk of court to administer oaths requested by out-of-state governing bodies, provided the oath or affirmation is required by law in the foreign jurisdiction	107
Virginia Recordation Tax Act requires every circuit court clerk to collect certain recordation taxes	137
Whether clerk is entitled to sovereign immunity is a fact-specific question that cannot be answered in the abstract	26
Commissioner of the Revenue. Local commissioner of revenue is responsible for making factual determinations in matters of local BPOL taxation	115
Commonwealth’s Attorney. Amending an arrest warrant or summons may only be made by appropriate judicial officer	93
Institution of criminal charges, as well as their order and timing, is matter of prosecutorial discretion	93
It is the court, rather than the prosecutor, who ultimately has authority to amend a warrant	93
It is well established that choice of offenses for which a criminal defendant will be charged is within the discretion of the Commonwealth’s attorney	93
Neither chief of police nor Commonwealth’s attorney has authority to unilaterally withdraw or dismiss a lawfully issued arrest warrant or summons	93

Once arrest warrant or summons is issued, the charges become the province of the judicial branch and are no longer within the unfettered purview of the Commonwealth’s attorney.....93

Prosecutor is permitted to move to amend a misdemeanor charge alleging a violation of a municipal ordinance to the equivalent misdemeanor charge alleging a violation of state law when an arrest was made by an officer of local police department93

Prosecutor remains free to exercise discretion in bringing and amending charges for violations of provisions outside Title 46.2.....93

Restriction on prosecutorial discretion in Section 46.2-1308 is expressly limited to violations under Title 46.2.....93

Sheriffs. Absent agreement between sheriff’s office and locality, money from inmate telephone service accounts remain within the purview of the locality110

All money received by the sheriff shall be deposited intact and promptly with the county or city treasurer 110

Funds derived from inmate telephone accounts are not imputable to the sheriff 110

Funds derived from inmate telephone accounts must be submitted to the treasurer for depositing..... 110

Funds properly attributed to sheriff’s office, regardless of where they are initially deposited, remain in the purview of the sheriff’s office 110

Sheriffs are constitutional officers whose power and responsibilities are limited by statute..... 110

Sheriffs is constitutional officer whose authority and duties shall be prescribed by general law or special act..... 110

Sheriff’s office may not establish and maintain a separate fund for telephone commissions 110

Virginia law does not require funds generated from inmate telephone commissions received by the treasurer to and deposited into city funds to be reallocated back to the sheriff’s office..... 110

Treasurers. All money received by the sheriff shall be deposited intact and promptly with the county or city treasurer 110

Constitution provides that treasurer’s duties shall be prescribed by general law or special act 110

Powers and duties of local treasure are set out generally in Article 2, Chapters 31 and 39 of Title 58.1 110

Section 58.1-3127(A) directs the treasurer to collect the amounts payable into the treasury of the of the political subdivision of the Commonwealth served by the treasurer 110

Upon receipt, treasurer shall account for and pay over revenue received in the manner provided by law 110

CONSTITUTION OF THE UNITED STATES

Fourth Amendment. Airport screenings generally have withstood Fourth Amendment challenge..... 36

Attorney General lacks standing to bring a Fourth Amendment claim on behalf of citizens of the Commonwealth 36

Fourth Amendment prevents the government from conducting unreasonable searches and seizures 36

Fourth Amendment protections are rights attaching to persons that can be asserted only by them or through an association 36

Merits of search and seizure claims depend heavily on their individual facts 36

Second Amendment, Right to Keep and Bear Arms. Second Amendment acts as a restraint on government, not private parties 90

CONSTITUTION OF VIRGINIA

Ability to serve on a jury is not governed by any constitutional provisions or tied to the right to vote 88

Constitution of Virginia is to be looked at, not to ascertain whether a power has been conferred to the General Assembly, but whether it has been taken away..... 50

Constitution of Virginia protects the right to bear arms, but it also recognizes the importance of property rights 90

Constitution of Virginia vests the legislative power of the Commonwealth in the General Assembly 50

Delegations of authority are adequately limited where the terms or phrases employed in the statute have a well understood meaning and prescribe sufficient standards to guide the administrator..... 50

Except as far as restrained by the State Constitution and the Constitution of the United States, the legislature has plenary power..... 50

For legislative delegation to remain within constitutional limits, laws delegating the authority must establish specific policies and fix definite standards to guide agency determinations 50

General Assembly cannot delegate its legislative power when the delegation is accompanied only by a broad statement of general policy..... 50

Unless a provision of the Virginia Constitution compels the legislature to act or operates to prohibit it from acting, the General Assembly is free to legislate as its judgment dictates 50

Whether legislative delegation is constitutional depends on the specific provisions of the statute 50

While statutes enjoy the presumption of constitutionality, delegations of legislative power are valid only if they establish specific policies and fix definite standards to guide the official, agency, or board in the exercise of power..... 50

Bill of Rights (Due process of law; obligation of contracts; taking of property).

Article I, Section 11 limits the exercise of local condemnation authority by providing that private property may not be taken except for public use 37

Condemnation for economic development and transfer of private property to private owners would be unconstitutional under proposed amendment 37

Damage in the constitutional sense involves damage resulting from a legal invasion that amounts to a loss of property rights 37

“Damages” under the Constitution means damaged in the legal sense..... 37

Determinations in condemnation cases always depend on the precise facts of a particular case 37

Fact that property acquired to serve public may also incidentally benefit some private individuals does not destroy the public character of the use..... 37

If property is damaged for public uses, just compensation will include depending on the facts of a particular case, compensation for lost access and lost profits to the extent authorized by the General Assembly..... 37

Merely rendering a property less desirable does not constitute damage contemplated by the Constitution, absent some diminution in substance caused by the public use 37

No compensation is due to the owner of property abutting a public road when the state, in the exercise of its police powers reasonably regulates the flow of traffic on the highway 37

Notwithstanding the provisions in the amendment, localities will retain ample condemnation authority to improve and upgrade transportation and utility infrastructure..... 37

Proposed amendment is designed to establish that the right to own and possess private property is a fundamental right..... 37

Under Article I, Section 11, the term “damage/damages” is not accorded its ordinary meaning	37
Under proposed amendment, the term “loss access,” and thus the degree of loss that will qualify for compensation, is to be defined by the General Assembly.....	37
Under proposed amendment, the terms “lost access” and “lost profits” will be components of just compensation.....	37
Under proposed amendment, whether primary use for condemned property is for private gain or benefit will be based upon evidence presented, without any legal presumption in favor of the condemning authority.....	37
Where a loss of access occurs conjointly with a taking or damaging of private property, the amendment provides that just compensation will include damages for lost access	37
Conservation. Article XI, Section 3, recognizes the General Assembly’s authority to define and determine Virginia’s oyster grounds	50
General Assembly may, from time to time, define and determine such natural beds, rocks or shoals by surveys or otherwise	50
General Assembly may delegate to Virginia Marine Resources Commission the authority to make adjustments to boundaries of the Baylor grounds.....	50
Language of Article XI, Section 3 does not prohibit General Assembly from delegating its authority to define and determine Virginia’s oyster grounds	50
Constitution of Virginia vests the legislative power of the Commonwealth in the General Assembly.....	50
Virginia Constitution does not prohibit the General Assembly from delegating the definition and determination of Baylor oyster grounds to the Virginia Marine Resources Commission.....	50
Education. Absent an appropriation, the limitations of Article VIII, § 10 do not apply.....	53
Article VIII, § 10 does not preclude enactment of statutes allowing tax credits that Virginia taxpayers may claim for making contributions to private schools not owned or controlled by the Commonwealth or one of its subdivisions	53
Because tax credits offset the tax obligation a taxpayer would otherwise occur, the benefit derived from a tax credit does not flow out of the state’s general fund	53
By its terms, Article VIII, § 10 applies only to appropriations of public funds	53
Formal act of appropriation takes place when General Assembly sets aside a specific sum for a specific use	53
Legislation providing for tax credits does not set aside a sum certain in the	

treasury upon its passage 53

None of presented proposed tax credits is an appropriation for purposes of Article VIII, § 10 53

Executive. Article V, Section 12 grants the Governor authority to remove political disabilities 87,88

Authority of Governor to remove political disabilities consequent upon conviction for offenses is broad enough to include those imposed by Section 18.2-434 .. 87,88

Authority to remove political disabilities includes ability to restore felon’s right to vote 87

“Forever” as used in Section 18.2-434 is limited to the time before a person convicted of perjury has political rights restored by the Governor..... 87,88

Governor is authorized to remit fines and penalties as may be prescribed by law 88

Governor’s power to remove political disabilities is not subject to limitation by law 88

Person convicted of perjury is eligible to serve on jury after political rights have been restored..... 88

Person convicted of perjury is eligible to hold elective office after political rights have been restored 87

Restoration of political rights removes the bar from jury service imposed by Section 18.2-434..... 88

Restoration of right to vote removes the disability to hold office imposed by Section 18.2-434..... 87

Right to serve on a jury is political right subject to restoration under Article V, Section 12 88

Franchise and Officers. General Assembly may not impose requirements on candidates for election to a governing body beyond those specified in the Virginia Constitution..... 87

No person convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor 87

Person convicted of perjury is eligible to hold elective office after political rights have been restored 87

Right to vote is the sole qualification for a Virginia resident to hold office..... 87

When constitution defines the qualifications for office, the specification is an

implied prohibition against legislative interference to change or add to the qualifications so defined 87

Legislature. Constitution of Virginia vests the legislative power of the Commonwealth in the General Assembly 50

General Assembly generally is able to impose limitations on jury service 88

General Assembly of Virginia has plenary powers and may enact any law not prohibited by the United States Constitution or the Virginia Constitution 88

Legislature – Appropriations to religious or charitable organizations. Absent an appropriation, the limitations of Article IV, § 16 do not apply 53

Article IV, § 16 concerns only funds appropriated from by the General Assembly and expended from the state treasury 57

Article IV, § 16 does not apply to inquiry involving expenditures by local governments 57

Article IV, § 16 does not preclude enactment of statutes allowing tax credits that Virginia taxpayers may claim for making contributions to sectarian entities or nonprofit organizations not controlled by the Commonwealth 53

Article IV, § 16 provides that General Assembly may authorize counties, cities, or towns to make appropriations to any charitable institution or association 57

Because tax credits offset the tax obligation a taxpayer would otherwise incur, the benefit derived from a tax credit does not flow out of the state's general fund 53

By its terms, Article IV, § 16 applies only to appropriations of public funds 53

Formal act of appropriation takes place when General Assembly sets aside a specific sum for a specific use 53

Legislation providing for tax credits does not set aside a sum certain in the treasury upon its passage 53

None of presented proposed tax credits is an appropriation for purposes of Article IV, § 16 53

Local Government. Authority of a county to contract debt is restricted by Article VII, Section 10(b) of Virginia Constitution 76

Taxation and Finance. Cooperative interest held in real estate cooperative does not qualify for the exemption provided by Article X, § 6-A 134

Exemption of Article X, § 6-A does not apply in favor of a veteran who is a propriety lessee in a real estate cooperative 134

Exemptions from real property taxation are narrowly construed 134

In doubtful cases, exemptions from real property must be construed against the applicant of the exemption..... 134

Statutory definition of real property for purposes of the exemption of Article X, § 6-A excludes leasehold interests 134

Substantive elements implementing the exemption provided by Article X, § 6-A are contained in Virginia Code Section 58.1-3219.5 134

COUNTIES, CITIES AND TOWNS

Power of local governing body must be exercised pursuant to an express grant57

Franchises, Public Property, Utilities. Alternative onsite sewage systems, as well as conventional systems, are regulated by the Virginia Department of Health ... 62,66

County or town has general authority to deny applications for onsite sewage systems when the locality has adopted a master plan for sewers..... 62,66

General Assembly intended localities to be able to play role in regulation of alternative onsite systems 62

Had the General Assembly wanted to establish a single, statewide set of standards or requirements for alternative onsite sewage systems, it could have done so 62

Localities are authorized to regulate, inspect and deny applications for alternative systems, but this authorization is limited in cases where public sewer facilities are unavailable..... 66

Localities cannot enact ordinances with standards or requirements greater than those of the state regulations where sewers or sewage facilities are not available66

Localities shall not require maintenance standards and requirements for alternative onsite sewage systems that exceed those allowed or established by the State Board of Health..... 62,66

Locality can adopt standards and requirements for alternative onsite sewage systems are in addition to or more stringent than those promulgated by the Board of Health, provided such standards do not relate to maintenance issues 62

Locality is precluded from adopting, as a condition of a permit to operate an alternative onsite sewage system, a bond requirement to provide for the maintenance, repair or replacement of such system 62

“Maintenance” as used in Section 15.2-2157 modifies both “standards” and “requirements” 62

Provided local requirements do not function as an effective ban on alternative system, where state regulations would allow their operation, a locality is free to impose such requirements..... 62

Section 15.2-2157(C) prohibits any locality from otherwise banning the use of alternative onsite sewage systems approved by the Virginia Department of Health when sewers or sewerage disposal facilities are not available..... 62,66

Where public sewer facilities are available, localities may adopt standards and regulations for alternative systems that exceed those promulgated by Board of Health, provided those standards are not related to maintenance 62,66

Where public sewers facilities are unavailable, and a property owner meets Board of Health regulatory requirements, a local ordinance exceeding such standards is without authorization if its enforcement could result in the denial of an application 66

General Powers of Local Government. Article IV, § 16 of Virginia Constitution does not apply to inquiry involving expenditures by local governments 57

General Assembly has specified several entities which in certain circumstances may receive gifts and donations from the local fisc 57

Generally, locality may make appropriations for the purposes for which it is empowered to levy taxes and make assessments for the support of the locality, for the performance of its functions and the accomplishment of all other lawful purposes and objectives 57

Locality is authorized to make appropriations of public finds, personal property or real estate and donations to any charitable institution or association located within its respective limitations if such institution provides services to residents of the locality 57

Locality may provide funds raised through taxation to nonprofit organizations like the Virginia Association of Counties and the Virginia Municipal League 57

General Provisions. Any zoning ordinance that places heavier burdens or greater restrictions on temporary political signs than on any other classification of temporary sign invalid..... 60

Any zoning ordinance that places heavier burdens or greater restrictions on temporary political signs than on any other classification of temporary sign is pre-empted by state law 60

Localities may regulate temporary political signs under zoning ordinances only in the same manner as other temporary signs 60

Joint Actions by Localities. Localities are authorized to join regional organizations 57

Localities are authorized to appropriate funds to their regional organizations or to provide goods and services to such organization to the purpose of advancing the welfare and economic interests of the locality..... 57

Localities are empowered to form and maintain associations for the purpose of promoting the interest and welfare of the several political subdivisions of the Commonwealth..... 57

Multiple localities and school boards may create a single voluntary, self-funded trust to insure health benefits for their employees and the families of their employees 57

Planning, Subdivision of Land and Zoning. “Agricultural products” as used in Section 15.2-2288 is not defined by the definitions set forth in Section 3.2-6400... 74

Any zoning ordinance that places heavier burdens or greater restrictions on temporary political signs than on any other classification of temporary sign invalid 60

Any zoning ordinance that places heavier burdens or greater restrictions on temporary political signs than on any other classification of temporary sign is pre-empted by state law 60

Localities may regulate temporary political signs under zoning ordinances only in the same manner as other temporary signs 60

Pursuant to its zoning powers, any locality may regulate, restrict, permit, prohibit and determine the size, height, area, bulk, location, erection of structures, including signs 60

Section 15.2-2288 provides that a zoning ordinance shall not require a special exception or special use permit for any production agriculture or silviculture activity in an area zoned as an agricultural district of classification..... 74

Public Finance Act. Absent exception, authority to contract debt is limited by requirement that the debt be approved by the majority voters 76

Although the question submitted to the voters may be worded specifically or generally, board of supervisors is bound by that language 76

Authority of a county to contract debt is restricted by Article VII, Section 10(b) of Virginia Constitution 76

Authority of a county to contract debt is set forth in general law pursuant to the Public Finance Act of 1991..... 76

Absent exception, authority to contract debt is limited by requirement that the debt be approved by the majority voters..... 76

Board of supervisors may not use bond proceeds for any use other than that expressly approved by the voters..... 76

County may not apply proceeds of general obligation bonds issued for one project to a different project unless the resolution or ordinance adopted by the county and submitted to the voters authorizes such application..... 76

Issuance of binds pursuant to an election must be in conformity with the terms and conditions of the submission to the voters 76

Once bond is issued, governing body is bound by the terms of the ordinance or resolution submitted to the voters 76

Ordinance or resolution submitted to voters to approve bond issuance must set forth the purpose or purposes for which the bonds are to be issued 76

Proceeds of a bond issue may be used only for the purpose for which the bond was issued 76

Public Finance Act establishes the procedures a county must follow to contract debt and issue general obligation bonds 76

COURTS NOT OF RECORD

Code clearly contemplates that judgments rendered by district courts will be presented to and accepted by the circuit court for docketing 79

District courts and their clerks are interested persons under Section 8.01-446 for purposes of enforcing assessments of fees and costs 79

District court clerk may file abstract of judgment with the circuit court for costs assessed against parents for legal services provided by appointed counsel or guardian ad litem 79

Section 8.01-446 does not permit a clerk of the court to docket a judgment rendered in court not of record unless docketing is requested by an interested person 79

Upon trial of a warrant, general district court may, on its own motion or at the request of counsel for either side, amend the form of the warrant in any respect in which it appears to be defective 93

Juvenile and Domestic Relations District Courts. Although Section 8.01-446 expressly provides for docketing restitution orders as judgments, the provision is limited to restitution ordered pursuant to Title 19.2; there is no provision for referencing restitution ordered pursuant to Section 16.1-278.8(10) 79

Assessments for guardian ad litem costs constitute a judgment against the parents 79

Confidentiality concerns do not bar a district court clerk from docketing an order for the payment of guardian ad litem fees 79

Confidentiality of juvenile files and records is governed by Section 16.1-305 79

District court is not person interested in satisfaction of restitution orders issued pursuant to Section 16.1-276.8(10) 79

Finding parents financially able to pay guardian ad litem fees, court is directed to assess against the parents the costs of such legal services 79

If court wants local department of social services to appear at proceedings to which it is not a party, then a subpoena or other court order is needed 82

Juvenile and domestic relations court is expressly authorized to order a juvenile to pay restitution for damages caused by a delinquent act..... 79

Juvenile and domestic relations court judges, for certain cases, are required to appoint guardians ad litem or counsel to represent the interests of minors over whom they are exercising jurisdiction 79

Local Department of Social Services is not a party to proceedings where transfer to the local department is one of the dispositional alternatives 82

Local Department of Social Services is not required to attend proceedings where transfer to the local department is one of the dispositional alternatives 82

No authority for circuit court clerk to docket juvenile restitution order when presented by district clerk court..... 79

Notice, but no subpoena, is needed to be given to local social services department in proceedings that may result in transfer of juvenile to department’s custody.... 82

Restitution is to be made to aggrieved parties; it is not assessed as costs..... 79

There is no express authority permitting district courts to have docketed with the circuit court orders for the payment of costs or decrees ordering restitution..... 79

Victim and not court is person interested in satisfaction of restitution order 79

Victim named in restitution order, but not the clerk, can release a restitution order 79

When juvenile under jurisdiction of juvenile and domestic relations court is found to be delinquent and restitution is ordered, the restitution order cannot be docketed pursuant to Section 8.01-446..... 79

COURTS OF RECORD

Clerks, Clerks’ Offices and Records. Clerk of circuit court cannot collect a returned check fee in civil cases..... 84

Fee for return of unpaid check is to assessed in accordance with Section 19.2-353.3 84

Section 17.1-275 sets forth which fees can be collected by circuit court clerks... 84

CRIMES AND OFFENSES GENERALLY

Crimes Against the Administration of Justice. Authority of Governor to remove political disabilities consequent upon conviction for offenses is broad enough to include those imposed by Section 18.2-434 87,88

“Forever” as used in Section 18.2-434 is limited to the time before a person convicted of perjury has political rights restored by the Governor..... 87,88

Person convicted of perjury is eligible to serve on jury after political rights have been restored.....	88
Person convicted of perjury is eligible to hold elective office after political rights have been restored	87
Restoration of political rights removes the bar from jury service imposed by Section 18.2-434.....	88
Restoration of right to vote removes the disability to hold office imposed by Section 18.2-434.....	87

Crimes Involving Health and Safety – Drugs. Absent state legislation to the contrary, federal law denies benefits for those convicted of felonies involving the possession, use, or distribution of controlled substances 143

Felony conviction under Section 18.2-248 or 18.2-258.1 subjects the offender to disqualification of benefits under federal law.....	143
Manufacturing a drug is a violation of Section 18.2-248, which by its terms includes possession among its elements	143
Not every offense established by Section 18.2-248 is a felony	143
Section 63.2-505.2 exempts certain food stamp applicants from the application of the ineligibility provisions of federal law	143
Section 63.2-505.2 provides that a person shall not be assistance solely because he has been convicted of a felony offense of possession of a controlled substance in violation of Section 18.2-250	143
To “obtain” a drug is to gain possession of it	143

Crimes Involving Health and Safety – Other Illegal Weapons. Employers can, like any other owner or private property, restrict the or ban the carrying of weapons onto their property..... 90

Had General Assembly intended to condition Section 18.2-308(B)(10) by requiring the transported handgun be unloaded, it clearly knew how to do so.....	90
Handgun may be carried in a vehicle without requiring the container or compartment storing it to be locked	90
Individual may not keep a firearm stored in his vehicle at a place of employment if there is a company policy or signage prohibiting firearms on the premises.....	90
It is Class 1 misdemeanor for any person without a permit to carry a firearm about his person, hidden from common observation.....	90

Provided handgun is stored as prescribed by statute, it can be kept loaded in vehicle when possessed by someone who may lawfully possess a firearm but has not been issued a concealed weapons permit..... 90

Provided handgun is stored according to statutory exception, it can be within reach of a driver or passenger inside the vehicle 90

Section 18.2-308(A) prohibits the carrying of a concealed weapon without a permit..... 90

Under 18.2-308, “about his person” contemplates the accessibility of concealed weapon for prompt and immediate use..... 90

CRIMINAL PROCEDURE

Amending an arrest warrant or summons is subject to judicial review 93

Amending an arrest warrant or summons may only be made by appropriate judicial officer 93

Changes or corrections to warrants should be regarded as amendments..... 93

Institution of criminal charges, as well as their order and timing, is matter of prosecutorial discretion 93

It is the court, rather than the prosecutor, who ultimately has authority to amend a warrant 93

Neither chief of police nor Commonwealth’s attorney has authority to unilaterally withdraw or dismiss a lawfully issued arrest warrant or summons 93

Once arrest warrant or summons is issued, the charges become the province of the judicial branch and are no longer within the unfettered purview of the Commonwealth’s attorney 93

Prosecutor is permitted to move to amend a misdemeanor charge alleging a violation of a municipal ordinance to the equivalent misdemeanor charge alleging a violation of state law when an arrest was made by an officer of local police department..... 93

Prosecutor remains free to exercise discretion in bringing and amending charges for violations of provisions outside Title 46.2 93

Provisions of Section 8.01-446 for docketing restitution orders as judgments is limited to restitution ordered pursuant to Title 19.2..... 79

Restitution is to be made to aggrieved parties; it is not assessed as costs 79

Restriction on prosecutorial discretion in Section 46.2-1308 is expressly limited to violations under Title 46.2 93

Section 19.2-71 provides that the process for the arrest of a person charged with a criminal offense may be issued by a judge, clerk of court, or magistrate 93

Victim and not court is person interested in satisfaction of restitution order	79
Victim named in restitution order, but not clerk, can release a restitution order.....	79

DEFINITIONS

Alternative onsite sewage system.....	62
Agricultural operation	14
Agricultural products	74
Animal.....	14
Appropriation	53
Aquaculture	14
Aquatic organisms.....	14
Area of operation.....	101
Association	134
Baylor grounds/survey	50
Bed	103
Commission	96
Community action agency.....	7
Conventional onsite sewage system	62
Cooperative	134
Cooperative interest	134
Damage/d/s.....	37
Definite place of business	129
Develop	119
Domestic	4
Domestic bank.....	4
Foreign	4
Foreign bank	4
Forever	87,88
Fowl	14

Governmental agency.....	7
Judgment	79
Licensed practicing attorney	28
Maintenance	66
Maximum	103
Merger	31
No more than.....	103
Obtain.....	143
Officer	7
Operate.....	119
Partnership	115
Person.....	115
Personal interest	7
Personal interest in a transaction.....	7
Political right.....	88
Practice of law.....	28
Practicing	28
Prima facie evidence	103
Primary.....	37
Primary use	37
Principal office	117
Public body	17
Public entity	119
Public use	37
Qualifying transportation facility.....	119
Regular	145
Regular payroll check	145
Required by law	107

Responsible public entity	119
Secured.....	90
Self-insurance.....	72
Transaction	7
Transportation facility	119
Treatment works.....	62
Use	37

DRAINAGE, SOIL CONSERVATION, SANITATION AND PUBLIC FACILITIES DISTRICTS

Sanitation Districts Law of 1946 - Nontidal Waters. As a municipal corporation, the Warm Springs Sanitation Commission is afforded sovereign immunity for its governmental actions

.....96

Warm Springs Sanitation Commission is a municipal corporation

.....96

Warm Springs Sanitation Commission is entitled to immunity for governmental, but not proprietary functions

.....96

Warm Springs Sanitation Commission members and employees can lose the protection of sovereign immunity through intentional misconduct or gross negligence.....

ELECTIONS

General Assembly may not impose requirements on candidates for election to a governing body beyond those specified in the Virginia Constitution

.....87

No person convicted of a felony shall be qualified to vote unless his civil rights have been restored by the Governor.....

.....87

Person convicted of perjury is eligible to hold elective office after political rights have been restored.....

.....87

Right to vote is the sole qualification for a Virginia resident to hold office

When constitution defines the qualifications for office, the specification is an implied prohibition against legislative interference to change or add to the qualifications so defined.....

.....87

Campaign Fundraising; Legislative Sessions. A member of the General Assembly is not precluded from raising funds for a candidate for public office while the General Assembly is in session

..... 100

FISHERIES AND HABITAT OF THE TIDAL WATERS

Any statutory scheme delegating Baylor grounds determinations to VMRC must be adequately limited in that the terms or phrases employed in the statutes have a well understood meaning and prescribe sufficient standards to guide VMRC in making Baylor grounds determinations50

Article XI, Section 3 of the Virginia Constitution recognizes the General Assembly’s authority to define and determine Virginia’s oyster grounds50

General Assembly may, from time to time, define and determine such natural beds, rocks or shoals by surveys or otherwise 50

General Assembly may delegate to Virginia Marine Resources Commission the authority to make adjustments to boundaries of the Baylor grounds50

Language of Article XI, Section 3 does not prohibit General Assembly from delegating its authority to define and determine Virginia’s oyster grounds.....50

Virginia Constitution does not prohibit the General Assembly from delegating the definition and determination of Baylor oyster grounds to the Virginia Marine Resources Commission 50

HEALTH

Environmental Health Services – Sewage Disposal. Alternative onsite sewage systems, as well as conventional systems, are regulated by the Virginia Department of Health..... 62,66

General Assembly intended localities to be able to play role in regulation of alternative onsite systems 62

Had the General Assembly wanted to establish a single, statewide set of standards or requirements for alternative onsite sewage systems, it could have done so62

Localities are authorized to regulate, inspect and deny applications for alternative systems, but this authorization is limited in cases where public sewer facilities are unavailable..... 66

Localities cannot enact ordinances with standards or requirements greater than those of the state regulations where sewers or sewage facilities are not available66

Localities shall not require maintenance standards and requirements for alternative onsite sewage systems that exceed those allowed or established by the State Board of Health..... 62,66

Locality can adopt standards and requirements for alternative onsite sewage systems are in addition to or more stringent than those promulgated by the Board of Health, provided such standards do not relate to maintenance issues 62

Provided local requirements do not function as an effective ban on alternative system, where state regulations would allow their operation, a locality is free to impose such requirements..... 62

Section 15.2-2157(C) prohibits any locality from otherwise banning the use of alternative onsite sewage systems approved by the Virginia Department of Health when sewers or sewerage disposal facilities are not available..... 62,66

Where public sewer facilities are available, localities may adopt standards and regulations for alternative systems that exceed those promulgated by the Board of Health, provided those standards are not related to maintenance 62,66

Where public sewers facilities are unavailable, and a property owner meets Board of Health regulatory requirements, a local ordinance exceeding such standards is without authorization if its enforcement could result in the denial of an application 66

HOUSING

Housing Authorities Law. Housing authority’s “area of operation” is coextensive with the boundaries of the locality within which it was created..... 101

Housing Authority Law creates in each locality a housing authority as a political subdivision of the Commonwealth 101

Housing authority may exercise its powers outside of its area of operation only upon compliance with statutory procedures, including receiving the approval of the governing body of the locality in which it wants to act 101

Local, regional or consolidated housing authority may not operate throughout entire Commonwealth without first meeting requirements of Section 36-23 101

MOTOR VEHICLES

Motor Vehicle and Equipment Safety. Nowhere does the General Assembly exclude any coal trucks from being weighed 103

Operation of permitted vehicles is subject to each of the conditions set forth in Section 46.2-1143 103

Permits to operate overweight vehicles are available provided prescribed conditions are met..... 103

“Prima facie evidence,” as used in Section 46.2-1143, refers only to an evidentiary standard used in a court of law 103

Section 46.2-1143 allows for a six-axle vehicle used exclusively for hauling coal or coal product to have a gross vehicle weight of 110,000 pounds, but no more, provided certain requirements are met..... 103

Section 46.2-1143(B) clearly establishes 110,00 pounds as the maximum gross weight permitted for six-axle vehicles hauling coal 103

Section 46.2-1143 does not create a presumption of weight beyond the evidentiary standard to be applied in a court of law 103

Section 46.2-1143 does not exempt any truck from being weighed 103

Size restrictions are distinct from weight restrictions 103

Powers of Local Governments. Prosecutor remains free to exercise discretion in bringing and amending charges for violations of provisions outside Title 46.2..... 93

Restriction on prosecutorial discretion in Section 46.2-1308 is expressly limited to violations under Title 46.2..... 93

Section 46.2-1308 is silent regarding a prosecutor’s discretion to amend a misdemeanor charge alleging a violation of a municipal ordinance to the equivalent state charge alleging a violation of state law when the arrest or summons was issued by local police department of deputy for local sheriff’s department 93

Section 46.2-1308 does not place any limitation on arrest warrants or summonses if issued by local police department or local sheriff’s office 93

Section 46.2-1308 does not refer to arrests or summons issued other than those brought under Title 46.2 and issued by an officer of the Department of State Police or other division of state government 93

OATHS, AFFIRMATIONS, AND BONDS

Oaths and Affirmations. Authority of a clerk of court to administer an oath or to take an affidavit is purely a creature of statute 107

Decision to administer oath required by out-of-state law remains within sound discretion of the clerk 107

In the absence of explicit language, the term “required by law” refers to laws of the Commonwealth and law of other jurisdictions 107

Section 49-4 authorizes the clerk of court to administer oaths requested by out-of-state governing bodies, provided the oath or affirmation is required by law in the foreign jurisdiction 107

Virginia recognizes oaths and affidavits administered in other state or country. 107

PRISONS AND OTHER METHODS OF CORRECTION

Duties of Sheriffs. Absent an agreement between the sheriff’s office and the locality, money from inmate telephone service accounts remain within the purview of the locality 110

Funds derived from telephone accounts are not imputable to the sheriff 110

Funds derived from inmate telephone accounts must be submitted to the treasurer for depositing 110

Language of Section 53.1-127.1 does not expressly allocate funds from telephone accounts for correctional facility use	110
Section 53.1-127.1 authorizes the establishment of stores or commissaries in local correctional facilities	110
Section 53.1-127.1 classifies monies received from operation of inmate commissaries and telephone services as public funds	110
Section 53.1-127.1 delineates the manner in which proceeds from operation of commissaries in local correctional facilities are to be used	110
Sheriff may not establish or maintain separate account for funds generated from inmate telephone commissions	110
Sheriff's office may not establish and maintain a separate fund for telephone commissions	110
That the store or commissary authorized by Section 53.1-127.1 is distinct from telephone services is clear from the General Assembly's decision to name them separately	110
Virginia law does not require funds generated from inmate telephone commissions received by the treasurer to and deposited into city funds to be reallocated back to the sheriff's office.....	110

Local Correctional Facilities – Prisoner Programs and Treatment. Application of Section 53.1-131.1 is limited to a court presiding over one of the enumerated offenses

By intentionally changing language of Section 53.1-131.1 from “criminal offense” to “misdemeanor,” the intent was to limit statute to only cases involving misdemeanors, traffic offenses and violations of Chapter 5 of Title 20.....	113
Plain language of Section 53.1-131.1 limit's court's authority to impose weekend/nonconsecutive sentence only to convictions for misdemeanors, traffic offenses and violations of Chapter 5 of Title 20	113

PROPERTY AND CONVEYANCES

Merger is the general rule that existing easements are extinguished by operation of law when the easement holder acquires fee simple title to the encumbered land.....

Form and Effect of Deeds and Covenants; Liens. For purposes of Section 55-58.1, “principal office” may be defined according to the definition provided in Title 13 of the Code of Virginia.....

Registered limited liability partnership organized under the laws of Virginia may serve as a trustee under a deed of trust covered by Section 55-58.1	115
Section 55-58.1 relates to recording requirements of certain deeds and trusts ...	115

To qualify as a trustee under Section 55-58.1, a corporation must maintain its principal office in the Commonwealth 117

To serve as a trustee, a corporation must meet two requirements: it must be chartered under either Virginia or federal law and it must maintain its principal office within the Commonwealth 117

Unless a corporation’s registered office is also its principal office, it would not serve to meet the requirements of Section 55-58.1

Whether a particular facility or operation satisfies the criteria of Section 55-58.1 and constitutes a principal office is a fact specific determination 117

Virginia Real Estate Cooperative Act. Cooperative interest of an otherwise tax relief qualified veteran in a real estate cooperative is an ownership interest in the association with a possessory interest in a unit under a proprietary lease 134

Cooperative is created under the Act only by recording a declaration executed in the same manner as a deed and conveying to the association the real estate subject to that declaration 134

Declaration of a cooperative is the instrument or instruments creating the cooperative and establishing the framework for its long-term governance and operations 134

Definition of “cooperative” clearly provides that real estate comprising a is owned by an association of proprietary lessees 134

In contrast to condominium regime where individual units are owned separately, the cooperative, by its very nature is owned by an association 134

Real estate exemption for otherwise qualifying veterans does not apply in favor of a veteran who is a propriety lessee in a real estate cooperative 134

PUBLIC SERVICE COMPANIES

Public-Private Transportation Act of 1995. Absent legislative change, only the VPA can effectuate a concession with a private entity to operate Port facilities 119

Any private entity seeking to develop and/or operate a transportation facility shall first obtain the approval of the responsible public entity 119

By the plain terms of the PPTA, the General Assembly assigned to the responsible public entity the central role in the PPTA proposal evaluation process 119

Governor may provide appropriate coordination and guidance as the Secretary of Transportation exercises his authority under Section 56-573.1(2) to determine whether to give final approval before the responsible public entity signs a comprehensive agreement 119

In exercise of its legislative power, the General Assembly enacted the PPTA ... 119

In situations where a private entity submits a proposal under the PPTA that may require approval by more than one public entity, representatives of the affected public entities must meet and determine which public entity shall serve as the coordinating responsible public entity..... 119

PPTA proposal process is not subject to the Virginia Public Procurement Act... 119

PPTA provides the authority for the Commonwealth and any public subdivision to enter into agreements with private entities so that private entities my develop and/or operate qualifying transportation facilities 119

PPTA recognizes that some projects may involve more than one interested public body 119

Responsible public entity is charged with developing guidelines that establish the process for acceptance and review of proposals 119

Signing of comprehensive agreement under the PPTA is subject to the Secretary’s authority to approve execution thereof 119

PPTA defines “transportation facility” to include “port facility” 119

Virginia Port Authority, as responsible public entity under the Act, has authority to approve entering into a comprehensive agreement and to execute a comprehensive agreement on behalf of the Commonwealth for the concession of Port facilities..... 119

Virginia Port Authority bears statutory responsibility to review and evaluate proposals..... 119

Virginia Port Authority has authority under the Act to determine whether or not to select a preferred proposer with which to enter into negotiations for a comprehensive agreement for concession to operate Port facilities 119

Virginia Port Authority is the responsible public entity under the PPTA for any concession of Port facilities 119

Virginia Port Authority is responsible public entity for purposes of consideration of proposals under PPTA for associated with the Port of Virginia..... 119

Virginia Port Authority may not sign comprehensive agreement without approval of Secretary of Transportation 119

SHERIFFS (See CONSTITUTIONAL OFFICERS)

SOVEREIGN IMMUNITY

Application of sovereign immunity for potential liability of clerk for erroneous recording of release of judgment is fact-specific question26

As a municipal corporation, the Warm Springs Sanitation Commission is afforded sovereign immunity for its governmental actions96

Cities and municipal corporations are entitled to immunity only in situations involving governmental, rather than proprietary functions 96

Commonwealth is immune from tort liability for the acts or omissions of its agents and employees unless an express statutory or constitutional provision waives that immunity 96

Counties, as integral parts of the state, enjoy full immunity 96

Sovereign immunity is alive and well in Virginia 96

Warm Springs Sanitation Commission is entitled to immunity for governmental, but not proprietary functions 96

Warm Springs Sanitation Commission members and employees can lose the protection of sovereign immunity through intentional misconduct or gross negligence 96

STATUTORY CONSTRUCTION

Ambiguity/clarity. When language in a statute is clear and unambiguous, rules of statutory construction dictate that the statute is interpreted according to its plain language 60

 When language of a statute is unambiguous, courts are bound by the plain meaning of that language 113, 134

 When statutory language is clear and unambiguous, the plain language used should determine the legislative intent 17

 When statutory language is clear and unambiguous, the plain language used should determine the legislative intent, unless such a literal construction would lead to a manifest absurdity 14,74

 When language of a statute is clear on its face, no further inquiry is needed 134

 Rules of construction or extrinsic aids are resorted to only when the words of the statute are ambiguous 62

Authority. Statute stating the manner in which something is to be done, or the entity that may do it, evinces legislative intent that it not be done otherwise 93

 When local ordinance exceeds the scope of locality’s authority, the ordinance is invalid 66

Conflict. Ordinance in conflict with a state law of general character and state-wide application is universally held to be invalid 60

Constitutionality. Acts of the General Assembly are to be harmonized with the Constitution of Virginia 87,88

 Any reasonable doubt shall be resolved in favor of an act’s constitutionality 50

Constitution of Virginia is to be looked at, not to ascertain whether a power has been conferred to the General Assembly, but whether it has been taken away 50

For legislative delegation to remain within constitutional limits, laws delegating the authority must establish specific policies and fix definite standards to guide agency determinations 50

No act of the legislature should be so construed as to bring into conflict with constitutional provisions unless such a construction is unavoidable..... 87,88

Whether legislative delegation is constitutional depends on the specific provisions of the statute 50

While statutes enjoy the presumption of constitutionality, delegations of legislative power are valid only if the establish specific policies and fix definite standards to guide the official, agency, or board in the exercise of power 50

Definition. In the absence of a statutory definition, the plain and ordinary meaning of a term is controlling 37

In the absence of a statutory definition, the plain and ordinary meaning of a term is controlling, given the context in which it is used..... 74,117

Meaning of a word is takes color and expression from the purport of the entire phrase of which it is a part..... 14

Statutory definition provided elsewhere may be looked to as interpretative guide for determining plain and ordinary meaning of a phrase as used in a statute 117

When a particular word in a statute is not defined therein, the word should be accorded its ordinary meaning..... 4

Dillon’s Rule. Any doubt as to the existence of power must be resolved against the locality..... 57,66

Dillon Rule applies to constitutional officers 110

Dillon Rule applies to school boards 72

Dillon Rule is applicable to determine in the first instance, from express words or from implication, whether a power exists at all; if the power cannot be found, the inquiry is at an end..... 101

Locality has only those powers expressly granted by legislature, those powers fairly or necessarily implied from expressly granted powers, and those powers which are essential and indispensable 57

Power of local governing body must be exercised pursuant to express grant.. 57,60

Powers of boards of supervisors are fixed by statute and are limited to those conferred expressly or by necessary implication 60

Virginia follows Dillon Rule of strict construction regarding the powers of local governing bodies, whereby such powers are limited to those expressly conferred by law or necessarily implied from conferred powers 72

Virginia follows Dillon Rule of strict construction, which dictates 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 110

Virginia follows Dillon Rule of strict construction, which provides that municipal corporations 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 66,101

When local ordinance exceeds the scope of locality’s authority, the ordinance is invalid 66

Expressio unius est exclusio alterius. Mention of one thing in statute implies the exclusion of another 110

Mention of specific item in statute implies that omitted items were not intended to be included within scope of statute 113

Where statute speaks in specific terms, an implication arises that omitted terms were not intended to be included within the scope of the statute 84

Where statute specifies certain things, the intention to exclude that which is not specified is inferred 90

Harmony. Acts of the General Assembly are to be harmonized with the Constitution of Virginia 87,88

Meaning of a word is 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 14

In pari materia/same subject. Related statutes must be considered together in construing their various material provisions 14, 26

Sections related to the same subject matter are to be read in *pari materia* 90

Statutes relating to same subject matter are to be read *in pari materia* 72

Statutes are not be to read in isolation 90

Statutes may be considered in *pari materia* when they relate to the same person or thing, the same class of persons or things, or to the same subject or to closely connected subjects or objects 12-060

Because Code of Virginia constitutes a single body of law, the practice of referring to other Code sections as interpretative guides is well established and other sections may be looked to where the same phraseology is used 115

Code of Virginia constitutes one body of law, and other sections can be looked to where the same phraseology is employed.....4, 117

Interpretation. Because Code of Virginia constitutes single body of law, practice of referring to other Code sections as interpretative guides is well established and other sections may be looked to where the same phraseology is used 115

Courts are not free to add language, nor ignore language, contained in statutes26,28

Court may not add to statute language the legislature has chosen not to include .90

Every word in the Constitution is to be expounded in its plain, obvious, and common sense53

Fundamental rule of statutory construction requires that courts view the entire statutory scheme to determine the true intention of each part4

In cases of statutory construction, the language of the statute is the first point of inquiry 134

In construing a statute, the plain meaning of the language determines legislative intent unless a literal construction would lead to a manifest absurdity.....26,28

In construing a statute, we must ascertain and give effect to the intention of the legislature and that intention must be gathered from the words used 110

In construing the constitution, it is necessary to give effect to an express provision, rather than to an implication 53

In interpreting statutes, we assume the legislature chose with the words it used when it enacted the relevant statute 145

Interpretations that render statutory language superfluous are to be avoided..... 14

Issues of statutory interpretation are pure questions of law 134

It is well settled that that the starting point for interpreting a statute is the language of the statute itself 134

Meaning of a word is 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..... 14

Primary purpose of statutory construction is to ascertain and give effect to legislative intent..... 4,113

Statute is not to be construed by singling out a particular phrase, but must be construed as a whole.....26

Statutes must be construed to give meaning to all of the words enacted by the General Assembly..... 14,26,28

When interpreting a statute, courts must look to the plain language used by legislature unless that language is ambiguous or leads to an absurd result..... 103

Legislative intent. Fundamental rule of statutory construction requires that courts view the entire statutory scheme to determine the true intention of each part4

In construing a statute, the plain meaning of the language determines the legislative intent unless a literal construction would lead to manifest absurdity ..26

In construing a statute, we must ascertain and give effect to the intention of the legislature and that intention must be gathered from the words used 110

In construing statutes, courts should give the fullest possible effect to the legislative intent embodied in the entire statutory enactment.....4

In interpreting statutes, we assume the legislature chose with the words it used when it enacted the relevant statute 145

Legislative intent is determined from the plain meaning of the words used..... 66

Manifest intention of the legislature, clearly disclosed by its language, must be applied 60

Primary purpose/objective of statutory construction is to ascertain and give effect to legislative intent..... 4,62,113

Virginia courts determine the General Assembly’s intent from the words contained in the statute 107

We determine legislative intent from the words used66

We must give effect to the legislature’s intention as expressed by the language used unless a literal interpretation of the language would result in a manifest absurdity 134

When the legislature amends a particular statute, it is normally presumed that a change in law was intended 113

When statutory language is clear and unambiguous, the plain language used should determine the legislative intent 17

When statutory language is clear and unambiguous, the plain language used should determine the legislative intent, unless such a literal construction would lead to a manifest absurdity 74

May/Shall. Unless it is manifest that the purpose of the legislature was to use “may” in the sense of “shall” or “must,” then “may” should be given its ordinary meaning -- permission, importing discretion..... 107

Use of “may” in statute indicates it is permissive and discretionary rather than mandatory 107

Plain and ordinary language/meaning. In construing a statute, the plain meaning of the language determines the legislative intent unless a literal construction would lead to manifest absurdity 26

Statutes are to be interpreted according to their plain language 84,90

Virginia courts apply the plain meaning of the words used and are not free to add language, or to ignore language, contained in a statute 107

When interpreting a statute, courts must look to the plain language used by legislature unless that language is ambiguous or leads to an absurd result..... 103

When language of a statute is unambiguous, courts are bound by the plain meaning of that language 113

Strict construction.

Criminal statutes are to be strictly construed..... 90

Exemptions from real property taxation are narrowly construed..... 134

TAXATION

1902 Act of Assembly exempts all land under federal jurisdiction from state and local taxation 129

License Taxes. Although United States government exercises exclusive control over the Naval Base at JEB Little Creek, such jurisdiction does not prohibit the City of Virginia Beach from assessing a BPOL tax on activities carried out by a private company on that land 129

Local commissioner of revenue is responsible for making factual determinations in matters of local BPOL taxation 129

Whether location constitutes definite place of business is question of fact 129

Whether the activity of a business at a particular location is sufficient for it to become a “definite place of business” is a question of fact to be determined by the local taxing official or trier of fact..... 129

While Supremacy Clause bars state and local taxation of federal lands, such taxation on activities on that land is permissible 129

Real Property Tax – Exemptions for Disabled Veterans. Cooperative interest held in real estate cooperative does not qualify for the exemption 134

Definition of real property for purposes of the exemption excludes leasehold interests..... 134

Exemption does not apply in favor of a veteran who is a propriety lessee in a real estate cooperative 134

Exemptions from real property taxation are narrowly construed..... 134

In doubtful cases, exemptions from real property must be construed against the applicant of the exemption..... 134

State Recordation Tax. Entities created by the federal government are not exempt from recordation tax when it is merely serving as a guarantor or beneficiary in the transaction 137

Federal statutes exempt Fannie Mae and Freddie Mac from taxes levied by Virginia Recordation Tax Act when they are the grantor or grantee on a deed, instrument or other writing in a transaction for the conveyance of real property 137

Recordation tax is not a tax on property but a tax on civil privilege 137

Virginia Recordation Tax Act requires every circuit court clerk to collect certain recordation taxes..... 137

When a federal statute prohibits all state or local taxation on an entity created by the federal government, except for taxation of that entity’s real estate, the entity enjoys an exemption from the recordation tax whenever it is principal to the transaction..... 137

WATERS OF THE STATE, PORTS AND HARBORS

Virginia Port Authority. Absent legislative change, only the VPA can effectuate a concession with a private entity to operate Port facilities 119

All powers, rights, and duties provided to the VPA legislatively are to be exercised by the VPA Board of Commissioners 119

Creation of the VPA as a body corporate and political subdivision is the product of legislative action..... 119

General Assembly has conferred on Virginia Port Authority alone the power to develop and/or operate Port facilities 119

General Assembly has empowered the VPA Board independently to lease or enter into a concession with another entity to operate its marine terminal facilities ... 119

General Assembly vested in the VPA oversight of the Port of Virginia..... 119

VPA is a body corporate and political subdivision of the Commonwealth of Virginia 119

VPA is tasked with the duty to develop and operate the Port 119

Signing of comprehensive agreement under the PPTA is subject to the Secretary’s authority to approve execution thereof 119

Virginia Port Authority, as responsible public entity under the PPTA, has authority to approve entering into a comprehensive agreement and to execute a comprehensive agreement on behalf of the Commonwealth for the concession of Port facilities..... 119

Virginia Port Authority is the responsible public entity under the PPTA for any concession of Port facilities	119
Virginia Port Authority is responsible public entity for purposes of consideration of proposals under the PPTA for associated with the Port of Virginia	119
Virginia Port Authority may not sign comprehensive agreement without approval of Secretary of Transportation	119
VPA bears statutory responsibility to review and evaluate proposals under the PPTA.....	119
VPA has authority under the PPTA to determine whether or not to select a preferred proposer with which to enter into negotiations for a comprehensive agreement for concession to operate Port facilities	119

WELFARE

General Provisions (Public Assistance). Absent state legislation to the contrary, federal law denies benefits for those convicted of felonies involving the possession, use, or distribution of controlled substances	143
Felony conviction under Section 18.2-248 or 18.2-258.1 subjects the offender to disqualification of benefits under federal law.....	143
Personal Responsibility and Work Opportunity Reconciliation Act of 1996 encompasses felony convictions for manufacturing controlled substances or for obtaining controlled substances by false pretenses.....	143
Section 63.2-505.2 exempts certain food stamp applicants from the application of the ineligibility provisions of federal law	143
Section 63.2-505.2 provides that a person shall not be assistance solely because he has been convicted of a felony offense of possession of a controlled substance in violation of Section 18.2-250	143

WORKERS' COMPENSATION

Compensation and Payment Thereof. Because the 5% member contribution toward retirement applies to all employees and is instituted uniformly and consistently, it makes no difference whether the contribution is instituted before or after an employee suffers a work injury	145
Neither payroll payments not deductions from such payments are claims for compensation under the Virginia Workers' Compensation Act	145
Neither the new 5% mandated member contribution toward retirement nor other deductions elected by the employee constitute an assignment of benefits or claim of a creditor.....	145
Payroll checks issued to injured workers receiving compensation benefits that include the new 5% contribution toward retirement are regular payroll checks.	145

Proposed legislative change adequately defines “regular payroll payment” to avoid any penalty..... 145

Regular payroll check is a payroll check issued in the normal course of the Commonwealth’s issuance of payroll checks and therefore uniform in occurrence and issued at fixed times..... 145

Regular payroll check is a payroll check that is like the payroll checks issued to the injured worker prior to his injuries 145

Section 65.2-524 creates an exception to its penalty provision when the Commonwealth issues a regular pay check in lieu of compensation..... 145

Section 65.2-524 establishes a penalty for failure to pay workers’ compensation benefits in a timely manner..... 145

Section 65.2-531 applies only to a claim for compensation under Title 65.2..... 145

Section 65.2-531 exempts workers’ compensation benefits from the collection efforts of employees’ creditors 145

Term “regular payroll check” refers to both timing and amount of the check.... 145

Whether deduction for new retirement contribution begins before or after injured employee is injured makes no difference 145