

**OPINIONS  
OF THE  
ATTORNEY GENERAL  
AND  
REPORT  
TO THE  
GOVERNOR OF VIRGINIA  
2014**



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



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**LETTER OF TRANSMITTAL**

May 1, 2015

The Honorable Terence R. McAuliffe  
Governor of Virginia

Dear Governor McAuliffe:

I am pleased to present to you the *Annual Report of the Attorney General* for 2014. The citizens of the Commonwealth of Virginia can be proud of the dedicated public servants who work for the Office of the Attorney General. I have enjoyed working with them and you over the past year and look forward to continuing to ensure that the Commonwealth has the finest lawyers and staff at the Department of Law to represent the interests of all Virginians. As you will see, some Sections of the Office were restructured in 2014 to enhance the agency's overall efficiency and its ability to meet key goals. It is therefore 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 represents the Commonwealth in the Supreme Court of the United States, in the Supreme Court of Virginia, and in federal appellate courts in non-capital cases that call into question the constitutionality of a state statute or that bear on sensitive policies of the Commonwealth. The Solicitor General also assists all Divisions of the Office with constitutional and appellate issues.

In 2014, the Solicitor General represented the State Registrar of Vital Records in *Bostic v. Rainey*, a landmark case challenging the constitutionality of Virginia's constitutional and statutory ban on the licensing and recognition of marriage between persons of the same gender. On January 23, the Solicitor General advised the United States District Court for the Eastern District of Virginia that the Attorney General had determined that Virginia's same-sex marriage ban violated the Fourteenth Amendment to the United States Constitution. He further advised the Court that the Commonwealth would seek a definitive judicial determination of the question, with all sides of the issue vigorously represented. On February 13, following a hearing on the parties' cross-motions for summary judgment, the district court invalidated Virginia's constitutional and statutory bans on same-sex marriage and enjoined the Commonwealth from enforcing them. On July 28, the Fourth Circuit Court of Appeals affirmed the judgment, and, on October 6, the Supreme Court denied all petitions for certiorari. The mandate issued on October 6 and the district court's ruling was immediately implemented by the executive branch of Virginia State government.

The Solicitor General's office was also involved in two high-profile cases concerning the availability of tax credits under the Patient Protection and Affordable Care Act (ACA). In *King v. Burwell*, a case in the Fourth Circuit, the Office filed an

amicus brief in support of the Federal Government's interpretation that the ACA makes tax credits available to eligible citizens in all States, regardless of whether the State opted to rely on a federally-facilitated health insurance Exchange, as Virginia did, or to create its own Exchange. On brief and at oral argument, the Solicitor General urged the court to reject the plaintiffs' interpretation of the ACA, arguing that the States were not on clear notice of the alleged adverse consequences of relying on a federally-facilitated Exchange and that the scheme the plaintiffs attributed to Congress would have been unconstitutionally coercive. In a unanimous decision issued July 22, a panel of the Fourth Circuit affirmed the lower court's ruling that Virginians are eligible for the tax credits. The Office raised the same arguments in an amicus brief it filed in the parallel case, *Halbig v. Burwell*, pending before the *en banc* D.C. Circuit. That amicus brief was joined by 17 other States. *Halbig* was then stayed following the Supreme Court's grant of certiorari in *King*.

The Solicitor General and Deputy Solicitor General also briefed and argued various cases in the Fourth Circuit involving claims by prisoners under the Eighth and Fourteenth Amendments and under the Religious Land Use and Institutionalized Persons Act of 2000. Those matters remained pending at the close of 2014.

Two other cases handled by the Section also are worthy of mention. In *Colon Health Centers of America v. Hazel*, the United States District Court (E.D. Va.) upheld the constitutionality of Virginia's certificate-of-public-need (COPN) program for medical equipment and services. The plaintiffs have appealed that decision to the Fourth Circuit. And in *Potomac Shores, Inc. v. River Riders, Inc.*, the Maryland Court of Special Appeals agreed with the position set forth in a joint amicus brief by the Attorneys General of Maryland and Virginia that the low-water mark boundary in the Potomac River moves with the river over time and is not fixed where it was first located in 1877, when the States established the boundary line in binding arbitration.

## CIVIL LITIGATION DIVISION

The Civil Litigation Division of the Attorney General's Office represents the Commonwealth and its agencies, institutions, and officials in civil matters. The Division handles civil enforcement actions pursuant to Virginia's consumer protection and antitrust laws, serves as consumer counsel in regulatory matters before the State Corporation Commission, pursues debts owed to Commonwealth agencies, prosecutes licensed medical professionals who have acted contrary to law, and investigates civil rights and fair housing claims.

The Division consists of six sections, some of which are further divided into units. The Trial Section includes the General Civil Unit, the Employment Law Unit, and the Workers' Compensation Unit. The Consumer Protection Section includes the Counseling, Intake and Referral Unit (CIRU), the Dispute Resolution and Investigations Unit (DRIU), and the Antitrust and Consumer Enforcement Unit (ACEU). The remaining four sections are the Insurance and Utilities Regulatory Section, the Division of Debt Collection, the Health Professions Unit, and the Division of Human Rights and Fair Housing.

### 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/Underinsured Motorists and the Birth-Related Neurological Injury Compensation Program. In addition, the Section provides support to the Solicitor General's office. The Trial Section includes three Units: the General Civil Unit, the Employment Law Unit, and the 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 2014, the Unit represented the Virginia State Bar in 8 new matters, including 5 attorney disciplinary appeals before the Supreme Court of Virginia, and the prosecution of 2 persons for the unauthorized practice of law. In addition, the Unit represents the Commonwealth in matters involving uninsured and underinsured motorists. In 2014, the Unit received 102 new lawsuits.

Significant cases the Unit handled in 2014 include *Educational Media v. Insley*. In that case, student newspapers at the University of Virginia and Virginia Tech challenged the constitutionality of a Department of Alcoholic Beverage Control (ABC) regulation restricting the advertisement of alcohol in college-level student publications. After the United States District Court (E.D. Va.) found the regulation to be constitutional as applied, the student newspapers appealed to the Fourth Circuit. The Fourth Circuit reversed the holding of the district court, finding that the regulation was not sufficiently tailored and was unconstitutional as applied to the student newspapers. Specifically, the court concluded that the regulation fails the fourth prong of the test in *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557 (1980), "because it prohibits large numbers of adults who are at least 21 years old from receiving truthful information about a product that they are legally allowed to consume." The Commonwealth did not appeal to the United States Supreme Court. The universities subsequently filed a motion in district court seeking injunctive relief, which the district court denied on jurisdictional grounds. That court entered final judgment for the student newspapers in August 2014.

In another significant case, the plaintiffs in *Page v. Virginia State Board of Elections* claimed that Virginia's 3rd Congressional District was unconstitutional due to racial gerrymandering. They sued members of the State Board of Elections (SBE) and sought a declaration that the district is unconstitutional, as well as an injunction to prevent any elections in the district until it is redrawn.

Virginia's Republican congressmen intervened as defendants. After a trial in May 2014, the three-judge panel of the United States District Court (E.D. Va.) issued an opinion finding that the 3rd Congressional District is unconstitutional. Elections this November may go forward, but the General Assembly must redraw the 3rd Congressional District in its next session for application in future elections. The Republican congressmen have appealed the matter to the United States Supreme Court and have filed a motion to postpone the date by which the General Assembly must redraw districts pending the Supreme Court's decision on the appeal. No appeal was filed by this Office.

In *Colon Health Centers of America v. Hazel*, the plaintiffs brought a constitutional challenge to Virginia's certificate-of-public-need (COPN) program administered by the Department of Health (VDH), as noted above in the summary of the Solicitor General's office. The United States District Court (E.D. Va.) upheld the constitutionality of the program, finding that it does not violate the dormant commerce clause. The plaintiffs have appealed the matter to the Fourth Circuit.

In *Sarvis v. Judd*, a case in the United States District Court (E.D. Va.), the plaintiffs challenged Virginia's signature requirement to appear on the ballot as well as Virginia's statute regarding order of names on the ballot. The plaintiffs were the Libertarian Party of Virginia and several candidates either nominated by the Libertarian Party or running independently. They alleged that Virginia's signature requirement and ballot ordering scheme violated their free speech, freedom of association, and right to equal treatment. A motion to dismiss filed on behalf of the defendants and was granted by the district court.

In *Wilkins v. Montgomery*, a case in the United States District Court (E.D. Va.), the plaintiff brought a claim for wrongful death and a § 1983 claim arising from a patient's death at Central State Hospital. The Commonwealth prevailed on its motion for summary judgment, and the case was dismissed. The plaintiff then appealed to the Fourth Circuit, which affirmed the district court's ruling in a published opinion.

In *Town & Country Veterinary Clinic v. Virginia-Maryland Regional College of Veterinary Medicine*, the plaintiff sued the veterinary school at Virginia Tech for intentional interference with a business expectancy and for conspiracy. The trial court sustained a demurrer in 2013. The plaintiff appealed. In April 2014, the Supreme Court of Virginia issued an order refusing the petition for appeal.

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 Commission through the Virginia Court of Appeals. Six eligibility petitions and 2 benefit matters were pending at the end of 2013. During 2014, the Unit represented the Program on at least 56 benefit claims, excluding 18 petitions for attorneys' fees and 16 claims that were submitted to the Board for determination. During 2014, the Unit also litigated 9 eligibility cases to conclusion and saved the Program over \$30,000 through negotiations regarding attorneys' fees petitions, as well as over \$17,000 through negotiations over pre-petition compensation requests. One of the cases resulted in a

dismissal and remand to the circuit court, despite the claimant's meeting the eligibility criteria. This action potentially saved the Program \$2 million. This case appears to be the first time the Commission has ruled that an election of remedies was made under the exclusive remedy provision of the Virginia Birth-Related Neurological Injury Compensation Act, despite the individual being eligible and not having received alternate compensation. At the end of 2014, three eligibility cases and 36 benefit claims remained pending. Three cases to determine whether claims are non-derivative and subject to remand were awaiting decision from the Virginia Court of Appeals.

### Employment Law Unit

In 2014, the Unit provided advice to, or represented in litigation, many state entities, including the Department of Human Resource Management, Department of Juvenile Justice, Department of Transportation, Department of Corrections, Department of Criminal Justice Services, Indigent Defense Commission, Department of Health, Department of Behavioral Health and Developmental Services, Central Virginia Training Center, Virginia State University, Norfolk State University, Virginia Commonwealth University, Longwood University, Old Dominion University, Virginia Community College System, Northern Virginia Community College, Department of Social Services, Department of Labor and Industry, Virginia State Police, Virginia Workers' Compensation Commission, State Corporation Commission, State Board of Elections, Department of Game and Inland Fisheries, Virginia Port Authority, Supreme Court of Virginia, Virginia Department of Alcoholic Beverage Control, and this Office's Division of Human Rights. The Unit also represented several individual defendants in employment-related litigation.

During the year, the Unit successfully defended lawsuits involving public institutions of higher education throughout the Commonwealth. Two cases are significant. First, in *Clark v. Virginia Community College System*, the United States District Court (E.D. Va.), dismissed defamation and retaliation claims brought by the plaintiff. The Fourth Circuit affirmed the dismissal. Second, in *Hentosh v. Old Dominion University*, the Fourth Circuit issued an opinion clarifying when a district court retains subject matter jurisdiction over a retaliation claim that has not been exhausted through the EEOC process. This decision should have significant consequences for future retaliation cases in both the public and private sectors.

The Unit also handled significant employment cases involving individual defendants. In *Martin v. Wood*, the Fourth Circuit, in a published opinion, held that state officials were immune from claims made under the Fair Labor Standards Act (FLSA). This decision will protect employees of the Commonwealth from personal liability for alleged FLSA violations in the absence of a clear departure from their official duties.

Another significant case handled by the Unit was *Whitely v. Fairfax County Juvenile and Domestic Relations Court*, in which the plaintiff alleged employment discrimination on the basis of race and disability, as well as retaliation, against a state court. The United States District Court (E.D. Va.) granted a motion to dismiss filed on behalf of the state court.

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Workers' Compensation Unit

The Workers' Compensation Unit defends workers' compensation cases filed by employees of state agencies. Because hearings are held throughout the Commonwealth, cases are assigned to attorneys in Richmond as well as field attorneys in Abingdon. The Unit handles claims brought by injured workers and employers' applications. Claims include initial compensability and change-in-condition claims, and may be handled for the life of the matter, including the initial hearing before a Deputy Commissioner, to review by the Full Commission, and appeals to the Virginia Court of Appeals and the Supreme Court of Virginia. In 2014, the Unit handled 322 new cases.

The Unit also pursues subrogation claims in order to recover funds for the Department of Human Resource Management's (DHRM) Workers' Compensation Services. Subrogation issues arise when a state employee is injured by a third party. The Unit assists Workers' Compensation Services in recovering from negligent parties, and through restitution, what it has paid to the employee in workers' compensation benefits. In 2014, the Unit assisted Workers' Compensation Services and its third-party administrator with subrogation recoveries exceeding \$1,277,000.

One of the Unit's cases went to the Supreme Court of Virginia in 2014. In *Kaminsky v. Virginia Tech*, the Supreme Court of Virginia dismissed on procedural grounds a denied workers' compensation claim that was on appeal from the Virginia Court of Appeals. The Unit also handled two significant cases in the Virginia Court of Appeals during the year. In *Correctional Administration v. Grubbs*, the Unit obtained a favorable ruling in a case involving a step ladder accident. There, the Court reaffirmed that, in the case of falls, a claimant must demonstrate a causal connection between the fall and his employment in order to recover workers' compensation benefits. In *Shaver v. Department of State Police*, the Unit prevailed in a case stemming from the claimant's heart disease. The Court held that the payment of workers' compensation wage indemnity benefits was not appropriate because the claimant was voluntarily retired and had lost no wages as a result of the condition.

The Unit also helped develop significant case law before the Full Commission in 2014. In *Rush v. University of Virginia Health System*, the Unit successfully defended a claim brought under, and interpreting, a relatively new statutory presumption for non-fatal injuries in *Va. Code Ann.* § 65.2-105. This was a case of first impression that remained pending before the Virginia Court of Appeals at the end of 2014. In *Boukhira v. George Mason University*, the Unit obtained a series of favorable rulings on multiple claims for permanency benefits, which will set precedent for subsequent cases.

During 2014, the Unit handled numerous other matters before the Full Commission. Two significant cases include *McGuire v. Virginia Department of Transportation* and *Johnson v. DMV*. In *McGuire v. Virginia Department of Transportation*, the Full Commission upheld the process for filing employers' applications, and found that the Commonwealth had not abandoned its appeal to terminate wage benefits. Although the case was appealed to the Virginia Court of Appeals, a settlement is pending. In *Johnson v. DMV*, the Unit prevailed in a claim

arising from an accident in an icy parking lot. The Full Commission found that the claimant was entitled to no benefits. The decision relied in large part on *Schott v. Supreme Court of Virginia*, which the Unit successfully defended in 2006.

### **Consumer Protection Section**

The Section's Counseling, Intake and Referral Unit (CIRU) serves as the central clearinghouse in Virginia for the receipt, evaluation, and referral of consumer complaints. Complaints received are handled within CIRU, referred to the Section's Dispute Resolution and Investigations Unit (DRIU), or referred to another local, state or federal agency having specific jurisdiction. DRIU offers dispute resolution services for complaints that do not demonstrate on their face a violation of consumer protection law. Where a complaint alleges or demonstrates on its face a violation of law, DRIU will investigate and either attempt to resolve the complaint, or, where a pattern or practice of violations is found, DRIU will work with attorneys in the Section to prepare a law enforcement action. During 2014, CIRU received and handled 34,790 telephone calls through its Consumer Hotline. Of 3,746 formal, written consumer complaints CIRU, together with DRIU, resolved or closed 3,611 complaints. Consumer recoveries from closed complaints totaled \$889,829.21.

In 2014, the Section's Antitrust and Consumer Enforcement Unit (ACEU) filed several new actions, defended state agencies, and obtained many beneficial results for consumers. In the antitrust field, the Unit continued to litigate a case that it, along with the attorneys general of 33 states and territories and the United States Department of Justice (DOJ), filed in 2012 against five of six major ebook publishers and Apple, Inc., for alleged price-fixing to raise the price of ebooks at the time of Apple's iPad launch. The five publishers settled prior to trial. In *State of Texas v. Penguin Group (USA) Inc.*, the United States District Court (S.D.N.Y.) found, after a trial in 2013, that Apple had violated Section 1 of the Sherman Antitrust Act by facilitating and participating in a horizontal conspiracy to fix the prices of ebooks. In 2014, Apple and the plaintiffs reached an agreement to resolve the damages phase of the litigation. The exact amount Apple will pay depends on the outcome of its appeal of rulings made in the liability phase. That appeal remains pending in the Second Circuit. The Court approved the settlement with Apple in November.

In *Petrie v. Virginia Board of Medicine*, the Unit, along with representatives of the Office's Trial and Health Services Sections, defended the Board of Medicine when Yvonne Kara Petrie, D.C., a formerly licensed chiropractor, filed suit against the Board of Medicine. The lawsuit alleged that the Board had engaged in a group boycott in violation of Section 1 of the Sherman Antitrust Act, and that it had intentionally interfered with her contracts and business relationships. In December 2014, the United States District Court (E.D. Va.) granted the Board of Medicine's motion for summary judgment. The case is now on appeal in the Fourth Circuit.

In the consumer protection field, ACEU resolved three new Virginia-specific enforcement actions. First, in *Commonwealth v. GRM Management L.L.C.*, the Unit sued a hotel in Henrico County, alleging that the hotel had violated the Virginia Consumer Protection Act (VCPA) and *Virginia Code Ann. § 18.2-217(a)* by informing

consumers over the phone, and providing written confirmation letters to many, that its hotel room price would be \$73 per night, plus tax, but later charging \$87 per night, plus tax, when the affected consumers arrived at the hotel. In the case, which was filed in Henrico Circuit Court, the Unit entered into a consent judgment with GRM that enjoins the company from violating VCPA and § 18.2-217(a), and provides for the following judgments in favor of the Commonwealth: (1) \$5,300.78 for restitution and as trustee for the use and benefit of over 100 named individuals; (2) \$2,500 for civil penalties; and (3) \$7,500 for attorneys' fees. The Commonwealth agreed to accept an initial payment of \$10,000 as payment in full, contingent upon GRM meeting certain conditions set forth in the consent judgment.

Second, in *Commonwealth v. Liberty Pawnshop & Gold, L.L.C.*, the Unit brought suit in Richmond Circuit Court against Liberty Pawnshop & Gold, alleging that the company had violated statute by making motor vehicle title loans to consumers without having first obtained a title loan license from the State Corporation Commission. The case initially was resolved when the Unit entered into an Assurance of Voluntary Compliance (AVC) with the company. Later, however, the AVC was amended after Liberty Pawn failed to disclose all title loan borrowers as required by the AVC. The amended AVC resulted in restitution to consumers totaling \$39,600.29; civil penalties to the Commonwealth in the amount of \$7,500; and attorneys' fees to the Commonwealth in the amount of \$9,500.

Third, the Unit entered into a Letter Agreement with Mattress Warehouse, Inc., concerning the disclosure of its general policy of not accepting returns. Under the Agreement, the company agreed to provide the required disclosures in a sign attached to the goods, or in a sign placed in a conspicuous area of its stores. The company also agreed to pay the Commonwealth \$10,000 for its expenses, costs, and attorneys' fees in investigating this matter.

During 2014, the Unit also finalized four previously filed Virginia-specific enforcement actions. Two matters involved claims against loan modification companies. The Unit entered into a consent judgment with Mid-Atlantic Loan Solutions, Inc., an Alexandria-based loan modification business, its President Joel Steinberg, and an affiliated business, MidAtlantic Financial Solutions, L.L.C. This resolved the case of *Commonwealth v. MidAtlantic Loan Solutions, Inc.*, a 2013 lawsuit in Alexandria Circuit Court, in which the Unit alleged that the defendants had violated the VCPA by charging advance fees for foreclosure avoidance services, and by failing to follow through on promises to deliver such services after receiving up-front payments from consumers. The Unit also alleged that the individual defendant, Joel Steinberg, should be held personally liable by virtue of his active participation in the statutory violations. The consent judgment provided for injunctive relief against the defendants, and judgment in favor of the Commonwealth in the amount of \$15,000 for restitution; \$10,000 for civil penalties; and \$15,000 for attorneys' fees.

The Unit also obtained a permanent injunction and final judgment against National Foreclosure Solutions, L.L.C., a loan modification business based in Virginia Beach. This resolved the case of *Commonwealth v. National Foreclosure Solutions, L.L.C.*, a 2012 lawsuit in the Virginia Beach Circuit Court, in which the Unit alleged

that the defendant had violated the VCPA by charging advance fees for foreclosure avoidance services. The final judgment provides for injunctive relief against the defendant, as well as judgment for the Commonwealth in the amount of \$3,200 for restitution; \$12,500 for civil penalties; and \$15,000 for attorneys' fees.

In addition, the Unit obtained a permanent injunction and final judgment against KLMN Readers Services, Inc. (KLMN), a Florida corporation with offices in Chesapeake, that conducts door-to-door sales of magazine subscriptions throughout the country. This resolved the case of *Commonwealth v. KLMN Readers Services, Inc.*, a 2013 lawsuit in the Chesapeake Circuit Court, where the Unit alleged that KLMN had violated the VCPA and the Virginia Home Solicitation Sales Act (VHSSA) by selling magazine subscriptions to consumers and then failing to follow through with delivery of the magazines; by failing to provide refunds to consumers who had submitted a timely notice of cancellation; and, in other instances, by failing to follow through on refunds that had been promised. The final judgment enjoins KLMN from violating the VCPA or the VHSSA and provides for judgment in favor of the Commonwealth in the amount of \$8,647.40 for restitution for over 100 named individuals; \$15,000 for civil penalties; and \$15,000 for attorneys' fees.

Finally, the Unit collected \$20,000 through a Contractor Transaction Recovery Fund claim filed with the Virginia Department of Professional and Occupational Regulation. This recovery related to a 2013 judgment the Unit had obtained in Chesterfield Circuit Court against a Richmond-area contractor and its Member/Manager, David W. Isom, in *Commonwealth v. Old Richmond Exteriors, L.L.C.* The amounts collected were used, in part, to provide full restitution to the 9 individuals named in the judgment.

In addition to these Virginia-specific actions, in 2014 the Unit entered into 7 multi-state consumer protection settlements providing significant benefits to the citizens of Virginia. First, the Unit, along with the District of Columbia, the attorneys general of 48 other states, and several federal agencies, entered into a consent judgment with SunTrust bank in *United States v. SunTrust Mortgage, Inc.* (D.D.C.). The consent judgment, which relates to the bank's mortgage and foreclosure practices, followed the basic framework of the national mortgage settlement finalized in 2012. Under the judgment, SunTrust agreed to make a cash payment of \$50 million for servicing claims, with \$10 million dedicated to various federal agencies and \$40 million earmarked for borrowers who lost their homes to foreclosure between January 1, 2008, and December 31, 2013. The borrower fund will be administered by the states. Virginia citizens are projected to receive payments totaling around \$2.59 million through this process. Furthermore, SunTrust agreed to complete a total of \$500 million in consumer relief activities, including principal reduction loan modifications and the refinancing of underwater loans (referred to as "menu" relief under the national mortgage settlement). Virginia's citizens are projected to receive around \$31.25 million in benefits through various forms of "menu" relief.

Second, the Unit, along with the attorneys general of 44 other states, entered into a consent judgment with GlaxoSmithKline, L.L.C. (GSK) in *Commonwealth v. GlaxoSmithKline L.L.C.*, a case before the Richmond Circuit Court. The consent

judgment resolves allegations that GSK violated the VCPA and other state laws by promoting its asthma drug, Advair, and two anti-depressant drugs, Paxil and Wellbutrin, for unapproved uses. The judgment prohibits GSK from making promotional claims, not approved by the FDA, that a GSK product is better, more effective, safer, or has less serious side effects or contraindications than have been demonstrated by substantial evidence or clinical experience. Virginia received \$2.35 million for its share of the \$105 million national settlement. This amount can be used to support future consumer protection enforcement activities.

Third, the Unit, along with the attorneys general of 40 other states and the District of Columbia, entered into a consent judgment with Pfizer, Inc., in *Commonwealth v. Wyeth Pharmaceuticals, Inc.*, a case before the Richmond Circuit Court. The judgment resolves allegations that Pfizer's subsidiary, Wyeth Pharmaceuticals, unlawfully promoted Rapamune, an immunosuppressive drug currently approved by the FDA as prophylaxis for organ rejection after kidney transplant surgery. It prohibits Pfizer from, among other things, making any claim comparing the safety or efficacy of a Pfizer product to another product when that claim is not supported by substantial evidence as defined by federal law and regulations. Virginia received \$807,000 for its share of the \$35 million national settlement. This amount can be used to support future consumer protection enforcement efforts.

Fourth, the Unit, along with the attorneys general of 49 other states, the Federal Trade Commission, and the Federal Communications Commission, entered into a settlement with AT&T Mobility in *Commonwealth v. AT&T Mobility, L.L.C.* (Richmond Circuit Court). The settlement resolves allegations that the company passed along unauthorized, third-party charges to consumers via their telephone bills. The consent judgments provide for injunctive relief, direct restitution to consumers, and a payment of \$20 million to the state attorneys general, \$356,779.21 of which was provided directly to the Commonwealth as reimbursement for its legal expenses.

Fifth, the Unit, along with the attorneys general of 44 other states and the District of Columbia, announced a settlement with Sirius XM Radio, Inc., in *Commonwealth v. Sirius XM Radio Inc.*, a case before the Richmond Circuit Court. The settlement resolved VCPA claims arising from Sirius' advertising, billing, and cancellation practices with regard to radio subscriptions following free-trial periods. Among other things, the settlement, which took the form of an AVC, included injunctive relief requiring the clear and conspicuous disclosure of material terms regarding automatic renewals and billings, cancellation information and fees, billing frequency, total charges, and other significant terms. The settlement also included a detailed consumer complaint resolution and restitution process. Sirius XM paid the settling states \$3.8 million. The Commonwealth received a share of \$15,000.

Sixth, the Unit, along with the Consumer Financial Protection Bureau and the North Carolina Attorney General's office, filed a stipulated final judgment and order along with a complaint alleging violations of the Consumer Financial Protection Act of 2010 against Freedom Stores, Inc., Freedom Acceptance Corporation, and Military Credit Services, L.L.C. ("Freedom"), and their two primary owners. *Consumer Financial Protection Bureau v. Freedom Stores, Inc.* (U.S. District Court, E.D. Va.).

The final order enjoins the owners from filing debt-collection actions in certain venues. It also restricts their ability to contact third parties in collection efforts, including military chain-of-command, and it limits their ability to charge third-party accounts and consumer back-up accounts. The final order also entered the following judgments against Freedom and its two owners: (1) \$2,748,474.66 in restitution, including amounts for refunds and credits to customers' accounts; and (2) civil penalties in the amount of \$100,000.

Seventh, the Unit, along with the attorneys general of 49 other states, the Federal Trade Commission, and the Federal Communications Commission, entered into a settlement with T-Mobile USA in *Commonwealth v. T-Mobile USA, Inc.*, a case before the Richmond Circuit Court. The settlement resolved allegations that the company had passed along unauthorized, third-party charges to consumers via their telephone bills. The consent judgments provide for injunctive relief, direct restitution to consumers, and a payment of \$18 million to the state attorneys general, \$321,000 of which was provided directly to the Commonwealth as reimbursement for its legal expenses.

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

The Insurance and Utilities Regulatory Section serves as the Office's Division of Consumer Counsel 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's citizens as consumers in the regulation 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 involve consumer interests in the regulation of these industries.

The SCC conducted its biennial review of Appalachian Power Company (APCo) in 2014. Consumer counsel from the Section submitted expert testimony and legal pleadings addressing the case's major issues of whether APCo had earned excessive profits during 2012 and 2013, which would trigger rate credits for customers, and the adoption of a new authorized return-on-equity (ROE) profit. APCo contended that it had not earned above its allowed return and sought a new authorized ROE of 10.52%. Consumer Counsel's testimony showed that customers were due rate credits because APCo had earned above its allowed return, and that the company's new ROE should be set at a much lower level. The SCC's final order agreed that APCo had earned surplus profits and ordered that rate credits totaling \$5.8 million be issued to customers. The SCC also found APCo's cost of equity to be within a range of 8.8% to 9.8%, and authorized a new ROE of 9.7%. Consumer counsel also successfully argued that it was unreasonable to increase APCo's fixed monthly customer charge from \$8.35 to \$16.00, as the company had requested.

In another APCo rate case, Consumer Counsel filed testimony in support of an application updating the company's Renewable Portfolio Standard (RPS) rate adjustment clause (RAC), which would have resulted in a reduction in bills to residential and other smaller customer classes. The Counsel opposed a recommendation made by large industrial customers that would have reduced the amount of the proposed rate credit to non-industrial customers. The SCC rejected

APCo's application and found that the company failed to meet its burden in establishing the amount of the credit.

During 2014, Consumer Counsel participated in Integrated Resource Plan (IRP) proceedings at the SCC for both APCo and Dominion Virginia Power. The IRP requires electric utilities to forecast future load obligations and develop a plan for meeting those obligations that is both reasonable and in the public interest. Consumer Counsel argued that APCo should take into consideration the EPA's proposed carbon dioxide emission regulations in its future planning processes, and that costs associated with an APCo affiliate's recent acquisition of a coal-fired generation facility should not be borne by APCo's Virginia customers without prior approval of the SCC. In Dominion's IRP case, Consumer Counsel raised several issues, including a recommendation that in addition to constructing new, utility-owned generating facilities, Dominion should consider purchasing energy and capacity from third-party generators. Consumer Counsel also recommended that Dominion revisit its current residential rate design in order to make it more equitable for customers. The SCC's final order incorporated these recommendations. Additionally, during the course of Dominion's IRP proceeding, Consumer Counsel successfully moved to compel Dominion to disclose publicly various data, including certain projected costs associated with a new nuclear project, which the company had sought to make confidential. Consumer Counsel's successful challenge to the utility's broad designations of confidentiality in the case brought about changes in the treatment of such information at the SCC, leading to greater transparency in these proceedings.

During the year, Consumer Counsel also appealed a finding of the SCC on Dominion's application for approval of its Brunswick generation station. A 2-1 majority of commissioners held that the enhanced ROE authorized by the *Code of Virginia* for certain types of new electric generation facilities applies not only to the capital investment in the generation facility itself, but also to associated transmission lines extending many miles from the facility. The majority's decision to apply the bonus return to transmission infrastructure resulted in millions of dollars in increased costs for consumers, and could have even greater impacts if applied to certain future generation facilities. The Virginia Supreme Court, in a 6-1 decision, affirmed the SCC's decision.

In a Rappahannock Electric Cooperative (REC) rate case designed to transition rates of former Allegheny Power customers to the level of rates paid by REC's legacy customers, Consumer Counsel filed expert testimony finding that REC's plan was reasonable and generally consistent with the SCC's 2009 order approving REC's acquisition of the Allegheny service territory. Consumer Counsel secured a commitment from REC that it will file annual financial statements over the course of the rate transition period, and that the SCC's authority to ensure that rates remain just and reasonable will continue during the migration plan period.

Consumer Counsel also participated in several cases regarding the establishment of prepaid electric service tariffs for electric cooperatives. Legislation passed in 2001 permits an electric cooperative to operate a voluntary prepaid system that is configured to terminate service when a customer incurs charges equal to a prepaid amount.

Consumer Counsel's participation in these cases focused on ensuring that certain customer safeguards were included in the terms for providing prepaid electric service.

In a Columbia Gas of Virginia rate case, Consumer Counsel joined SCC Staff, the County of Fairfax, and an industrial customer group in a settlement that reduced the requested gross increase in annual distribution rates from \$31.8 million to \$25.2 million, and that established the allowed ROE profit margin at 9.75%, compared to the company's requested 10.9%.

Consumer Counsel filed comments with the SCC on a toll increase application of the Dulles Greenway. Counsel successfully argued that the benchmark for any percentage increase permitted by statute must be based on the lower amount of tolls actually charged, rather than on the higher level of "maximum base tolls authorized" from last proceeding. This outcome benefited consumers by reducing the amount of the increase permitted by law.

Finally, in an insurance proceeding, Consumer Counsel again participated in an annual workers' compensation rate proceeding of the National Council on Compensation Insurance to establish the advisory "loss cost" component of rates for the Voluntary Market and the "assigned risk" rates for the Assigned Risk Market. Its work in this matter includes retaining an actuarial consultant to participate in a working group among the insurance industry, the SCC's Bureau of Insurance, and other interested stakeholders to identify and address actuarial issues before the rate cases each year. The 2014 proceeding resulted in an overall average increase of 0.9% to the loss cost component of rates, and a decrease of 2.9% to assigned risk rates.

### **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 state agencies. The Division has 8 attorneys and 16 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, and one attorney serves as general counsel to the Unclaimed Property Division of the Department of Treasury.

In 2013, the Division assumed the oversight and coordination responsibilities for non-Medicaid related recoveries under the Fraud Against Taxpayers Act. As part of these responsibilities, the Division filed a case in Richmond Circuit Court that represents the largest civil fraud action ever pursued by the Commonwealth, *Integra v. Barclay*. In this case, the Commonwealth alleges that 11 financial institutions misrepresented their underwriting standards, and submitted fraudulent prospectus statements that the Virginia Retirement System (VRS) relied on in purchasing residential mortgage backed securities. The suit alleges that VRS and Commonwealth taxpayers suffered as a result, and the litigation remains ongoing in order to recoup the losses and to penalize the defendants.

In 2014, the Division partnered with the Office's Construction Litigation Section to leverage the expertise of both Sections through joint representations on debt

collection matters involving construction litigation. This partnership already has resulted in substantial economic benefit to the Commonwealth.

The Division periodically hosts a summit to inform its client agencies on relevant collections laws and trends. Past summits have been evaluated highly, particularly on content and materials, and on the opportunity for agency representatives to interface with Division attorneys and staff.

The Division is self-funded by contingency fees earned from its recoveries on behalf of state agencies. During the 12 months from July 1, 2013 through June 30, 2014, the Division's gross recoveries for 37 agencies totaled more than \$12 million, up by \$.7 million from the previous fiscal year. During fiscal year 2014, the Division recognized fees of almost \$2.6 million, up \$.1 million from the previous year. Fiscal year 2014 fees were nearly \$800,000 in excess of Division expenditures. Out of these fees, \$585,000 was returned to the agencies, resulting in a 23.8% reduction of the base contingency rate paid by agencies. The remainder of the fees was turned over to the General Fund at fiscal year end.

### **Health Professions Unit**

The Health Professions Unit (HPU) provides for the focused and effective administrative prosecution of cases against health care professionals involving violations of health care-related laws and regulations before the various health care regulatory boards under the Virginia Department of Health Professions (DHP). The Unit's staff provides prosecutorial advice and representation 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. Many of the cases HPU prosecutes involve standard of care violations, incompetence issues, substance abuse issues, mental illness issues, sexual touching, and patient abuse. Disciplinary sanctions are often imposed following formal board hearings. Sanctions may include suspension or revocation of a professional's license. In addition to prosecuting administrative actions against licensees, HPU provides training to investigators, Board staff, and Board members.

HPU handled several significant cases before the health regulatory boards in 2014. Five of these cases involved medical doctors whose licenses were suspended or revoked for reasons ranging from inappropriate personal relationships with patients to failure to meet medical standards of care in prescribing medications..

During 2014, the Unit also handled three significant cases against dentists resulting in license suspension or revocation for reasons including drug abuse and negligent performance of dental procedures.

In addition, the Unit's efforts in 2014 involving a pharmacist's dangerous dispensing practices, a nursing home administrator's fraudulent credentials, and a massage therapist's inappropriate behavior with clients extended significant protection to Virginia residents.

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**Division of Human Rights and Fair Housing**

The Division of Human Rights (DHR) performs two primary missions with regard to Virginia's civil rights laws. First, the DHR investigates complaints alleging discrimination in employment, places of public accommodation, and educational institutions in violation of the Virginia Human Rights Act or corresponding federal laws. At the conclusion of an investigation, DHR is charged with determining whether there is reasonable cause to believe discrimination occurred. As part of its investigative process, DHR also facilitates conciliation efforts among the parties to resolve their cases either before or after an investigation. DHR 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 related civil rights laws. DHR met its goal this year of investigating 44 cases for violations of Title VII under the EEOC work-share agreement covering federal fiscal year 2014. Overall, the Unit processed 209 complaints of discrimination in 2014. DHR successfully resolved 5 cases through conciliation or mediation, recovering \$41,400 in settlement funds to the five complainants, one of whom was re-hired by the respondent employer to a better position than she had when she was terminated because she was pregnant.

In its second primary function, DHR's attorney serves as counsel to the Real Estate Board and Fair Housing Board for allegations of housing discrimination filed by complainants. If an investigation of housing discrimination results in a "reasonable cause" finding and resulting "Charges of Discrimination" issued by either or both of the Boards, the Unit prosecutes the alleged violations of the Virginia Fair Housing Law through civil actions filed in the appropriate local circuit court. In 2014, DHR appealed a trial court ruling regarding reasonable accommodation issues and sovereign immunity in a case involving disabled parking at an Arlington condominium. In this case, *Commonwealth of Virginia v. Windsor Plaza Condominium Association*, the Supreme Court of Virginia affirmed in part and reversed in part the trial court's ruling, providing clarification on reasonable accommodation and reasonable modification issues, and reversing the trial court's ruling that the Commonwealth was not protected by the doctrine of sovereign immunity for civil actions it brought to enforce fair housing laws pursuant to a charge of discrimination issued by the Boards.

In addition, DHR reached settlements in four cases in which the Boards had found "reasonable cause" existed to believe housing discrimination occurred, resulting in \$55,000 in recoveries for the complainants in those cases. In one of these cases, the Respondents agreed to pay \$15,000 to a complainant who was denied housing because her family included children, and \$5,000 to the fair housing organization that assisted the complainant with her complaint and did testing on the Respondents. In another matter, a disabled woman received \$20,000 in settlement of a claim that her homeowners' association discriminated against her by refusing to make an accommodation to the community's parking rules to allow complainant to have an accessible parking space located near her dwelling.

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**COMMERCE, ENVIRONMENT AND TECHNOLOGY DIVISION**

The Commerce, Environment and Technology Division provides comprehensive legal services to secretariats, executive agencies, state boards, and commissions for much of the Commonwealth's government. Composed of three Sections - Technology and Procurement, Financial Law and Government Support, and Environment - the Division provides legal advice across a wide range of substantive areas, including guidance on matters of employment, contracts, technology, purchasing, environment 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.

**Technology and Procurement Law Section**

The Technology and Procurement Law Section provides legal counsel to the Virginia Information Technologies Agency, the Department of General Services, the Information Technology Advisory Council, the Secretary of Technology, the Cyber-Security Commission, the Wireless E-911 Services Board, the Virginia Geographic Information Network Advisory Board, the Innovation and Entrepreneurship Investment Authority, the Secretary of Administration (for intellectual property, procurement, and supplier diversity issues), the State Corporation Commission (for procurement matters), and the Department of Small Business and Supplier Diversity (for procurement and supplier diversity issues), as well as dozens of other agencies and institutions in areas involving contracts, technology issues, intellectual property, procurement, and ethics rules.

During the year, the Section provided the legal support for Commonwealth initiatives such as public procurement law reform, advancing equity for small, women- and minority-owned businesses in public procurement, cyber-security, and the prevention of "patent trolling." This included service on an advisory workgroup of the Special Joint General Laws Subcommittee Studying the Virginia Public Procurement Act, legal support for development of the Governor's Executive Order No. 20 ("Advancing Equity for Small, Women, and Minority Owned Businesses"), legal advice for the Governor's newly-formed Cyber-Security Commission and legislation protecting sensitive information relating to cyber-security, assistance in the development of legislation to prohibit bad faith assertions of patent infringement, legal advice for a legislative study group regarding adoption of electronic identity management standards, and advice to support Joint Legislative Audit and Review Commission studies of technology governance and higher education support costs. The Section also provided legal contingency planning support for agencies when the regular session of 2014 legislature ended without passage of an Appropriation Act.

Throughout the year, the Section provided legal support for the Commonwealth's central procurement agencies, the Department of General Services (DGS) and the Virginia Information Technologies Agency (VITA), including the review of amendments to procurement regulations and policies, as well as legal assistance concerning agency procurements, contracts, and associated disputes. Specific assistance included providing continued legal support to VITA in its management of

the Commonwealth's Comprehensive Infrastructure Agreement with Northrop Grumman Systems Corporation, with respect to issues such as the use of existing contract provisions and remedies to address deficiencies in services, the creation of contract provisions for the extension of services to executive branch agencies, the negotiation and drafting of changes to subcontractors' terms of service, and the negotiation of multiple amendments that enhanced security or enabled Commonwealth use of technology not previously available to state agencies. Legal assistance was also provided to support VITA's procurement and negotiation of statewide data telecommunications contracts, and also to support DGS's development of legally compliant forms and correspondence to streamline debarment processes.

The Section initiated a Fraud Against Taxpayers Act suit on behalf of DGS and the Commonwealth in 2014. The lawsuit involves action against a State contractor to recover for the overbilling of state and local entities under a medical services contract. The action is still pending. Also in 2014, the Section successfully represented VITA in a lawsuit brought against another state agency involving onerous data preservation and production demands.

The Section also represented and provided legal support to many other Commonwealth agencies, institutions, and boards with respect to various procurement and contract issues, technology acquisitions, ethics questions, and intellectual property matters. This included assisting the State Corporation Commission with a critical procurement of information technology services to replace the Clerk's Information System, helping it analyze and address an associated protest from a losing vendor, and defending the Commission against that vendor's currently-pending petition for mandamus in the Virginia Supreme Court. Service to other agencies included the successful representation of the Virginia Military Institute and the Department of Military Affairs against procurement and contract claims asserted in state circuit courts, the continued provision of legal guidance on significant contract performance problems affecting both the Unemployment Insurance Modernization project and the acquisition of a financial management system for the Virginia Employment Commission.

In addition, the Section advised agencies regarding intellectual property matters, responded to office actions by the U.S. Patent and Trademark Office, won federal registration of new trademarks for the Department of Human Resource Management and the Fort Monroe Authority, and assisted with the drafting of a statewide intellectual property policy. The Section also advised agencies in the development of social media policies, and helped state officers address their due diligence responsibility as government representatives serving on a private board of directors.

Throughout the year, the Section assisted Opinions Counsel in drafting many formal and informal advisory Opinions requested by state officers regarding ethics questions, conflict-of-interest inquiries, and agency governance issues. It also provided legal support to the Secretary of the Commonwealth's office, as well as other state and local agencies, with regard to conflict of interest requirements and the implementation of extensive statutory amendments made to ethics laws during the 2014 legislative session.

Finally, the Section provided educational services, such as continuing legal education training for attorneys on public procurement, freedom of information, and public record laws; ethics and Conflict of Interests Act training for public procurement professionals at DGS' annual Public Procurement Forum; a presentation on data sharing to the Commonwealth Data Stewards Group; and a contract drafting presentation for newly-licensed attorneys attending the Virginia State Bar's "First Day in Practice" Seminar.

### **Financial Law and Government Support Section**

The Financial Law and Government Support Section (FLAGS) provides legal counsel to a wide variety of agencies, boards, and commissions, including those reporting to the Secretaries of Administration, Agriculture and Forestry, Commerce and Trade, Commonwealth, Finance, Public Safety and Homeland Security, and Veterans and Defense Affairs, as well as to the secretariats. FLAGS attorneys provide representation and advice on regulatory enforcement, administrative appeals, litigation, employment issues, Freedom of Information Act matters, and contract negotiations.

In 2014, FLAGS continued to represent the Commonwealth regarding state and federal elections issues through its representation of the State Board of Elections (SBE) and the newly formed Department of Elections (ELECT). The year saw several federal court challenges to redistricting and ballot access. The Section assisted in representing the SBE in litigation challenging the 2011 redistricting plan for the 3rd Congressional District, and currently is overseeing the defense of SBE and ELECT in ongoing litigation regarding the 2011 redistricting plan for the House of Delegates.

The Section represents the Department of Agriculture and Consumer Services and the boards and commissions concerned with agriculture, commodities, and charitable gaming, including the Milk Commission, the Horse Industry Board, the Soybean Board, the Wine Board, and the Charitable Gaming Board. The Virginia Racing Commission (VRC), an agency newly housed within the Agriculture and Forestry Secretariat, also is advised by the Section. In 2014, FLAGS advised VRC during contract negotiations between Colonial Downs and the Virginia Horseman Benevolent and Protective Association (HBPA) to conduct live thoroughbred horse racing in Virginia. At the time, Colonial Downs was the sole unlimited licensee with the privilege and duty of operating more than 14 days of live horse racing. Following the failure of Colonial Downs and the HBPA to reach an agreement, Colonial Downs surrendered its unlimited license. The Section advised VRC in relation to the licensing of advanced account deposit wagering licensees in the wake of Colonial Downs' license surrender.

The Section also represents the Department of Professional and Occupational Regulation as well as the professional and occupational boards serviced by that agency, such as the Board for Barbers and Cosmetology; the Professional Boxing, Wrestling, and Martial Arts Advisory Board; the Real Estate Board; and the Auctioneers Board.

FLAGS has represented the Department of Veterans Services and the board and councils served by that agency for a number of years. In addition to advising the Department, attorneys in the Section are heavily involved in training employers participating in the Virginia Values Veterans (V3) program. Training sessions focus on

educating employers about compliance with the Uniformed Services Employment and Reemployment Rights Act (USERRA) as well as other federal and state statutes that offer protection to employees who are veterans, who serve in the military reserves, or who serve in the National Guard. Additionally, the Section provides USERRA and Higher Education Opportunity Act training for state agencies and institutions of higher education.

FLAGS also represents the Department of Labor and Industry (DOLI) and the Virginia Employment Commission (VEC). The Section handles VEC unemployment benefits appeals in the circuit courts. During 2014, likely due in part to improved economic conditions, the number of such appeals continued to decrease from prior years. Specifically, the Section handled 91 petitions for judicial review in 2014, as compared to 133 petitions in 2013, 168 petitions in 2012, and 174 petitions in 2011. The number of appeals this year was actually below the average of approximately 100 appeals per year seen in the years before the economic downturn.

A number of attorneys in the Section provide advice to the agencies and boards directly concerned with the finances of the Commonwealth, including the Departments of Planning and Budget, Taxation, Treasury, and Accounts; the Comptroller; and the Auditor of Public Accounts. Section attorneys serve as litigation counsel for the Department of Taxation in matters that challenge the assessment and collection of state taxes, including retail sales taxes, use taxes, and corporate and individual income taxes. The Section defended the Department of Taxation in several significant cases during 2014. One group of cases involved the requirement that corporate taxpayers add back royalty expenses subject to *Va. Code Ann.* § 58.1-402(B)(8) to their federal taxable income. Four Virginia corporate taxpayers, Lorillard Tobacco Company, Kohl's Department Stores, Inc., United Parcel Service, Inc., and Michael Baker Jr., Inc., filed individual suits in Virginia circuit courts against the Department of Taxation. Their complaints allege that the royalties paid to their related members were subject to an exception set forth in *Va. Code Ann.* § 58.1-402(B)(8)(a)(1) and, therefore, were not required to be added back to their federal taxable income. These lawsuits remain pending. During 2014, the Section also defended a number of claims by individual Virginia taxpayers alleging that taxes were not owed because the taxpayer was not domiciled in Virginia.

The Section works closely with the Department of Taxation in challenges to its determinations of the amount of tax credits allocated to taxpayers who donate conservation easements in accord with the Virginia Land Conservation Incentives Act (the "Act"). The Section represented the Department in a number of litigated claims under the Act in 2014, including *Woolford v. Virginia Department of Taxation*; *QDP, L.L.C. v. Department of Taxation*; and *Cox v. Department of Taxation*. In each of these cases, the taxpayer claimed that the value of the property encumbered by the easement that was donated was far in excess of the value that was supported by the underlying documentation submitted to the Department by the taxpayer. During 2014, the Section worked with the Real Estate and Land Use Section to draft an amicus brief filed with the Supreme Court of Virginia on behalf of the Virginia Outdoors Foundation in *Wetlands America Trust, Inc. v. White Cloud Nine Ventures*. While this case involves a dispute by private parties over the use of land protected by a conservation easement,

the Commonwealth has an interest in the matter because the easement was donated through the Act and the donor received tax credits as a result of the donation.

FLAGS attorneys who work with the Commonwealth's financial agencies also advise a number of authorities who issue bonds for revenue-producing capital projects, such as the Virginia Resources Authority, the Virginia Public Building Authority, the Virginia College Building Authority, and the Virginia Small Business Financing Authority. In addition to representing entities directly concerned with the finances of the Commonwealth, FLAGS attorneys also advise a number of boards and agencies whose mission is to foster the expansion of the Commonwealth's economy: these bodies include the Virginia Economic Development Partnership, the Virginia Tourism Authority, the Virginia Film Office, and the Tobacco Indemnification and Community Revitalization Commission (the "Commission"). Because the Commission was represented by a private law firm prior to mid-2014, FLAGS has assisted in saving taxpayer dollars by assuming the role of the Commission's legal counsel.

FLAGS also represents the Department of Alcoholic Beverage Control (ABC). During 2014, it litigated six appeals of administrative actions at the circuit court and Virginia Court of Appeals levels for the agency, all of which resulted in favorable outcomes. One case involving the Beer Franchise Act is currently on appeal at the circuit court level -- in this case, several beer wholesalers have brought a challenge regarding distribution rights to a new brand of beer, and whether the new brand constitutes a brand extension. Throughout the year, Section attorneys also continued to provide counsel to ABC in a variety of ways, including through appointment of in-house Special Counsel at ABC for the express purpose of advising the agency's law enforcement operation, and through representation of the ABC Enforcement Division in administrative actions at the agency level.

For several years, the Section has prosecuted violations of animal fighting and animal cruelty laws. In 2014, the Section responded to 60 requests for assistance from animal control units, law enforcement agencies, and commonwealth's attorneys regarding claims of animal neglect or cruelty, dangerous dogs, and animal fighting throughout the Commonwealth. The Section prosecuted 5 individuals for animal fighting in federal court, in conjunction with the U.S. Attorney's Office, Western District of Virginia. Under special prosecution agreements with several localities, the Section also assisted in a multi-state animal fighting investigation, and it assisted in 2 animal cruelty cases at the local level. During 2014, the Office finalized plans for the formation of an Animal Unit. The Animal Unit, which will be the first of its kind in the nation, will be housed in the Environmental Section.

Finally, the Section provides legal advice to certain independent agencies, including the Virginia Retirement System (VRS) and the Virginia Workers' Compensation Commission. With respect to VRS, the Section coordinated in 2014 with outside counsel in both domestic and foreign securities litigation matters. Section attorneys were particularly involved in a class action lawsuit styled *In re MF Global Holdings Limited Securities Litigation*, in which VRS serves as the co-lead plaintiff. This securities action arises out of allegations of material misrepresentations and omissions made by certain MF Global former officers and directors, as well as the

underwriters of public securities offerings, regarding MF Global's financial condition. A partial settlement of \$74 million was reached with a group of underwriter defendants near the end of 2014.

### **Environmental Section**

The Environmental Section represents agencies reporting to the Secretary of Natural Resources, the Secretary of Agriculture and Forestry, the Secretary of Health and Human Resources, the Secretary of Finance, and the Secretary of Commerce and Trade. Its clients include the Department of Environmental Quality; the Department of Conservation and Recreation; the Department of Taxation; the Department of Forestry; the Division of Consolidated Laboratory Services; the Department of Game and Inland Fisheries; the Marine Resources Commission; the Environmental Health Division of the Department of Health; the State Veterinarian's Office and Consumer Protection Division of the Department of Agriculture and Consumer Services; the Department of Mines, Minerals, and Energy; and the Commonwealth's Soil and Water Conservation Districts. Attorneys in this Section provide a wide range of legal services, including litigation, regulatory and legislative review, counseling, transactional work, representation in personnel issues, and responses to subpoenas issued to agency personnel. Recently, the Section expanded its services to offer real estate expertise to its clients. It also has assumed representation of two divisions within the Department of Agriculture and Consumer Services, and it is currently working with the Financial Law and Government Support Section (FLAGS) to handle conservation tax credit matters for the Department of Taxation.

The Section represents the Air, Renewable Energy, Water, Land Protection and Revitalization (Waste), and Enforcement divisions of the Department of Environmental Quality (DEQ). It provided counsel on multiple litigation and other matters in 2014. It currently represents the Air Division of DEQ in *Maryland v. EPA*, a case before the Fourth Circuit involving a challenge to a Final Action of EPA and assertion that the Commonwealth's Infrastructure State Implementation Plan (SIP) was deficient because it lacked a "good neighbor" provision. Virginia intervened. The parties currently are participating in mediation with a court-appointed mediator. If those negotiations fail, Virginia's brief will be due in May 2015.

In 2014, the Section advised the DEQ's Air Division on complex proposed EPA Clean Air Act Section 111(d) "Clean Power Plan" regulations and associated state legislative initiatives, and also served on the Attorney General's 111(d) Internal Working Group. Section attorneys will continue to advise as the Clean Power Plan regulations are finalized and the Commonwealth is tasked with drafting a compliance plan. The Section also advised DEQ's Air Division on amendments to its regulations for Major New Source Review, Stage II Vapor Recovery, alternative dispute resolution, and open burning. It also negotiated a Memorandum of Understanding with NASA regarding DEQ's use of a NASA facility for air quality testing.

The Section continues to represent the Renewable Energy Division of DEQ in an Administrative Process Act appeal of the Department's "Permit by Rule" for small renewable wind energy projects. During 2014, it advised the Renewable Energy Division on its small solar working stakeholder group, which created a report on the

costs and benefits of solar power in Virginia for the General Assembly, and it also advised the Division on “Permit by Rule” application scenarios with respect to historic resources.

Section attorneys represented DEQ’s Water Division in multiple litigation and non-litigation matters in 2014. *Chesapeake Bay Foundation v. State Water Control Board* is an administrative appeal of certain regulations pertaining to animal feeding operations. It is pending before the Richmond Circuit Court and is set to be heard in July 2015. *United States v. American Infrastructure*, a case in the United States District Court for the Eastern District of Pennsylvania, is a multi-jurisdictional, EPA-lead stormwater enforcement action against the defendant for alleged violations of the Clean Water Act and state stormwater laws in Virginia, Maryland, and Pennsylvania. Section attorneys have successfully negotiated a consent decree that will benefit the Commonwealth. *Kelble v. State Water Control Board* is an administrative appeal of State Water Control Board regulations and the General Virginia Pollutant Discharge Elimination System (VPDES) Permit for Discharges from Construction Activities. It is pending before the Richmond Circuit Court. Additionally, the Office filed an amicus brief in 2014 in matter of *American Farm Bureau Federation v. EPA* in the Third Circuit, supporting affirmance of the district court’s ruling dismissing a judicial challenge to the Chesapeake Bay Total Maximum Daily Loads (TMDL). The matter is still pending.

During 2014, the Section initiated an enforcement action on behalf of the DEQ against an individual accumulating, storing, and distributing poultry litter without a permit and in violation of the State Water Control Law and the Virginia Pollution Abatement regulations. It also successfully negotiated a dismissal in an administrative appeal of a VPDES permit issued to the Rappahannock Shenandoah Warren Regional Jail Authority.

The Section advised DEQ’s Land Protection and Revitalization Division on multiple matters, including a large Superfund site remediation contribution action related to the Atlantic Woods Industries, Inc., property in Portsmouth, Virginia. The matter seeks contribution from the U.S. Navy for its share of contamination of a portion of the Elizabeth River and the subject site. In addition, the Section successfully negotiated a settlement of a South Carolina Superfund liability action against multiple Virginia agencies and educational institutions, including the DEQ. This matter involved the disposal of hazardous substances over many years at the Phillip Services Site, a hazardous waste disposal and recycling facility in Rock Hill, South Carolina.

The Section handled a variety of matters in 2014 for the Department of Conservation and Recreation (DCR), including multiple real estate matters involving property acquisitions, leases, easements, land swaps, and conservation easement tax credits. This work commenced in December 2014 with the hiring of the Section’s real estate attorney. The Section offered advice on DCR’s rollout of Resource Management Plan Regulations, including advice on the interplay of the regulations with the Freedom of Information Act (FOIA) and other state permitting programs. It also offered advice on several matters involving the DCR’s dam safety program and on the need for Conservation Officers in Breaks Interstate Park, a state park located in both Virginia

and Kentucky. The Section advised the Soil and Water Conservation Districts on matters relating to FOIA, personnel, compliance, the Government Data Collection and Dissemination Practices Act, and enforcement matters. It gave a presentation on relevant legal issues at the Virginia Association of Soil and Water Conservation Districts (VASWCD) Conference. Section attorneys also advised the Department of Forestry on an information technology services contract, on FOIA-related matters, on agreements involving access to public lands, and on multiple real estate matters (i.e., easements, the sale of surplus property, land swaps) beginning with the hiring of the Section's real estate attorney as noted above.

The Section assisted the Division of Consolidated Laboratory Services in a matter involving the revocation of a laboratory's operating license. It also advised the Division of Consolidated Laboratory Services regarding a settlement of its liability related to hazardous waste disposal at a South Carolina Superfund site.

The Section advised the Department of Game and Inland Fisheries (DGIF) on implementation of an assortment of legislation. It also represented DGIF in securing an agreement to breach the Harvell Dam in order to allow fish to pass up and down the Appomattox River. It drafted an official Opinion advising DGIF on the application of legislation pertaining to hunting on Sundays. It advised on the termination of an information technology services contract and other contract dispute matters, a wrongful death claim, personnel matters, FOIA-related matters, and multiple litigation matters. One significant case involves the 2013 transfer of a boat title by DGIF to a marina owner under *Va. Code Ann.* § 29.1-733.25. Two *pro se* plaintiffs filed suit in the United States District Court (E.D. Va.) alleging that the actions of DGIF and its employees deprived them of property without due process and that DGIF and its employees violated RICO by taking the boat. The case is ongoing.

The Section represented the Marine Resources Commission (VMRC) in an administrative appeal pursued by the Chincoteague Inn of a Commission order requiring the Inn to remove a barge that had been moored to the restaurant for the sole purpose of expanding its seating capacity. The Supreme Court of Virginia in 2014 granted a petition for review and reversed the Court of Appeals's holding that the Commission did not have jurisdiction over the barge. It also remanded the case to the Court of Appeals to determine whether federal maritime law preempted application of Virginia law to regulate the barge, and the Court of Appeals found that it did not. The Inn has appealed the preemption decision of the Court of Appeals, and the Section is currently representing the Commission in opposition to the appeal. The Supreme Court's ruling on the Inn's petition is pending.

In *Py v. Wetlands Board*, a case before the Norfolk Circuit Court, a landowner sought an after-the-fact wetlands permit from the Norfolk Wetlands Board for a riprap he installed on his property. The Board denied his permit and issued a remediation order requiring him to remove the riprap. Py sued the Wetlands Board, seeking an injunction against enforcement of the remediation order pending an appeal, and against VMRC, seeking a declaration that it can hear appeals of remediation orders. The Section filed a plea of sovereign immunity. Shortly after the plea was filed, Py took a nonsuit and is now complying with the order from the Norfolk Wetlands Board.

The Section also represented the VMRC in multiple Virginia Administrative Process Act appeals, after-the-fact permits for the use of state-owned bottomlands, and in an appeal of the agency's one-year suspension of two fishermen's licenses and fishing privileges. VMRC requested assistance in addressing the problem of fishermen disregarding orders revoking their licenses and privileges by continuing to fish during the revocation period. The Section drafted legislation giving VMRC the power to assess a civil penalty of up to \$10,000 against an individual who is caught fishing while his licenses and privileges have been revoked. This legislation was passed during the recent session of the General Assembly.

The Section represented the Virginia Department of Health (VDH) in multiple cases and other matters in 2014. In a Virginia Indoor Clean Air Act (VICAA) case, VDH took the position that a restaurant and hookah lounge was subject to the smoking restrictions in VICAA, and the circuit court affirmed the agency's decision. The Virginia Court of Appeals found that the facility, while a restaurant, was also a retail tobacco store, and therefore exempt from the VICAA. In its petition to the Supreme Court of Virginia, the Section argued that VICAA does not exempt restaurants that are located on the premises of retail tobacco stores. In January 2015, the Supreme Court of Virginia found that restaurants could not exempt themselves from the Act's smoking ban by selling tobacco to their patrons.

During 2014, the Section commenced advising VDH on a comprehensive overhaul of the Office of Drinking Water Regulations. It also advised VDH on several Administrative Process Act and FOIA-related matters, as well as on the complex issue of VDH enforcement of local ordinances (specifically with respect to Loudoun County and towns within that County). The Section represented VDH in a case involving the Department's permitting of septic systems on a development where landowners had built more bedrooms than were contemplated in the permits. In addition, it represented the Department in an ongoing case alleging a Class 3 misdemeanor against an individual campground owner in Chesterfield County for operating the business without a permit.

In late 2014, the Section became counsel for the Virginia Department of Agriculture and Consumer Services' (VDACS) Division of Consumer Protection, including the Office of Pesticide Services (OPS). It represented OPS in an administrative appeal of the agency's assessment of a civil penalty against an individual for applying pesticides in a manner not in accord with the label.

The Section was very active in 2014 in representing the Department of Mines, Minerals and Energy (DMME), handling several high profile cases and other matters, some of which remain ongoing. The Section negotiated, on behalf of DMME, the Virginia Offshore Wind Technology Advancement Project (VOWTAP) Lease between the U.S. Bureau of Ocean Energy Management (BOEM), as Lessor, and the DMME. The VOWTAP project is an offshore wind electric generation demonstration project, funded in part by the U.S. Department of Energy, which will construct two wind turbines approximately 24 nautical miles off the coast of Virginia Beach. VOWTAP will be used by the energy industry to evaluate the suitability of Virginia's coastal waters for commercial-scale wind projects. The project represents an important step

forward in implementing the Commonwealth's Energy Policy of establishing a diverse portfolio of energy resources. The lease is the product of many months of negotiations involving this Office, DMME, BOEM, the U.S. Department of Defense, and Dominion Virginia Power. The lease and associated Operator's Agreement have now been finalized. The Commonwealth will be the first state to execute a lease with BOEM for offshore wind turbines in the mid-Atlantic region.

The Section made a significant accomplishment in assisting DMME in the development draft fracking regulations (recently released under a Notice of Intended Regulatory Action). The Section also drafted an official Opinion regarding the ability of localities in Virginia to regulate and exclude fracking operations. Publication of that official Opinions is currently pending. In addition, the Section provided advice and drafting assistance to DMME for legislation designed to release from escrow certain coalbed methane royalties that are due to gas claimants throughout southwest Virginia. Approximately \$28 million in escrowed funds have been the subject of significant litigation and have presented an intractable problem for the Virginia Gas and Oil Board, for claimants, and for industry for many years. The law will release the majority of the escrowed funds to gas claimants within a year.

The Section handled several significant cases for the DMME during 2014. In *Bailey v. Spangler*, a surface landowner brought a § 1983 civil rights action against DMME's Director, alleging that the General Assembly took her mine voids when it amended a statute concerning the ownership of mine voids, although the landowner never owned the voids in question. The case is currently pending before the Supreme Court of Virginia on a certified question. The Section also represented DMME in finalizing a joint federal-state consent decree with Alpha Natural Resources arising from Clean Water Act violations; in an ongoing appeal of an administrative denial of a pending surface coal mining permit; in an enforcement action and pending consent decree with ICG, Inc.; and in enforcement actions against the Justice Companies under Virginia's Surface Mining and Reclamation Act as well as the Clean Water Act.

### HEALTH, EDUCATION, AND SOCIAL SERVICES DIVISION

Attorneys in the Health, Education, and Social Services Division represent agencies and institutions of the Commonwealth that are responsible for regulating health, education, and the provision of social services. By providing legal counsel to these governmental bodies, the Division helps ensure that public health threats are addressed, that medical professionals are properly regulated, and that children and other vulnerable populations in the Commonwealth receive critical social services and other forms of support. Division attorneys also provide counsel to the Commonwealth's public universities, community colleges, and museums on a wide range of rapidly-evolving issues pertaining to public education. In addition, attorneys within the Division assist in ensuring the proper use of Medicaid resources.

The Division's work in 2014 was significantly impacted by the Fourth Circuit Court of Appeals' decision in *Bostic v. Shaefer*, which invalidated Virginia's constitutional prohibition on same-sex marriage. (Please see related discussion *supra* in the summary of the Solicitor General's office.) This landmark decision affected the

responsibilities of several state agencies with regard to vital statistics, adoption, parental support, and educational benefits.

### **Child Support Enforcement Section**

Attorneys in the Child Support Section represent the Division of Child Support Enforcement (DCSE) of the Department of Social Services in both state and federal courts to determine paternity and to establish, modify, and enforce child support obligations. They also provide legal advice, counsel, and training to DCSE generally. Section attorneys experienced many changes this year as DCSE began reorganizing its regional offices and modernizing its technology systems. The attorneys began training for DCSE's new Internet-based case management system, and they assisted the agency in its efforts to "image" its records and convert to a largely paperless system. The forty-two Section field attorneys' offices were re-aligned geographically to match DCSE district offices as supervised by the DCSE's three field Assistant Directors.

The Section handled an enormous number of child support cases efficiently in 2014 - appearing at 130,923 child support hearings. The majority of these hearings were heard on 4,792 dockets in juvenile and domestic relations district courts that were dedicated to child support cases. After adjusting for the small percentage of cases handled by outside counsel, each field attorney, on average, appeared in approximately 250 hearings per month. Through its work the Section established new child support orders totaling in excess of \$1.4 million and enforced existing orders by obtaining lump sum payments of nearly \$13 million and coercive sentences totaling 549,871 days in jail. As of December 2014, the Child Support Section's bankruptcy unit was handling 893 active bankruptcies that affected 1,086 support cases.

In 2014, the Section reviewed and updated the *Child Support Benchmarks*. This document, available in hard copy and electronically on an internal server, contains comprehensive reviews and concise summaries of the most relevant statutes and cases governing all aspects of establishing, modifying, and enforcing child support orders. The *Benchmarks* are an excellent resource for all residents of the Commonwealth. The Section also worked with DCSE to review the most effective use of liens against real property as a collection tool, as well as the use of new technology to enhance efficiency in court preparation and presentation in support cases.

As noted in my 2013 Annual Report, the Section helped spearhead important legislation in 2014 that updated Virginia's Child Support Guidelines to align with current economic data on the cost of raising children. In addition, the Section helped to finalize a comprehensive review of child support regulations contained in the *Virginia Administrative Code*. Final changes to these regulations were approved by the Governor on December 10, 2014. The majority of these amendments served to streamline the regulations, to reduce redundancy between the regulations and existing statutes in the *Code of Virginia*, and to update certain terminology.

### **Education Section**

The 42 lawyers in the Education Section provide advice, counsel, and guidance to the Commonwealth's educational institutions, including the Commonwealth's public

colleges, universities, and museums. For the Department of Education and K-12, this guidance often directly influences local schools in implementing the Standards of Learning and Standards of Quality, in providing access to technology for disadvantaged students, in maintaining discipline and safety on school grounds, in complying with federal education programs, and in improving school facilities. Virginia's fourteen colleges and twenty-three community colleges are self-contained communities with a full range of legal needs: issues include campus safety and security, admission and educational quality, human resources, the proper relationship between the colleges and the Commonwealth, contracts, procurement, and financing.

In 2014, in addition to a multitude of other issues, Section attorneys worked closely on issues related to sexual violence on campus. They are frequently called on to advise individuals on campus - from athletic staff, to student affairs deans, to the institution's president - on complex legal issues encountered when a student or employee reports an allegation of sexual violence. Issues on which the attorneys advise include compliance with overlapping and occasionally inconsistent federal requirements, facilitation of trauma-informed recovery for victims, coordination with local law-enforcement, provision of due process for accused individuals, and how to properly weigh requests from a victim for confidentiality or non-pursuit of an investigation against the safety concerns of the campus community.

During the year, the U.S. Department of Education issued a 53-page guidance document on institutions' obligations to address sexual violence under Title IX, as well as exhaustive regulations implementing the 2013 Violence Against Women Act. Section attorneys acted quickly to revise existing campus policies regarding sexual violence and Title IX in response to these federal mandates, as well as my directive to conduct a top-to-bottom Office review of all campus sexual violence policies and procedures.

Section attorneys also actively engaged with the Governor's Office in providing education and legal guidance for the joint initiatives of this Office and the Governor, including the Joint Declaration on Combating Campus Sexual Violence, signed by all public college and university presidents after close consultation with Section attorneys, and the ongoing work of the Governor's Task Force on Combating Campus Sexual Violence. In addition, Section attorneys planned and participated as presenters at this Office's two-day Campus Sexual Violence Summit in October 2014. Increased public awareness and media consideration of campus sexual violence, along with heightened oversight by the U.S. Department of Education's Office for Civil Rights, has resulted in an unprecedented level of priority by Section attorneys to public relations issues, FOIA requests, and guidance to college and university leadership on matters relating to campus sexual violence.

### **Health Services Section**

In 2014, the Health Services Section continued to represent the Commonwealth and the Department of Behavioral Health and Developmental Services (DBH) in the implementation of a settlement agreement between the United States and the Commonwealth regarding the state's system of services for individuals with

developmental disabilities. The Section also assisted DBH with legal issues that arose in the process of closing the first of four state training centers. In addition, it continued to provide general legal advice to DBH on many issues including civil commitment, confidentiality, human resources, and regulatory compliance. Section attorneys also provided statewide training on legislative changes made to the civil commitment process.

The Section continued to represent the Department of Health Professions (DHP) and its 14 health regulatory boards in matters relating to the adjudication of administrative disciplinary proceedings against health care professionals. (Please note that, as mentioned *supra*, the Health Professions Unit of the Civil Litigation Division is responsible for the administrative *prosecution* of these cases.) Disciplined professionals appealed many of these cases to state courts, including the Virginia Court of Appeals, where the Section's attorneys successfully represented the Boards. In addition, in a joint effort with the Trial Section and the Consumer Protection Section's ACEU (Civil Litigation Division), the attorneys successfully defended the Board of Medicine in *Petrie v. Virginia Board of Medicine*, a suit filed in the United States District Court (E.D. Va.) by a chiropractic licensee alleging antitrust violations. The case is currently on appeal to the Fourth Circuit.

During the year, the Section also worked extensively with the Department of Health to address public health concerns over the Ebola Virus Disease by providing legal advice on quarantine issues, reviewing form orders of isolation and quarantine, and developing a training video for law enforcement pertaining to its role in the quarantine process. In addition, Section attorneys represented the Department of Health in multiple cases filed in state courts challenging the Commissioner's decisions regarding the issuance of certificates-of-public-need. They also continued to provide general advice to the Department of Health on a variety of issues including reporting of child abuse and neglect, vital records, exchange of health information, emergency medical services, employee grievances, and emergency preparedness. In particular, the Section worked closely with the State Registrar of Vital Statistics to implement the opinion issued by the Fourth Circuit in *Bostic v. Schaefer*, providing legal counsel regarding marriage licenses and birth certificates in light of the Court's decision invalidating Virginia's ban on same-sex marriage.

Finally, Section attorneys successfully defended the Department for Aging and Rehabilitative Services in the Fourth Circuit in an appeal of a lawsuit filed by an applicant for education benefits who alleged that her constitutional rights had been violated.

### **Medicaid and Social Services Section**

The attorneys in the Medicaid and Social Services Section provided advice, counsel and legal representation to the Department of Medical Assistance (DMAS), the Department of Social Services (DSS), and the Office of Comprehensive Services (OCS) on several noteworthy matters in 2014, thereby continuing to assist the agencies in protecting the health and safety of children and other vulnerable citizens in the

Commonwealth. The Section also was responsible for the recovery of millions of public dollars that had been inappropriately disbursed.

The Section successfully defended a number of Medicaid appeals related to Medicaid provider reimbursement appeals. The most significant case was *1st Stop Health Services v. DMAS*. In this case, the Virginia Court of Appeals found that a provider's documentation errors constituted a material breach of his participation agreement with DMAS. In another significant case, *LifeCare Med. Transports, Inc. v. DMAS*, the Virginia Court of Appeals affirmed that DMAS could collect an overpayment for Medicare crossover claims because equitable defenses do not apply against the sovereign unless expressly permitted by the General Assembly.

The Section also reviewed and certified several regulatory packages that were included in the Governor's "A Healthy Virginia" plan. This plan expanded Medicaid coverage to uninsured Virginians with acute mental health needs. The regulations included emergency regulations implementing a two-year demonstration waiver, known as the Governor's Access Plan (GAP) for individuals with serious mental illness. The GAP demonstration waiver provides a targeted population of eligible citizens access to a limited benefit package for basic medical and behavioral health services, and a limited provider population for peer supports and GAP case management services. The Section also certified emergency regulations to amend previous regulations that excluded the children of state employees from eligibility for the Children's Health Insurance Program (CHIP), known in Virginia as FAMIS.

During the year, the Section continued to assist DMAS in implementing significant reforms to the Medicaid program, including additional work for the Commonwealth Coordinated Care program, or the Medicare-Medicaid Financial Alignment Demonstration, which allows Virginia to integrate covered Medicare and Medicaid benefits under one system for those dually eligible. The program covers approximately 78,000 eligible individuals aged 21 or older who live in designated regions around the Commonwealth. These individuals receive long-term support and services through nursing facilities. The program successfully launched this year when DMAS awarded contracts to several MCOs (managed care organizations) and the Section certified the regulations.

During the year, the Section represented DSS in many cases, including cases challenging local departments of social services' findings on the abuse and neglect of children, cases involving various benefits programs, and cases involving DSS' revocation or denial of certain licenses. In a case before the United States District Court (W.D. Va.), *Roy W. Krieger v. Loudoun County Department of Social Services*, Section attorneys, in partnership with the Civil Litigation Division, successfully defended a suit involving both the Supplemental Nutrition Assistance Program (SNAP) and a local department's actions in supplying voter registration information. In *Williams v. Virginia Department of Social Services*, which was filed in the U.S. Bankruptcy Court in Norfolk, the Section defended DSS's interception of debtors' federal income tax return in order to recover payment for SNAP benefits the debtors received when they were ineligible to receive those benefits. The parties reached a settlement allowing for DSS' eventual recovery of the intercepted tax refund.

Section attorneys also worked on a number of matters dealing with DSS' Child Care Subsidy Program, which arose due to changes in converting from a manual to an electronic system. The Child Care Subsidy Program is Virginia's child care assistance program funded by the federal Child Care and Development Block Grant (CCDBG) and implemented by DSS in concert with local departments of social services. The Section assisted DSS in resolving a number of disputes with providers that occurred due to this transition. Section attorneys also completed a comprehensive review of all the program's contracts with child care providers serving families who are eligible to receive the assistance. Under the program, the providers are paid directly once the family has been determined to be eligible, and the provider agrees to abide by program rules and regulations. Revised agreements were implemented and entered into by all providers in Spring 2014. Section attorneys also reviewed and certified regulations which were revised to accurately reflect the program's operations and to be more consistent with program goals, federal requirements, and the state's vendor agreements.

The Section also assisted DSS in an important contractual matter signifying the Commonwealth's support for Small, Women-owned and Minority-owned Businesses (SWaM). DSS had a contract with a private company to operate two child support enforcement district offices. The terms of the contract required the company to meet certain expenditures to subcontractors that are SWaM businesses. The company failed to meet its SWaM obligations under the contract, and the Section negotiated a penalty settlement with the company.

The Section also assisted DSS in studying various issues through its participation in certain workgroups. The 2014 General Assembly required DSS to study the issue of foster care diversion and to make recommendations for potential statutory or regulatory changes. Foster care diversion is a practice undertaken by local DSS agencies to prevent children who are at risk of removal from their homes from entering foster care. This is often accomplished by placing the children with relatives. The Foster Care Diversion Workgroup met several times in 2014 and reviewed possible statutory and regulatory changes, but has yet to settle on any formal recommendations. The Section also assisted the Workgroup for the Extension of Foster Care Services for young adults aged 18-21 by reviewing proposed legislation that was prepared by the workgroup.

The Office of Comprehensive Services (OCS), along with its supervisory body, the State Executive Council (SEC), administers the provisions of the Comprehensive Services Act for At-Risk Youth and Families (CSA), a law that establishes a single state pool of funds to purchase services for at-risk youth and their families. The Section advised the SEC at the annual SEC Retreat held in June 2014 on the statutory definition of "child in need of services" (CHINS), resulting in an expansion in the numbers of children and youth that localities are mandated to serve under the CSA program. *Virginia Code Ann.* § 16.1-228 states that a CHINS is "a child whose behavior, conduct or condition presents or results in a serious threat to the well-being and physical safety of the child." Historically, a child would be determined to be a CHINS if his own behavior, his substance abuse, his mental health issues, or actions taken by him resulted in a serious threat to his well-being and safety. The use of "condition" in the definition, however, allows for circumstances not caused by the child himself, but also factors within the child's environment, such as the actions, substance abuse, or mental health

issues of the child's parents, the occurrence of domestic violence in the home, or other various circumstances, that may result in a serious threat to the child's well-being or safety.

## **CRIMINAL JUSTICE AND PUBLIC SAFETY DIVISION**

The Criminal Justice and Public Safety Division includes the following Sections: Computer Crimes, Correctional Litigation, Criminal Appeals, Major Crimes and Emerging Threats, Health Care Fraud and Elder Abuse, and the Sexually Violent Predators Section. The Division handles computer crimes and cyber-security issues, cases brought by prisoners, criminal appeals, Medicaid fraud cases, as well as prosecutions relating to child pornography, gangs, money laundering, fraud, and patient abuse. It also represents various Commonwealth agencies, petitions for the civil commitment of sexually violent predators, and administers the 1998 Tobacco Master Settlement Agreement.

### **Computer Crimes Section**

In 1998, the General Assembly authorized and funded the creation of a Computer Crime Section within the Office to spearhead Virginia's computer-related criminal law enforcement in the 21st Century. The Computer Crimes Section exercises the Office's original and concurrent jurisdiction to investigate and prosecute crimes set forth in Virginia's Computer Crimes Act, crimes that implicate the exploitation of children, and crimes involving identity theft. During 2014, the Section continued to travel extensively throughout the Commonwealth to investigate and prosecute such crimes. The Section handled cases in the counties of Amelia, Botetourt, Chesterfield, Fairfax, Floyd, Hanover, Henrico, King William, Prince William, and Spotsylvania, and the cities of Lynchburg, Newport News, Richmond, and Virginia Beach, among others. Section attorneys are cross-designated as Special Assistant United States Attorneys and prosecute cases in federal as well as state courts.

The Section's attorneys handled 81 cases this year, obtaining 27 convictions during 2014 (with the remainder of cases ongoing) for crimes involving production of child pornography, distribution of child pornography, receipt of child pornography, Internet solicitation of children, and computer fraud. Defendants in these cases were sentenced to an aggregate of 193 years and 6 months of active imprisonment; one life sentence also was imposed. Descriptions of some of the significant cases handled by the Section follow.

In *United States v. Philip Sebolt*, the defendant was convicted following a bench trial in United States District Court (E.D. Va.) on a charge of advertising child pornography, and was subsequently sentenced by the Court to life imprisonment in 2013. Prior to this conviction, the defendant had been serving a 360-month sentence for separate federal convictions of possession, transportation, and advertising of child pornography. The defendant came to prison officials' attention in February 2010 after they searched a fellow inmate's property prior to that inmate's scheduled release. Among the inmate's property were numerous envelopes with postage bearing the defendant's name. Upon further inspection, prison officials discovered that the

envelopes contained advertisements soliciting child pornography from individuals in numerous foreign countries. The inmate informed prison officials that the defendant had asked him to mail several letters and packages on his behalf upon his release from prison. In addition, it was discovered that the defendant had asked “pen pals” to send him nude photos of their prepubescent children on at least two occasions. On appeal to the Fourth Circuit, the defendant raised several issues challenging the admission of evidence and the application of sentencing enhancements. The Fourth Circuit remanded the case for re-sentencing under proper procedures and the district court again sentenced the defendant to life imprisonment, which the Fourth Circuit affirmed again on appeal in 2014.

In *United States v. Fidel Rodriguez and Yida Perez*, the defendants were convicted on four counts of production of child pornography following a trial in the United States District Court (E.D. Va.). The defendants are husband and wife and parents of former defendant Yosvany Rodriguez, who was 30 years old at the time. The defendants were detected after undercover agents downloaded child pornography from Yosvany’s computer at the residence. A subsequent search warrant and forensic examination revealed that all three family members engaged in sexual conduct, while photographing and filming it, with a child relative when the child was 11 to 12 years old. Further evidence showed that the family had been engaging in this conduct since the child was an infant. Child Protective Services removed the child from the residence at the execution of a search warrant. Four days before the trial, Defendant Yosvany committed suicide after agreeing to accept a plea to the charge of receipt of child pornography. The court sentenced the remaining two defendants each to 15 years’ imprisonment.

In *United States v. Lawrence Paul Sayers*, the defendant was identified during an investigation by the Chesterfield County Police Department upon allegations that he had molested two minor females. The Chesterfield Police Department obtained a search warrant for the defendant’s residence and recovered two of the defendant’s cellular telephones. FBI agents examined the phones and recovered approximately 45 images and 5 videos of the defendant’s 8-year-old stepdaughter engaged in sexually explicit conduct with the defendant. The defendant admitted to engaging in sexual activity with his stepdaughter and to taking the sexually explicit images and videos of her with the phones. He was convicted of production of child pornography in the United States District Court (E.D. Va.) and received a 30-year sentence. Subsequently, he was sentenced to 55 years with 35 years suspended in the Chesterfield County Circuit Court on state convictions of molesting two 9-year-old females.

In *United States v. Cameron Bivins-Breeden*, the defendant pled guilty to one count of production of child pornography and one count of enticement of a minor in the United States District Court (E.D. Va.). He was detected after several minor girls reported to police in Washington State in March 2014 that he was threatening them online, enticing them to produce child pornography, enticing them for sex, and also distributing child pornography. Evidence from the defendant’s online accounts revealed he had indeed been engaging in violent, threatening enticement chats with dozens of minor girls around the country. Many of the minors had produced child pornographic images of themselves per his requests and threats and had sent the images

to the defendant. The defendant admitted to engaging in such conduct with approximately 100 victims. The court sentenced him to 24 years' imprisonment.

In another significant case, *Commonwealth v. Nathaniel Toth*, the defendant entered guilty pleas to one count of distribution of child pornography and four counts of possession of child pornography and was sentenced to 20 years' imprisonment with 11 years suspended in the Chesterfield County Circuit Court. The defendant was identified when officers with the Amelia County Sheriff's Office downloaded four child pornography files from the defendant's computer. Officers executed a search warrant at defendant's residence, seized numerous items of computer evidence, and interviewed the defendant. The defendant admitted to downloading, viewing, and sharing child pornography. A forensic exam conducted by employees of this Office yielded hundreds of child pornography files on a laptop, external hard drive, and thumb drive found in defendant's home.

In 2014, the Office's Computer Forensic Unit within the Computer Crimes Section continued to make extensive progress towards alleviating Virginia law enforcement's computer forensic backlog. The Unit handled 120 total cases for 20 separate jurisdictions across the Commonwealth. As part of those cases, the Unit forensically examined 630 pieces of evidence, including computer hard drives, cell phones, and various storage devices. The Unit also continued to bolster its state-of-the-art computer forensics lab located in this Office, thereby increasing its work capacity.

The Section continues to be an active member of the Southern Virginia and Northern Virginia Internet Crimes Against Children Task Forces, and the Richmond-based Virginia Cyber Crime Strike Force, dedicating its computer forensic examiners and providing prosecutors to help assist in these efforts. These entities handle crimes committed via computer and the Internet, including child exploitation and solicitation, Internet fraud, computer intrusion, computer harassment, and identity theft. They create partnerships among federal, state, and local law enforcement agencies that coordinate the prosecution of computer crimes and provide citizens of the Commonwealth with centralized locations to report such crimes.

The Section's team of prosecutors and investigators continues to provide education and training on a statewide basis. Throughout 2014, the Section's members trained prosecutors and law enforcement professionals, including school resource officers, at various conferences and police training academies in Fredericksburg, Hampton, Martinsville, Richmond, and Weyers Cave. These training conferences 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. As part of this outreach effort, this Office hosted a five-day computer forensic certification course in Fredericksburg for two-dozen law enforcement officers who were subsequently certified as computer forensic examiners for their respective jurisdictions.

In addition to investigating and prosecuting computer crimes, the Section continues to serve as a clearinghouse for information concerning the criminal and civil misuse of computers and the Internet. In 2014, Section investigators handled over 200 investigatory leads and citizen complaints submitted through the Section's email inbox

and the Internet Crime Complaint Center (the primary national resource for computer crime complaints). The Section also reviewed 305 notifications from companies experiencing database breaches for compliance with Virginia's database breach notification law contained in *Va. Code Ann.* § 18.2-186.6. Given these responsibilities, members of the Section are often asked to give presentations or to make media appearances to inform the public about issues such as the increasing scourge of identity theft, computer fraud, computer security, and sexual predators' use of the Internet to make contact with children.

During 2014, as in past years, members of the Computer Crimes Section traveled frequently throughout the Commonwealth to speak to students and parents and deliver the Office's Virginia Rules "Safety Net" presentation. "Safety Net" is an interactive presentation that addresses current issues of "cyber-bullying" and "sexting." It utilizes an actual case study to demonstrate how easy it is for a predator using very little personal information to track down a child victim over the Internet. This presentation continues to be in high demand among middle schools, high schools, and parent groups across the Commonwealth. This year members of the Section delivered the presentation over 40 times to schools in Chesterfield, Fairfax, Henrico, King William, Norfolk, Orange, Portsmouth, Prince William, Richmond, Suffolk, and many other locations throughout the Commonwealth.

### **Correctional Litigation**

The Correctional Litigation Section represents the Departments of Corrections, Juvenile Justice, and their respective Boards, as well as the Parole Board. The Section also represents the Secretary of Public Safety and the Governor on extradition matters, the Commonwealth's Attorneys on detainer matters, and Correctional Enterprises. During 2014, the Section was responsible for handling 122 Section (§) 1983 cases, 1 employee grievance, 116 habeas corpus cases, 174 mandamus petitions, 43 inmate tort claims, 6 warrants in debts, and 325 advice matters.

Several of the significant matters handled by the Section in 2014 involved claims brought by inmates under the Eighth Amendment to the United States Constitution. In *Chapman v. Willis*, an inmate filed suit in the United States District Court (W.D. Va.) claiming numerous constitutional violations by various prison officials arising from alleged sexual harassment and battery by a female counselor. All claims were dismissed except for one Eighth Amendment claim against a single defendant. A jury returned a verdict for the Commonwealth in this matter. In the pending case of *Scott v. Clarke*, four plaintiffs allege they and all other similarly-situated offenders at Fluvanna Correctional Center for Women have been receiving inadequate medical care in violation of the Eighth Amendment. After a lengthy mediation, the parties have agreed in principle to settle the suit. Among other things, the agreement anticipates the creation of a Compliance Monitor at the correctional center to better ensure that offenders are receiving adequate medical care and that no systemic changes are needed. Nevertheless, the matter is still pending in the United States District Court (W.D. Va.).

In addition, the Section is currently litigating the case of *Porter v. Clarke*, in which five death row inmates have filed suit in the United States District Court (E.D. Va.)

alleging, *inter alia*, that the conditions of death row confinement constitute cruel and unusual punishment, in violation of the Eighth Amendment. The Section's motion to dismiss is currently scheduled for oral argument.

Many of the cases litigated by the Section involved religious freedom protections. In *Coleman v. Jabe*, the United States District Court (W.D. Va.) held that Department of Corrections' policies restricting the purchase of prayer oil to a certain amount from a single vendor, and restricting the length of inmates' beards to no more than ¼ of an inch, did not violate the Religious Land Use and Institutionalized Persons Act (RLUIPA). In *Allah v. Commonwealth*, the same district court ruled for the Department of Corrections in a RLUIPA suit brought by an inmate to have the group known as the "Five Percenter" recognized as a religion.

In 2014, the Section successfully mediated two religious freedom claims brought by inmates in the United States District Court (W.D. Va.) under § 1983 and RLUIPA. In *Brown v. Holloway*, an inmate brought suit against the Department of Corrections claiming wrongful removal from the fast of Ramadan. In *Jacobsen v. Clarke*, an inmate brought suit against the Department claiming that he was not provided food suitable for Passover. In both cases, the Section provided mediation resulting in some modification to Department of Corrections' policy, as well as payment of the plaintiffs' costs of litigation.

The Section also handled two other significant cases brought by inmates this year. In *Howard v. Phipps*, an inmate brought a § 1983 action in the United States District Court (W.D.), claiming he was subjected to excessive force in an incident involving his hand being caught and injured in his prison cell's tray slot. He sought damages of \$50,000. A seven-member jury ultimately returned a verdict in favor of the Commonwealth. In *Hockman v. Brown*, an inmate petitioned the Fluvanna County Circuit Court for injunctive relief and damages of \$900,000 to challenge a policy of the Fluvanna Correctional Center for Women barring the use or possession of CD-ROMs by inmates. After a one-day trial, the Court affirmed the general policy of the facility and denied the inmate's claim for relief.

The Section handled one employee grievance matter in 2014. In *Virginia Department of Corrections v. Hayden*, an employee's termination was affirmed by the hearing officer and the Department of Employee Dispute Resolution, but was reversed at the circuit court level based on a procedural due process violation. The Section appealed the matter to the Virginia Court of Appeals, which reversed the decision of the circuit court and affirmed the action of the Department of Corrections.

The Section currently is litigating one matter before the Virginia Supreme Court involving the state's Freedom of Information Act (FOIA). *Surovell v. Virginia Department of Corrections* involves a citizen who sought to obtain, pursuant to FOIA, various execution-related records maintained by the Department of Corrections. The trial court, although agreeing that the Department had permissibly withheld some of the records, ordered the Department to produce other records that had been withheld under the FOIA security exemption. The Department appealed, and the matter now is pending before the Virginia Supreme Court.

Finally, in 2014, the Director of the Department of Juvenile Justice (DJJ) sought advice from the Section as to whether DJJ should implement additional measures to ensure that committed juveniles are not deprived of their constitutional rights to access the courts. The Section advised that DJJ should provide additional resources to committed juveniles, and it assisted in negotiating an agreement between the Department and a legal clinic at the University of Richmond, in conjunction with a non-profit children's advocacy group, for the provision of legal services at DJJ facilities.

### **Criminal Appeals**

The Criminal Appeals Section handles a variety 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 Actual Innocence and Capital Litigation Unit defends against appellate and collateral challenges to all cases in which a death sentence is imposed. In addition, Section attorneys review wiretap applications and provide advice and assistance to prosecutors statewide. Finally, the Section represents the Capitol Police, state magistrates, and the Commonwealth's Attorneys' Services Council. In 2014, the Section defended against 948 petitions for writs of habeas corpus and represented the Commonwealth in 210 appeals in state and federal courts. The Section received 31 petitions for writs of actual innocence, an increasing area of responsibility. In addition, Section attorneys provided advice and assistance to prosecutors statewide in several hundred instances in 2014.

The Section's Actual Innocence and Capital Litigation Unit defended on appeal and collateral attack the convictions of persons sentenced to death under Virginia law. In *Gray v. Davis*, *Porter v. Davis*, and *Prieto v. Davis*, the United States District Court (E.D. Va.) dismissed the inmates' habeas corpus petitions. In all three cases, the inmates asserted claims that had been exhausted in state court, as well as defaulted claims that they argued could be reviewed under the rule announced by the United States Supreme Court in *Martinez v. Ryan*. In *Teleguz v. Davis*, the United States District Court (W.D. Va.) dismissed the inmate's claim that he was innocent and could therefore present defaulted habeas corpus claims under the rule announced by the United States Supreme Court in *Schlup v. Delo*. All four of these cases are pending on appeal in the Fourth Circuit. Although there were no exonerations in 2014, the Unit's Director has forged a productive relationship with the Executive Director of the Mid-Atlantic Innocence Project, and has worked collaboratively with Innocence Project attorneys to have two cases placed under stay pending further investigation and scientific testing.

The Section saw several significant decisions from the Supreme Court of Virginia and the Virginia Court of Appeals during 2014. In *Sarafin v. Commonwealth*, the Supreme Court of Virginia clarified dicta from prior cases and affirmed the defendant's driving under the influence conviction. The defendant had been passed out drunk while seated in the driver's seat of his car, which was parked in his driveway. The key was in the ignition and the radio was playing. The Supreme Court held that the legislature did not include as an element of driving under the influence that the operation of a car must occur on a public roadway. The court noted that the legislature had included the public roadway as an element in other statutes, and that the DUI statute applied to the operation of a train, which

occurs on privately-owned tracks. In *Grimes v. Commonwealth*, the Supreme Court of Virginia affirmed Grimes's conviction from Newport News for statutory burglary, finding that the crawl space of a home was structurally a part of the house that contained integral utilities such as plumbing and ductwork that are needed in a dwelling house.

In *Dawson v. Commonwealth*, the Virginia Court of Appeals, in a case of first impression, held that the evidence was sufficient to satisfy the recently enacted strangulation statute, *Va. Code Ann.* § 18.2-51.6, where the victim showed ligature-like bruises around her neck after the strangulation and testified that her neck hurt. The Court held that this evidence was sufficient to satisfy the "bodily injury" requirement under the statute. The Virginia Court of Appeals also issued a significant decision in *Foley v. Commonwealth*, which addressed the meaning of the term "curtilage" in *Virginia Code Ann.* § 18.2-308(B), holding that that the language created an affirmative defense to carrying a concealed weapon.

Finally, in *Huguely v. Commonwealth*, the Virginia Court of Appeals issued an opinion affirming a second-degree murder conviction. The opinion is significant because it addresses a unique aspect of a defendant's Sixth Amendment right to counsel. The defendant in *Huguely* had been convicted following the conclusion of a lengthy trial in the lower court. During the middle of the trial, one of defendant's two retained attorneys became ill and was unable to attend for two days. The trial judge denied the defendant's request for a continuance. On appeal, the Court of Appeals held the trial court possessed the discretion to allow the trial to proceed with other defense witnesses. The trial judge balanced the defendant's right to counsel of his choice against the need for the orderly prosecution of the case. In denying the defendant's request for continuance, the trial judge did not display an "unreasoning and arbitrary insistence" on expeditiousness," but proceeded in a manner that had the least impact on the missing attorney's role in the defense.

### **Major Crimes and Emerging Threats**

The Major Crimes and Emerging Threats Section (MC&ET), formerly the Special Prosecutions/Organized Crime Section (SPOCS), is the primary prosecutorial section of this Office. The Section prosecutes various crimes throughout the Commonwealth, serves as counsel to the Commonwealth's criminal justice and public safety agencies, and implements this Office's public safety initiatives. With respect to its prosecutorial duties, the Section prosecutes crimes pursuant to either the jurisdiction of the Attorney General under the *Virginia Code*, or upon the request of local Commonwealth's Attorneys. In 2014, the Section continued its mission of keeping Virginia's citizens safe by retaining new prosecutors and expanding Section prosecutions. The Section engaged in multiple initiatives including the establishment of a major heroin and prescription drug abuse agenda; the prevention, intervention, and suppression of criminal street gang activity; the prevention and prosecution of identity theft offenses; the participation in major financial crime investigations; and the apprehension and prosecution of violators of Virginia's RICO and tobacco statutes.

### Criminal Prosecutions

MC&ET is headed by a Chief who reports directly to the Deputy of the Public Safety and Enforcement Division. The Section has seven Assistant Attorneys General prosecutors, five of whom are sworn as Special Assistant United States Attorneys who routinely handle criminal prosecutions in federal court. One of the seven 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 Newport News. Another Assistant Attorney General serves as special counsel to the Northern Virginia Multi-Jurisdiction Grand Jury. Three prosecutors are now based in Norfolk, with one also assisting in violent crime prosecutions in Northern Virginia as needed. In 2015, all Section prosecutors will be sworn as Special Assistant United States Attorneys in the Eastern and Western Districts of Virginia to further enhance the valuable working relationship that exists between the Section and the United States Attorney's office. The Section expects to hire at least one additional prosecutor for the western part of the state in the future.

In 2014, MC&ET attorneys and staff established a major multi-faceted program to combat the heroin/opiate epidemic in Virginia through education, prosecution, and appropriate legislation. The epidemic was identified as a major issue during my recent public safety tour, as well as through meetings such as the one held between Section attorneys and the national drug czar. As part of this effort, the Section sought to develop a consensus about the epidemic among law enforcement professionals, health care professionals, and other stakeholders. This was accomplished through a statewide summit held in Charlottesville. Planning for the summit was a cooperative effort between Section attorneys and DCJS employees. The Section also drafted proposed legislation (i) equipping first responders with drug-counteracting medication, (ii) creating a prescription drug monitoring bill, and (iii) providing a defense for those who call 911 to report overdoses.

With the new retention of experienced prosecutors, the Section is poised to combat heroin trafficking and other major crimes in areas of the state where enforcement is needed most, primarily the South Hampton Roads area. Section attorneys have become active in the Hampton Roads community through initiatives such as Project Safe Neighborhoods (PSN) and the federal High Intensity Drug Trafficking Area program (HIDTA), both of which combat crimes related to firearms, drug trafficking, and violent gang activity. In addition, a PSN grant has provided for the hiring of an outreach coordinator/crime analyst who will assist the Section in its goal of preventing these types of crimes.

Assisting Virginia's Commonwealth's Attorneys is a priority for the Unit. In 2014, the Unit assisted Commonwealth's Attorneys in investigations and prosecutions throughout Virginia, including cases in Fairfax, Prince William, Frederick, Buchanan, Newport News, Richmond, and throughout Shenandoah Valley. Crimes included the theft and embezzlement of state property, the theft of state records, possession with the intent to distribute contraband cigarettes, gang participation, use of a firearm during the commission of a felony, and murder. All Section attorneys are currently handling open

investigations and prosecutions pending in various jurisdictions throughout the Commonwealth.

Examples of significant cases handled (or being handled) throughout the Commonwealth are described as follows.

In a case in the Alexandria Circuit Court, *Commonwealth v. Charles Severance*, the defendant is charged with capital murder (two counts), murder, malicious wounding, use of a firearm (four counts), and felon in possession of a firearm (two counts). The defendant killed three individuals and wounded another in Alexandria during the years 2003, 2013, and 2014. Section prosecutors have become important members of the trial team at the request of the Alexandria Commonwealth's Attorney.

In a case in the Newport News Circuit Court, *Commonwealth v. Marcus Williams*, three members of the "Bang Squad Bloods," Floyd Taybron, Marcus Williams, and Tyrone Batten, are charged with gunning down a rival gang member and an innocent bystander in 2008. The matter was investigated extensively by the Peninsula Multi-Jurisdiction Grand Jury for nearly two years. The Grand Jury eventually returned indictments against the three perpetrators for two counts of murder, use of a firearm during the commission of a felony, discharge of a firearm in a school zone, and felony gang participation. Williams was found guilty by a jury and was sentenced to two life terms plus 30 years in prison.

In a case in the Buchanan County Circuit Court, *Commonwealth v. James Brown & Larry Boone*, Larry Boone, the godfather of the "Mad Stone Bloods," pled guilty to conspiracy to escape from a correctional facility, conspiracy to abduct the facility's warden, and felony gang participation. He was sentenced to 10 years of active incarceration in the Department of Corrections. Mr. Boone is the second highest ranking Mad Stone Bloods member in Virginia. He was arrested on these charges just days prior to being released from the Virginia Department of Corrections. The Section determined that he posed a significant threat to public safety and proceeded in the case against him. James Brown, his co-defendant, was convicted of conspiring with Boone to escape from prison. Brown also was sentenced to 10 years of active incarceration in the Department of Corrections.

In a case in Fauquier County Circuit Court, *Commonwealth v. Kincheloe*, the defendant, an attorney, pled guilty to three misdemeanor counts of failure to file state tax returns and was sentenced to 6 months' active incarceration. The defendant had previously pled guilty in Fairfax County to felony embezzlement for taking funds from an elderly client. He was sentenced to 6 years in prison for the embezzlement, and 6 months' active incarceration for the tax charges. Both cases had been investigated by the Fairfax County Police Department and presented to the Northern Virginia Multi-jurisdiction Grand Jury.

In a case in the Staunton Circuit Court, *Commonwealth v. Fields*, the defendant, Meaghan Marie Fields, a former probation officer with the Virginia Department of Corrections, entered *Alford* pleas of guilty to felony charges of abusing her position to engage in sexual contact with multiple gang members who were under her supervision. Ms. Fields was sentenced to 18 months in prison for these offenses.

In a case before the United States District Court (E.D. Va.), *Jane Doe v. Virginia Department of State Police*, the plaintiff alleged that her constitutional due process rights, her right to raise her children, and her right to free exercise of religion were violated through the reclassification of her 1993 conviction of carnal knowledge of a minor to a sexually violent offense, which prohibited her from entering or being present on school property during school hours or during school-related or school-sponsored activities. The Fourth Circuit affirmed the district court's decision that Doe's claim was unripe because she had failed to seek post-deprivation review of her claims in a Virginia circuit court as provided by the *Virginia Code*. The plaintiff filed a petition for certiorari in the United States Supreme Court, which the Department of State Police opposed. In March 2014, the United States Supreme Court denied Doe's petition for certiorari.

Some examples of significant criminal cases prosecuted by Section attorneys in federal court are as follows:

In *United States v. Foster*, a case before the United States District Court (E.D. Va.), the defendant was charged with conspiracy to commit bank fraud (18 U.S.C. § 1349), bank fraud (18 U.S.C. § 1344), and aggravated identity theft (18 U.S.C. § 1028A). A federal grand jury indicted Foster on one count of conspiracy, eight counts of bank fraud, and two counts of aggravated identity theft. A Section attorney prosecuted numerous individuals involved in a counterfeit check scheme. The scheme involved stealing valid checks from local business mailboxes and, through the use of a computer and printer, transforming the stolen checks into blank counterfeit checks. All co-conspirators pled guilty or were found guilty by jury. The case was investigated by the Richmond Metro ID Task Force, the U.S. Postal Inspection Service, and the U.S. Secret Service.

In *United States v. Thorne*, a case before the United States District Court (E.D. Va.), a drug dealer was convicted following the death of one of his clients. August 21, 2013, Emylee Lonczak, a 16-year-old from McLean, Virginia, rode into Washington, D.C. with friends to purchase heroin. Two of Lonczak's friends had purchased heroin numerous times from Thorne. Thorne sold the group heroin, which they split and consumed in the District of Columbia. Lonczak became unconscious. The group traveled back to Virginia, and Lonczak was left with her friend, Kyle Alifom, who did not seek medical aid for her because he was on probation and afraid of being apprehended on a probation violation. Lonczak died of a drug overdose during the night. In the morning, Alifom discovered that Lonczak had died, and he dragged her body into some nearby woods and attempted to hide her. Thorne, the dealer, was convicted of conspiracy to distribute 100 grams or more of heroin, in violation of 21 U.S.C. 841(a)(1) and 846. He was sentenced to 25 years in prison. (Alifom pled guilty to tampering with evidence, in violation of 18 U.S.C. § 1512, and was sentenced to 80 months' imprisonment.)

In *United States v. Williams*, a case before the United States District Court (E.D. Va.), the defendant was charged with conspiracy to distribute one kilogram or more of heroin (21 U.S.C. § 841(a)(1) & 846). The defendant, a Washington, D.C. based drug dealer, sold heroin to dozens of individuals from Orange and Culpeper counties in

Virginia, who traveled through the Eastern District of Virginia to meet him. The defendant was sentenced to 30 years in prison for conspiring to distribute heroin and for possessing a firearm in furtherance of the offense. At least three individuals died in Fairfax County, Virginia, as a result of consuming heroin distributed by Williams.

In *United States v. Coles*, a case before the United States District Court (E.D. Va.), the defendant was charged with conspiracy to prepare and file false tax returns and bank fraud, following an extensive investigation. The defendant, a former Virginia Department of Social Services (DSS) employee, engaged in a private business to prepare tax returns for individuals. She prepared returns for hundreds of individuals, often filing them from her former place of employment at Virginia DSS. On the returns, she falsified business losses, dependents, tax credits and other tax items to obtain large refunds. The tax loss amount was over \$1 million. She also committed bank fraud by falsifying her income in order to receive several bank loans. Coles was sentenced to 5 years in prison.

Pursuant to *Virginia Code Ann.* § 52-8.2, the Virginia State Police (VSP) is prohibited from initiating, undertaking, or continuing an investigation of a state or local elected official for a criminal violation except upon the request of the Governor, the Attorney General, or a grand jury. Because sheriffs and chiefs of police often have conflicts of interest that prevent them from investigating alleged criminal activity of local elected officials within their jurisdictions, the vast majority of elected official investigations are conducted by the Virginia State Police. When VSP requests permission to conduct an investigation of an elected official, the Section reviews the allegations to determine what, if any, criminal violations may have occurred if the allegations are proven. Section attorneys work closely with VSP to give these important cases the judicious treatment they merit. In 2014, Section attorneys processed 19 of these requests and recommended authorization for 8 investigations.

### Agency Representation

The Section also serves as agency counsel to VSP, the Department of Criminal Justice Services (DCJS), the Department of Forensic Science (DFS), and the Office of the Inspector General (OSIG). This legal representation includes, but is not limited to, reviewing proposed legislation, reviewing proposed regulations or amendments to regulations, representing the agencies in federal and state courts, and providing advice to the agencies on a variety of issues such as FOIA requests, contracts, and personnel issues. The Section also is responsible for representing DCJS in administrative hearings involving individuals licensed by the agency, including bail bondsmen, bail enforcement agents, and private security guards. Of the client agencies assigned to the Section, VSP consistently requires the most legal resources. During 2014, Section attorneys represented VSP in various courts throughout the Commonwealth in cases involving motions to vacate improperly granted expungements, and motions to quash subpoenas *duces tecum* where civil attorneys attempted to subpoena VSP criminal investigative files for use in civil cases. Section attorneys also represented VSP in several cases filed by registered sex offenders in which they petitioned the court to be relieved of their registration requirements.

The Section also provides legal advice to the OSIG. Created by the General Assembly in 2011, the OSIG officially became operative in July 2012. It has requested advice on many occasions on issues such as interpretation of *Virginia Code* sections, the proper establishment of FOIA policies, and the scope of its investigative power.

In addition to the duties outlined above, during the year the Section prepared advisory Opinions, reviewed and monitored legislation, and filed and argued appeals on a number of criminal and civil issues. Members of the Section also served as organizers or lecturers at law enforcement training programs such as Gangbusters, the Virginia Gang Investigators' Association Conference, and Human Trafficking training in Virginia.

The Section also provides general legal advice to the following agencies: the Department of Emergency Management (DEM), the Department of Fire Programs, the State Fire Marshal, and the Department of Military Affairs. In addition, it responds to requests for legal advice from the Governor's Office and the Secretary of Public Safety and Homeland Security as they are assigned. A unique feature of representing DEM is that it involves close interaction with the Virginia Emergency Operations Center (EOC), especially during emergency situations. The EOC maintains 24/7 contact information for agency counsel within the Section. During emergencies, agency counsel is in contact with the EOC and the State Coordinator of DEM, either in person or via telephone at all times, including after hours and weekends. Agency counsel reviews draft "state of emergency" declarations for DEM before these declarations are sent to the Governor. In addition, DEM agency counsel works with other agency counsel and local government attorneys to field legal issues that arise during emergencies.

In addition to providing legal advice, the Section represents DEM in regional and national emergency management activities and events, including presentations on emergency management at the Virginia Local Government Attorneys Conference, the Virginia State Bar Pro Bono Conference, the Governor's Campus Preparedness Conference, and the Virginia Emergency Management Symposium (annually). Other events include the National Capital Region (NCR) Legal Counsel Workgroup consisting of state and local attorneys in the NCR jurisdictions, as well as counsel from the District of Columbia.

Finally, the Section serves as counsel to the Department of Military Affairs. In this capacity it works with the Virginia National Guard on issues of state law relating to Guardsmen who are not in federal service, and it advises the Virginia Defense Force. Section counsel for the Department of Fire Programs/State Fire Marshal advises on legal issues related to fire protection.

#### MC&ET Financial Crime Investigators

The Section retains two financial investigators and one financial analyst who work to identify, target, and disrupt the financial aspects of crime in the Commonwealth. One investigator is based at the Loudoun County Sheriff's Office, and the other is based at the Frederick County Sheriff's Office. The financial analyst is based in Richmond.

This team works to disrupt the flow of criminal proceeds in the Commonwealth. They also enable Commonwealth's Attorneys and other law-enforcement officials to better address and attack the financial aspects of crime in their jurisdictions by assisting in 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. Examples of 2014 investigations include the following:

The investigation of *Frank Welch Jr., et al.*, is being conducted jointly with the Frederick County Sheriff's Office. Mr. Welch is the owner/operator of a gas station/mini-mart in Stephens City, Virginia. He is under investigation for cigarette trafficking and money laundering.

The investigation of *Maria Rosalba Alvarado McTague* is being conducted by the United States Attorney's Office for the Western District of Virginia and Homeland Security Investigations (HSI) in Harrisonburg, Virginia. Ms. McTague is believed to be involved in labor-related human trafficking through her restaurant in Harrisonburg known as "Inca's Secret."

During 2014, the investigative team assisted state prosecutors in Maryland and Virginia in charging and convicting individuals for violations of felony conspiracy, possession and transportation of untaxed cigarettes, unlawful purchase of tax stamps, as well as violations of the Virginia Comprehensive Money Laundering Statute and the Virginia RICO statute. Federal partners in this effort included the Bureau of Alcohol, Tobacco, Firearms and Explosives; Homeland Security Investigations; the Internal Revenue Service; the United States Secret Service; the FBI; and the United States Attorney's Office for the Western District of Virginia. State and local agency partners included agents of the Virginia ABC Board, the Virginia National Guard, the Virginia State Police, the Virginia Department of Taxation, the Northern Virginia Cigarette Tax Board, and police and prosecutors from Emporia City/Greenville County, Fairfax County, Orange County, Shenandoah County, Fredericksburg City/Spotsylvania County, and Rockingham County.

### **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 administering and enforcing the MSA, the Unit collaborates with the National Association of Attorneys General Center for Tobacco and Public Health as well as other MSA states. During 2014, the Commonwealth received more than \$115 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 to prevent childhood obesity.

The Unit also maintains the Virginia Tobacco Directory, which lists tobacco product manufacturers that have been certified as compliant with Virginia state law, and also collects information on cigarette stamping activity throughout the Commonwealth. The Unit enforces the MSA's implementing legislation through the

review, analysis, and investigation of manufacturer applications to sell cigarettes in the Commonwealth; the 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 the task forces of federal, state, and local law enforcement agencies to combat cigarette trafficking. Specifically in 2014, the Unit conducted 1,813 retail inspections and seized 20,736 packs of contraband cigarettes, filed 269 civil cases involving the destruction of seized contraband, investigated more than 30 potentially false businesses involved in cigarette trafficking, conducted 19 stamping agent facility inspections, performed 20 stamping agent field audits, and certified 29 cigarette manufacturers as compliant with Virginia state law. Members of the Unit also studied tobacco legislation in the General Assembly and provided information to the Virginia State Crime Commission for its use in a study of cigarette trafficking in the Commonwealth. Finally, the Unit continued to work with outside counsel representing the Commonwealth in the settlement of a multi-million dollar MSA payment dispute.

### **Health Care Fraud and Elder Abuse Section**

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

The Medicaid Fraud Control Unit (MFCU) of the Health Care Fraud and Elder Abuse Section investigates and prosecutes allegations of Medicaid fraud and elder abuse and neglect in health care facilities. MFCU is operated by investigators, auditors, analysts, computer specialists, attorneys, outreach workers, and support staff. Over the past 32 years, MFCU has successfully prosecuted more than 177 providers in cases involving patient abuse and neglect, or fraudulent acts committed against the Medicaid program, and has amassed over \$1.9 billion dollars in criminal and civil recoveries. In addition to prosecuting those responsible for health care fraud or abuse, the MFCU recovered over \$6,384,000 in 2014, representing court-ordered criminal restitution, asset forfeiture, fines, penalties, civil judgments, and settlements.

MFCU had a successful year in 2014. At the end of the year, MFCU had 45 active criminal investigations. The Civil Investigations Squad opened 86 new civil cases, and 9 criminal cases were awaiting trial or sentencing in federal court. MFCU ended the calendar year with 27 convictions and delivered restitution checks in excess of \$22,408,418 to the Department of Medical Assistance Services (DMAS) to be deposited into the Commonwealth's General Fund Health Care Account. MFCU has seen an increase in referrals as it continues to work with local jurisdictions and agencies throughout the Commonwealth.

MFCU has expanded its outreach efforts to help inform the public on the latest methods to prevent and report elder abuse, and to provide an additional resource for investigative referrals. MFCU Community Outreach Coordinators in Richmond, Tidewater, Roanoke, Abingdon and Northern Virginia work to establish and strengthen programmatic partnerships between MFCU and community organizations, government agencies, academic institutions, and law enforcement professionals working with Virginia's senior population. MFCU also is developing a working group made up of MFCU staff, prosecutors, ombudsmen, social services agencies, law enforcement

agencies, adult protective services agencies, and other organizations that will share information and collaborate on issues of elder abuse and neglect. This working group may eventually be used as a best practices model throughout the Commonwealth. MFCU publishes an Annual Report, a law enforcement training video, and a quarterly newsletter; it also has a Twitter account and active Facebook page.

In 2014, MFCU won the Inspector General's Award for Excellence in Fighting Fraud, Waste, and Abuse. This award is presented annually to the nation's top MFCU by the United States Department of Health's Office of the Inspector General (OIG). In 2013, MFCU broke its own record for the largest case investigated by a state agency in its \$1.5 billion case against Abbott Labs for improperly marketing and promoting the prescription drug Depakote. Virginia's MFCU previously won the OIG Award in 2008 following a similar case against Purdue Pharma, which was the largest case ever at the time. Criteria for the OIG Award of Excellence include MFCU's impact as measured in monetary recoveries and convictions, its use of innovative investigative and prosecutorial techniques, and its MFCU's level of success in collaborating with the OIG's Office of Investigations, the state's Medicaid agency, and other law enforcement partners.

In nominating MFCU for this award, OIG noted the Unit's strong partnerships and collaborative work with the Virginia Department of Medical Assistance Services, the United States Attorneys' Offices for the Eastern and Western Districts of Virginia, the FBI, the Criminal Investigation Division of IRS, the Virginia Department of Health, the Virginia Department of Social Services, and the OIG for the United States Department of Health and Human Services.

In September 2014, MFCU received its second national award of the year when the Taxpayers Against Fraud Education Fund (TAFEF) presented the Unit with its "Honest Abe" Integrity in Government Award at its annual conference in Washington, D.C. Since 2006, the award has been presented to individuals and organizations that combat fraud against government funds through the use of False Claims Act laws and other anti-fraud measure aimed at promoting the public-private partnership between the government and whistleblowers.

Significant cases handled by MFCU during 2014 are described as follows:

In *United States v. Choice Group, Inc.*, a case in the United States District Court (E.D. Va.), the Unit helped settle a *qui tam* action that returned \$106,846.78 to the Commonwealth's General Fund Health Care Account. The plaintiff is the largest private vocational rehabilitation company in the Commonwealth. It is an accredited Employment Services Organization (ESO) and has been a party to contracts with the Commonwealth regarding reimbursement for the provision of vocational rehabilitation services to disabled persons under the Medicaid and Rehabilitation Act programs. The complaint alleged a scheme by the plaintiff to submit false and fraudulent claims for reimbursement by submitting claims for non-billable activities and maintaining false or inaccurate client records.

After several years of investigation, a settlement was reached that resolved fraudulent claims for services submitted under the Medicaid program to DMAS for

non-billable activities between August 1, 2009 and May 31, 2011. These non-billable activities included claims for services performed without the client present, overlapping claims where one counselor worked with multiple clients at the same time, and overlapping claims where more than one counselor worked with the same client at the same time. The total settlement amount, representing the plaintiff's civil liability for federal and state false claims, was \$217,080.

In *United States v. Perry*, a case in the United States District Court (E.D. Va.), defendants were charged with conspiracy to commit health care fraud, health care fraud (four counts), false statements relating to health care matters (eight counts), alteration of public records, and aggravated identity theft (four counts). The defendants prepared and submitted to DMAS approximately 6,472 fraudulent claims representing that personal care services and respite care services had been provided to 78 Medicaid recipients. Additionally, with the help of a DBH employee, Allison Hunter-Evans (Hunter-Evans), the defendants attempted to conceal their fraudulent billing by altering the medical documentation on Medicaid patient forms. Hunter-Evans had previously pled guilty to one count of alteration of public records. As a result of the fraud, Medicaid was billed \$1,328,744.40 for work that was not performed. On September 16, 2014, the defendants were found guilty on all counts by a federal jury. On January 8, 2015, the district court sentenced defendant W. Wayne Perry to 63 months in prison, followed by three years of supervised release. Co-defendant Angela Perry was sentenced to 25 months in prison, followed by three years of supervised release. In addition, they are together responsible for the payment of \$1,459,451.08 in restitution.

In *Commonwealth v. James H. Fincham, Jr.*, *Commonwealth v. Alma J. Fincham*, *Commonwealth v. Kilby*, and *Commonwealth v. Muller*, the cases initially were referred to MFCU through an anonymous phone call advising that Medicaid recipient James Fincham was committing health care fraud. The caller advised that Fincham, his wife Alma Fincham (employer of record), and his two aides, Brittany Kilby and Haley Muller, were billing Medicaid for services not being provided. The Finchams had entered into an agreement with Kilby and Muller that Kilby and Muller would complete timesheets for both personal care and respite care hours. The Finchams approved the timesheets and the money was split between the Finchams, Kilby, and Muller.

On February 5, 2014, James Fincham appeared in the Louisa County Circuit Court and entered a guilty plea to two counts each of Medicaid fraud and Obtaining Money by False Pretenses. On April 21, 2014, he was sentenced to 4 years with 3 years suspended on each Medicaid Fraud count, as well as 4 years with all time suspended on each False Pretenses count, with time imposed to be served consecutively. He will be on supervised probation for a period of 3 years upon his release from prison, and he has been ordered to make restitution in the amount of \$19,316.13.

On February 5, 2014, Brittany Kilby and Haley Muller appeared in the Louisa County Circuit Court and each entered a guilty plea to one count of Medicaid fraud. On April 26, 2014, Kilby was sentenced to 5 years with all time suspended, placed on supervised probation for a period of 3 years, and ordered to make restitution in the amount of \$1,800.00. On April 26, 2014, Muller was sentenced to 5 years with all time

suspended, placed on supervised probation for period of 4 years, and ordered to make restitution in the amount of \$11,550.09.

On February 5, 2014, Alma Fincham appeared in the Louisa County Circuit Court and entered a guilty plea to one count of Medicaid fraud and one count of Obtaining Money by False Pretenses. On April 30, 2014, she was sentenced to 5 years with 4 years suspended on the Medicaid fraud count, as well as 5 years with all time suspended on the False Pretenses count. She will be placed on supervised probation for a period of 5 years upon her release from prison, and has been ordered to make restitution in the amount of \$18,375.30.

In *United States v. Avi Klein et al.*, a federal Grand Jury returned an indictment on June 24, 2014, charging Avi Klein of Miami Beach, Florida; Alicia Dietrich, of Lancaster, Ohio; Charles R. Menten, of Wilton Manors, Florida; and Vicki Cox, of Kingsport, Tennessee, with various crimes relating to the operation of the nursing facility formerly known as the “Brian Center Health and Rehabilitation Center” in Weber City, Virginia. Klein was charged with racketeering conspiracy; conspiracy to commit wire, mail and healthcare fraud; wire fraud (ten counts); healthcare fraud; mail fraud (55 counts); obstruction of justice; and conspiracy to commit money laundering. Dietrich was charged with racketeering conspiracy; conspiracy to commit wire, mail and healthcare fraud; wire fraud (8 counts); healthcare fraud; mail fraud (55 counts); obstruction of justice; and conspiracy to make false statements. Menten was charged with racketeering conspiracy; conspiracy to commit wire, mail and healthcare fraud; wire fraud (two counts); mail fraud (55 counts); and conspiracy to commit money laundering. Cox was charged with racketeering conspiracy; conspiracy to commit wire, mail and healthcare fraud; wire fraud (8 counts); healthcare fraud; and conspiracy to make false statements.

The defendants and their associates operated the Brian Center, a 90-bed skilled nursing facility in Weber City, Virginia. They conspired to commit a multi-component fraud scheme that included defrauding Medicare and Medicaid by, among other things, causing the facility to operate without sufficient certified nursing assistants and supplies, in violation of Federal nursing facility requirements. The other components of the fraud scheme included defrauding vendors who supplied goods and services to the facility, and defrauding the facility’s employees of money withheld from their paychecks for benefits that were not provided.

The indictment alleges that the defendants caused residents to live in unsanitary and unclean conditions, to be withheld proper nutrition and personal and oral hygiene, including but not limited to a lack of bathing, toileting, grooming, cleaning, turning, feeding, and meaningful restorative services, and to suffer neglected and untreated pressure sores. If convicted, each defendant faces decades in federal prison, as well as fines in the hundreds of thousands of dollars. Each defendant also faces significant forfeiture possibilities. The trial is scheduled to begin on June 8, 2015.

### **Sexually Violent Predators Section**

Since the Sexually Violent Predators Act became effective in April 2003, the Commitment Review Committee and the courts have referred a total of 1,280 cases to

the Sexually Violent Predators Section. The Section has filed a total of 699 petitions for civil commitment or conditional release, and has reviewed approximately 560 other cases where it was determined that offenders did not meet the statutory criteria to be considered a sexually violent predator, resulting in no petition being filed. Approximately 552 persons have been determined to be sexually violent predators, and approximately 381 have been 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 149 offenders determined to be sexually violent predators have been placed on conditional release.

In 2014, the Section filed approximately 67 petitions, made 436 court appearances, and travelled approximately 77,184 miles.

The Supreme Court of Virginia issued one opinion in 2014 dealing with a sexually violent predator. This was the case of *Gibson v. Commonwealth*. The case arose out of a sexually violent predator trial where the jury found that the respondent met the criteria to be considered a sexually violent predator. During the disposition phase, the trial court agreed with the Commonwealth that based on the court's prior decision in *Commonwealth v. Bell*, the burden of proof lay with the respondent to prove by a preponderance of the evidence that he met all four statutory criteria to be placed on conditional release. The Supreme Court of Virginia, however, reversed the trial court, finding that the burden of proof remains with the Commonwealth to show by clear and convincing evidence that there is no lesser restrictive alternative to civil commitment.

## **TRANSPORTATION, REAL ESTATE & CONSTRUCTION LITIGATION DIVISION**

The Transportation, Real Estate and Construction Litigation Division includes three Sections: Transportation, Real Estate and Land Use, and Construction Litigation. It provides comprehensive legal services to executive agencies, state boards, and commissions within its areas of expertise. The Division provides legal advice on a wide variety of subjects, including advice on matters of employment, contracts, purchasing, and the regulatory process. Division attorneys regularly assist state agencies with complex transactions and also represent those agencies in court, often in close association with other attorneys in the Office.

### **Transportation Section**

The Transportation Section represents and advises the state agencies, offices, authorities, and boards that report to (or are assigned to) the Secretary of Transportation. These bodies include the Virginia Department of Transportation (VDOT), the Commonwealth Transportation Board (CTB), the Department of Motor Vehicles (DMV), 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 Port Authority Board of Commissioners, the Virginia Department of Aviation, the Virginia Aviation Board, the Motor Vehicle Dealer Board, the Virginia Commercial Space Flight Authority, and the Office of Transportation

Public-Private Partnerships for the Commonwealth of Virginia. The Section also advises and serves as counsel to the Secretary of Transportation.

Section attorneys serve their transportation clients in numerous administrative, regulatory, transactional, or contractual matters, including Public-Private Transportation Act (PPTA) transactions; bond issuance and bond refunding/refinancing transactions; contract negotiation, drafting and dispute issues; eminent domain and condemnation issues; land use issues; outdoor advertising and roadway sign issues relating to rights-of-way; personnel issues; environmental issues; procurement strategies and disputes; automobile titling and registration issues; driver licensure and regulation issues; motor vehicle fuels tax collection and enforcement issues; motor vehicle dealer licensure and regulation issues; administration of motor vehicle dealer franchise laws (to include the regulation of disputes between franchise dealers and manufacturers); administration of the VASAP program; review of transportation legislation; rail and other grant agreement drafting and negotiation; FOIA requests; conflict of interests inquiries; and administrative hearings involving a wide variety of issues and agencies.

In 2014, Section attorneys handled many cases involving the Commonwealth's transportation interests. The Section was involved in a case in the Fourth Circuit dealing with the question of the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA) creates a private cause of action enforceable in federal courts. There was a circuit split with regard to the issue, with a majority of circuits holding there was no private cause of action. The Fourth Circuit, which had not yet dealt with the issue, ruled in favor of Section attorneys, holding that no private cause of action exists. This year, the Section also was involved in an appeal to the Supreme Court of Virginia by landowners who contend that the required appraisal for eminent domain offers under *Va. Code Ann.* § 33.1-124 (H) should be admissible as a party admission. Both the statute and prior precedent of the Virginia Supreme Court support treating the offer as inadmissible. The matter has been extensively briefed by the parties, and the Section is awaiting argument and a decision from the Court.

At the trial court level, the Section successfully settled the matter of *Livingston v. Virginia Department of Transportation*, a case in Fairfax Circuit Court that had been remanded to that court by the Supreme Court of Virginia as a result of an appeal in 2013. The case involved flooding at Cameron Run in Fairfax County, a section of which was in VDOT's right-of-way, and which had been altered by VDOT during construction of the beltway in the 1960s. The Section resolved the last outstanding claim concerning the 2006 flooding, and the claim was dismissed by the court in September 2014. This dismissal, along with the settlement of 109 other plaintiffs, resolved all claims pending in the case.

During 2014, the Section also provided legal services associated with closing several key VDOT transportation project transactions, including the negotiation of a \$300 million funding agreement between VDOT and the Metropolitan Washington Airports Authority relating to Phase Two of the Dulles Metrorail Project. The Section also provided advice regarding the termination of the Route 29 Western Bypass project in Charlottesville after the Federal Highway Administration (FHWA) found that too

much time had elapsed on the environmental record and that need for the project was uncertain. The Section assisted VDOT in the development of a new Route 29 Solutions Project aimed at addressing traffic congestion in the Route 29 corridor in Charlottesville and Albemarle County. In addition, the Section was heavily involved in providing legal advice for new highway projects throughout Northern Virginia, particularly in and around the Interstate 66 corridor. The Section assisted with various legal matters associated with the construction and opening of the I-495 HOT lanes. It also assisted with legal issues associated with the creation of the Hampton Roads Transportation Accountability Commission (HRTAC). Furthermore, it addressed legal issues associated with the Interstate 64 Capacity Improvements Project, HRTAC's first highway project, which is expected to be constructed in three phases. Finally, the Section was extensively involved with the Route 460 project in Hampton Roads. It assisted with certain legal issues associated with the project as a PPTA, helped draft new PPTA guidelines, reviewed environmental law issues associated with the Army Corps of Engineers Wetlands Permit as it pertained to the project's proposed route, provided counsel to the Secretary of Transportation and the Commonwealth Transportation Board, and provided legal advice regarding solutions and contract options for the project or the development of a new permissible route for the project.

Considerable time and effort was invested to provide legal services for VDOT's six-year Traffic Operations Center service contract, valued at \$425 million. This groundbreaking contract garnered international attention within both the public and private spheres. The contract privatizes VDOT's traffic management operations and creates a technology-based traffic management system that encompasses five VDOT operations centers and six VDOT operational services. The system allows for efficient statewide traffic monitoring, responses to roadway incidents, and reduction of traffic congestion. In the first year of the contract, the Section assisted with legal and operational challenges arising from the transfer of VDOT resources and responsibilities to the private contractor.

During the year, the Section provided extensive support to VDOT on fiber optic resource sharing agreements. These agreements allow fiber optic companies to install their lines on VDOT right-of-ways, in exchange for the companies' providing VDOT with the necessary fiber optic resources for traffic management and communications functions. These agreements save the Commonwealth's taxpayers significant sums of money.

The Section was involved in two significant Virginia Fraud Against Taxpayers (FATA) suits in 2014. The first involved the Washington Metropolitan Area Transit Authority (WMATA), which settled with the Commonwealth for approximately \$457,000. The second involved an eminent domain matter against a Tysons Corner developer, which settled with the Commonwealth for \$2,275,000. Due to favorable bond and market financing rates in 2014, the Section assisted VDOT and CTB with the issuance of CTB Refunding Bonds for the Camp 30 facility in Fairfax County in the amount of \$55 million, as well as CTB Refunding Bonds for the Route 58 Corridor Development Program in the amount of \$198 million.

The Section handled numerous matters for DMV during 2014. Among other things, it provided legal support for the creation of the first DMV Customer Services Office at a U.S. Army federal installation, Fort Belvoir. It also provided legal support for the DMVs' grant of provisional operating authority to UBER and LYFT, two transportation network companies that utilize private drivers and automobiles to offer rides to citizens via electronic applications over internet and wireless networks. The Section also participated in an "Autonomous Vehicle Research and Development" workgroup with the DMV that raised significant legal and licensing issues for the agency. Work on these significant issues raised the bar on the Section's representation of the DMV, helping the agency achieve cutting edge innovations and successes in 2014.

The Section was also heavily involved in rail transportation issues in 2014. After many years of Section assistance with legal issues and negotiations between VDOT, the Virginia Department of Rail and Public Transportation (DRPT), the Metropolitan Washington Airport Authority, and the Washington Metropolitan Area Transit Authority, the parties successfully completed construction of the Silver Line Metro Rail to Tysons Corner. The Section also assisted DRPT in analysis and response to the Federal Transit Administration's (FTA) concerns over the Tri-State Oversight Committee (TOC), which oversees safety on the WMATA metro-rail system. Other legal projects included negotiations for the Southeast High Speed Rail (SEHSR) Corridor from CSX Transportation; assistance with agreements concerning environmental studies for the development of SESHR; negotiations between VDOT and AMTRACK concerning parking expansion for the Richmond Staples Mill Amtrak station; the negotiation and drafting of agreements with Amtrak for federally-required state assumption of financial responsibility for all inter-city passenger service; and the negotiation of agreements for the expansion of inter-city passenger rail service to Roanoke.

The Section was actively involved in advising the Virginia Port Authority (VPA) in 2014. It handled many legal issues related to the reorganization of the Port Authority's operating company, Virginia International Terminals (VIT), into a single-member Limited Liability Company under the direct supervision of the VPA's Board of Commissioners. Administrative services of the VPA and VIT were consolidated under a shared services agreement, with most services being transferred to the VPA, allowing VIT to focus solely on operating the VPA's maritime terminals. The Section advised VPA's new executive director as he worked to reduce costs and to restructure the Port's business to regain profitability. The Section also assisted the VPA's Board of Commissioners in a multitude of business matters involving container and rail logistics at the Port, as well as advising on the issue of returning container freight to the Portsmouth Marine Terminal while supporting bulk shippers and exporters from the same terminal. The Section also assisted the VPA with various legal issues associated with the availability of funding to meet the existing VPA Bond Covenants.

Finally, the Section researched and gave advice on legal issues associated with Orbital Sciences Corporation's unsuccessful third Commercial Resupply Mission to the International Space Station at Virginia's Mid-Atlantic Regional Spaceport (MARS) on Wallops Island. The launch anomaly and explosion upon liftoff of the Antares Rocket

resulted in approximately \$20 million of damage to launch pad “0A” at the Virginia MARS facility. The Section provided extensive legal advice to the Virginia Commercial Space Flight Authority with regard to Orbital Sciences Corporation’s legal obligations under various MARS agreements associated with launch operations. Orbital had experienced prior success providing International Space Station commercial resupply missions for NASA from the Virginia MARS facility at Wallops Island.

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

The Real Estate and Land Use Section (RELU) handles several specialized areas of legal practice. Real estate issues 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 contact for the transaction. The Section does not handle VDOT right-of-way acquisitions. During 2014, RELU opened 372 new matters and closed 324 matters. At the end of 2014, the Section was handling 220 active cases with an estimated value in excess of \$1 billion.

Significant transactional real estate matters handled for the Commonwealth include sales, purchases, leases and easements on state lands. RELU provides daily advice on real estate issues to the Division of Real Estate Services (DRES) of the Department of General Services (DGS), as well as other state agencies with significant real estate activity. The Section also provides significant real estate support to the various institutions of higher education in the Commonwealth. Real estate litigation includes boundary line disputes, landlord and tenant litigation, title disputes, enforcement of open space and historic preservation easements, and miscellaneous real estate related matters. In addition, the Section reviews real estate related legislation introduced in the General Assembly, and if a bill raises legal or constitutional issues, the Office will notify the patron. The Section also helps prepare and review legislation proposed by the Executive Branch when requested to do so by agencies or Cabinet Secretaries.

In recent years the Section has done a significant amount of work on issues related to the rights of the Commonwealth in and to subaqueous lands. RELU worked closely with the Environmental Section of the Commerce, Environment and Technology Division during the year to advise state agencies and help resolve these issues. This work has intensified in some areas and is expected to continue.

The Section advises the Virginia Outdoors Foundation (VOF), the Department of Conservation and Recreation (DCR), the Department of Forestry (DOF), the Department of Historic Resources (DHR), and local Soil and Water Conservation Districts on their open space easements. The Section also provides general legal advice and serves as agency counsel for both VOF and DHR, including advising on the renovation and restoration incentive programs administered by DHR. During 2014, DHR requested the Section’s increased involvement in general agency matters, and the Section began providing those services.

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, until the tender of a formal complaint and transfer of the case to the Construction Litigation Section. RELU advises the DGS' Division of Engineering and Buildings (DEB), regarding policies, procedures and other issues that arise in DEB's role as statewide construction manager and building official. The Section also reviews and approves all required bid, payment, and performance bonds for construction projects in which DGS is involved. One RELU attorney is located in Northern Virginia and is shared with the Construction Litigation Section. This attorney assists VDOT with contract administration and claims resolution for significant VDOT projects in Northern Virginia in addition to his real estate responsibilities.

RELU continues to serve as the General Counsel to the Fort Monroe Authority (FMA) and as counsel to the Governor on all matters related to Fort Monroe. The Fort, which traditionally has been a U.S. Army installation, contains approximately 565 acres of land with over 400 buildings and other facilities, many of which bear historical significance. Fort Monroe was listed on the 2005 Base Relocation and Closure list, and the Army ceased all active military operations there on September 15, 2011. Three hundred twelve (312) acres of the land area at Fort Monroe reverted to the Commonwealth in 2013. The Commonwealth and the U.S. Army are negotiating an Economic Development Conveyance under the Base Relocation and Closure law for another 80 acres. The remaining 173 acres of federal surplus property (much of it submerged) will be transferred to the National Park Service ("NPS") to create the Fort Monroe National Monument. The Commonwealth has agreed that over 100 acres of its reversionary land will also be transferred to the NPS for creation of the National Monument. During 2014, the Section, on behalf of the FMA, was actively engaged in discussions with the NPS regarding this transfer. It drafted and circulated deeds, easements, and agreements for review and comment by the NPS. Discussions with the NPS and with the U.S. Army will continue in 2015.

Virginia's colleges and universities see an increase in real estate related activity as the economy improves, and much of this activity is accomplished with the participation of each institution's various foundations. The Section often is asked to assist with these transactions, either directly or as support for University Counsel. During 2014 the Section provided significant direct support to Virginia State, Norfolk State and Longwood Universities for a variety of projects. It also assisted University Counsel at Mary Washington, William and Mary, and George Mason on real estate and construction projects for those schools. Of particular note in 2014 was work done for George Mason on the Campus Drive project, as well as assistance provided to Virginia State on the Chesterfield Avenue Development Project. The Section also assisted the Virginia Military Institute (VMI) to finalize a boundary line agreement, along with the relocation of several easements along a portion of the boundary between VMI and Washington & Lee (W&L) to accommodate the expansion of W&L's Global Learning Center. The Section also assisted Radford University in the acquisition of 309 East Main Street in Radford, Virginia, for the construction of a new \$6,927,000 facility.

Other significant projects included assisting the Division of Real Estate Services (DRES) in the first auction sale of surplus property, resulting in the sale of seven properties at various sale prices by various agencies. The Section also assisted the Department of Corrections (DOC) and the Department of Taxation (TAX) in a complex transaction involving the Coffeewood Correctional Center. In this transaction with Culpeper County (i) the Department of Taxation will convey 45 unimproved acres of DOC's Coffeewood Correctional Center to the County for the construction of a County jail, (ii) the County will construct a new water system serving the area where the DOC facility is located and will provide water service to the facility, (iii) DOC will reimburse the County for certain costs associated with constructing the water system, and (iv) the County will use DOC's existing wastewater treatment facility to serve the new County jail. The Section worked with DGS, DOC and TAX in negotiating and drafting the agreements memorializing the various components of the transaction.

Several significant matters were handled for VOF in 2014, including continued legal advice regarding the proposed Trump Golf Course on property in Albemarle County that is under open space easement held by VOF; the resolution of litigation attempting to force a property division in Rockingham County to resolve a contested divorce; legal assistance to help VOF develop strategies for addressing a dispute with the Rockbridge Area Conservation Council over the management of 876 acres in Rockbridge County (including the peaks of House Mountain); and continued legal support regarding the dispute between Martha Bonetta and the Piedmont Environmental Council (PEC) regarding the terms of an easement co-held by VOF and the PEC. In other open space easement matters, the Section worked with VOF and DCR on the transfer of land from Dixon Lumber Company, Inc., to DCR. This transfer was part of a negotiated settlement to mitigate the loss of habitat in an area protected by a VOF easement where Austinville Limestone Company had impermissibly cut timber.

The Section was involved in more litigation than usual during 2014, including the representation of VOF, DHR, and other agency clients in enforcement actions or disputes involving easements. One significant case involved a claim brought against the Commonwealth for \$330 billion based on a claim of illegal confiscation of real property following the Revolutionary War. After a ruling in favor of the Commonwealth, the Plaintiff filed a Petition for Review with the Virginia Supreme Court. The Plaintiff is currently proceeding *pro se*.

Finally, the Section researched, drafted, and filed an amicus brief in the case of *Wetlands America Trust, Inc. v. White Cloud Nine Ventures, L.L.C.* In this case from the Loudoun County Circuit Court, the Commonwealth is concerned about the standard of review established by the trial court for conservation and open space easements. VOF and DHR, in particular, asked the Section to review the decision and determine whether the Commonwealth's arguments should be heard in the case.

### **Construction Litigation Section**

The Construction Litigation Section (CLS) is responsible for all litigation concerning the construction of roads, bridges, and buildings for the Commonwealth's

agencies and institutions. The efforts of this Section support effective partnerships between the Commonwealth, general contractors and road builders, and facilitate timely and efficient completion of construction projects across the Commonwealth, which benefits the citizens of Virginia.

CLS gave legal advice to the Virginia Department of Transportation (VDOT) on every major transportation construction project that VDOT was involved in during 2012. The advice was often provided during the life of the construction projects, or during the claims process and any ensuing litigation. Some significant cases are described below.

CLS continues to provide advice and representation to VDOT in a \$22.4 million suit filed against the agency regarding the Chincoteague Bridge project on the eastern shore of Virginia. This project was the largest road and bridge transportation project on the eastern shore of Virginia in many years. The litigation is highly complex and involves a large number of issues.

During 2014, the Section provided ongoing legal advice and support on the I-495 Virginia HOT Lanes Project, which delivered the most significant enhancements to the Capital Beltway since its opening in 1964. This \$1.4 billion project added two new lanes in each direction, from the Springfield Interchange to just north of the Dulles Toll Road. It also replaced a significant amount of aging infrastructure, in that it involved replacing more than 50 bridges, overpasses, and major interchanges. During the construction phase of the project, the Section advised senior project staff on change order language, claims management, issue documentation, FOIA requests, as well as surety, prompt payment, schedule and emergency management issues. During the past year, the construction phase of the Project achieved substantial completion, and the Section began assisting senior project staff with the Concessionaire's transition to the operation of the HOT Lanes.

The Section also provided substantial assistance to VDOT regarding the I-95 Virginia Express Lanes Project which will create approximately 29 miles of new HOV/HOT lanes on I-95 from Garrisonville Road in Stafford County to the Edsall Road area on I-395. This \$925,000,000 project was procured under the PPTA. At the request of senior project staff, the Section provided ongoing project support, which includes advising on schedule issues, change order language, claims management, issue documentation, and drafting of correspondence. This project was ahead of schedule and expected to meet its substantial completion date under budget as of December 31, 2014. Another significant VDOT project that the Section devoted substantial time and effort to was the ongoing \$74 million design-build contract to construct a truck climbing lane on I-81. The contractor began having difficulties from the beginning of the project and has now filed an \$11.5 million claim. The Section continues to devote a great deal of time defending VDOT from this claim.

The Section worked with VDOT during 2014 regarding the Route 29/Linton Hall Road Interchange Project. This \$267,000,000 project involves construction of a temporary detour for Route 29, construction of two railroad overpasses, widening of Route 29, and the creation of a limited-access facility on a portion of Route 29 and will greatly enhance the interchange with Route 66.

The Section also provided a great deal of assistance on the Route 50 at Courthouse Road project that involves the reconstruction of two major interchanges in Arlington. Due to intense development and heavy congestion in this area, the project presents particularly challenging work sequencing and traffic management issues. Soon after commencing work, the contractor fell significantly behind schedule and sought additional compensation. The Section provided ongoing legal support for the project. After lengthy negotiations, its efforts resulted in a global settlement of all issues through a time certain. VDOT considered the global settlement a major success.

In 2014 a great deal of time and effort was spent by the Section investigating and ultimately causing the Commonwealth to intervene in the case styled *Commonwealth of Virginia v. Trinity Industries, Inc.*, which is currently pending before the Richmond Circuit Court. The matter was previously filed under seal. Trinity manufactures and sells guard rail end treatments that are purported to act as crash cushions when motorists travelling on Virginia's highways have an accident and crash into the end of a guard rail. Changes were made to the product in 2005 and neither the FHWA nor any of the effected states, including Virginia, were notified of the changes by Trinity. The changes should have been disclosed, as they appear to have made the product much less safe. This case is being pursued as a Fraud Against Taxpayers action.

During 2014 the Section worked on over \$100,000,000 in claims and litigation involving the Commonwealth. Claims and litigation against the Commonwealth handled by the Section sought nearly \$6.5 million, but were resolved for a collective total payment by the Commonwealth of approximately \$1.6 million. In addition, the work of the Section resulted in payments to the Commonwealth, its departments, and universities, in the amount of approximately \$9.65 million.

### **LEGISLATIVE ACCOMPLISHMENTS**

In 2014, this Office worked with a bipartisan set of legislators to introduce or craft a number of bills aimed at promoting public safety and consumer protection.

The Office won a significant victory with passage of a law sponsored by Senator Richard Stuart and Delegate Israel O'Quinn that protects Virginia businesses from "patent trolling." These bad faith claims of patent infringement force businesses, including many small businesses, to choose between paying exorbitant and unjustified license fees or fighting the claim through costly litigation. The bill enjoyed the support of a broad, bipartisan coalition of stakeholders. It established criteria for determining whether a patent infringement claim is being made in bad faith, a practice that costs the United States' economy as much as \$29 billion per year. Those criteria include issuing a letter claiming infringement that includes false statements, does not identify the patent holder, fails to specify how the target is infringing, demands an unreasonable license fee, or reasserts infringement claims that have previously been declared baseless by a court. This Office will assist businesses in pursuing those who make such fraudulent claims.

In addition, as part of this Office's ongoing efforts to offer greater protections to victims of crimes, three public safety bills were crafted to (1) make witnesses of drug-related crimes and violent felonies eligible for important protections, including the ability to keep their identifying and contact information confidential (2) extend the address confidentiality program to victims of stalking, and (3) self-authenticate 911 calls in criminal proceedings. Our Office drafted these bills based on feedback from public safety advocates. All three bills were passed by the General Assembly.

The Office also worked alongside legislators on House Bill No. 403, a bill that I previously introduced as a member of the Senate of Virginia, which makes prior sexual offenses admissible in court when a defendant is accused of a felony sexual offense with a child. The passage of this bill gives prosecutors another tool to protect victims and imprison dangerous sex offenders.

The Office also fought for the elimination of the cruel practice of fox penning, a practice in which wild foxes are trapped, confined, and hunted by dogs for purposes of training, or, in some cases, sport, competition, and gambling. After years of legislative stalemate on the issue, the Office worked with the Department of Game and Inland Fisheries, the Secretary of Natural Resources, and the General Assembly to enact compromise legislation that places a moratorium on any new facilities and phases out fox-penning in Virginia.

Finally, the Office continued its ongoing efforts to combat human trafficking and the sexual exploitation of minors. It worked with stakeholders and legislators to create and promote comprehensive legislation that would have created new penalties for traffickers, promoted justice for victims, and allowed for the seizure and forfeiture of property used in committing such felonies. Unfortunately, the legislature chose not to pass the comprehensive legislation we helped craft, but we believe the bill can and will serve as an important model for human trafficking legislation in future sessions.

## **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 Office attorneys. Opinions are assigned to attorneys within all Divisions of the Office based on the request's subject matter. In 2014, the Opinions Section received over 100 opinion requests, including requests not statutorily entitled to a response, that were withdrawn, or that were answered by previously issued opinions. The Office issued 64 official, informal and conflict of interests opinions in 2014, including the 50 official opinions published in this report and on the Office website. 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 by May 1.

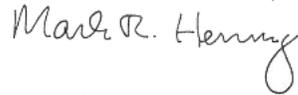
## **CONCLUSION**

It is an honor and pleasure to serve the citizens of the Commonwealth as Attorney General. The achievements of the attorneys and staff of this Office are many, and while

it is impossible to include all of their accomplishments in this report, the names of the dedicated professionals who served the Office last year are listed on the following pages. The citizens of the Commonwealth are well served by the efforts of these individuals.

With kindest regards, I am

Very truly yours,

A handwritten signature in cursive script that reads "Mark R. Herring". The signature is written in dark ink and is positioned above the printed name.

Mark R. Herring  
Attorney General

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

Kenneth T. Cuccinelli II .....	Attorney General
Mark R. Herring .....	Attorney General
Cynthia E. Hudson .....	Chief Deputy Attorney General
Patricia L. West .....	Chief Deputy Attorney General
Cynthia V. Bailey .....	Deputy Attorney General
Rita W. Beale .....	Deputy Attorney General
Jeffrey M. Bourne.....	Deputy Attorney General
Linda Lee Bryant.....	Deputy Attorney General
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Jill M. Ryan.....	Senior Assistant Attorney General/Chief
Kristina P. Stoney.....	Senior Assistant Attorney General/Chief
Allyson K. Tysinger .....	Senior Assistant Attorney General/Chief

<sup>1</sup> This list includes all persons employed and compensated by the Office of the Attorney General during calendar year 2014, 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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Richard C. Vorhis.....	Senior Assistant Attorney General/Chief
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Victoria L. Johnson .....	Assistant Attorney General
Brittany Alicia Jones .....	Assistant Attorney General
Adam L. Katz .....	Assistant Attorney General
Benjamin H. Katz .....	Assistant Attorney General
Elizabeth C. Kiernan .....	Assistant Attorney General
Usha Koduru .....	Assistant Attorney General
Grant E. Kronenberg .....	Assistant Attorney General
Mark S. Kubiak .....	Assistant Attorney General
Michelle A. L’Hommedieu .....	Assistant Attorney General
Amanda L. Lavin .....	Assistant Attorney General
Joshua E. Laws .....	Assistant Attorney General
Stephanie Cothren Lloyd .....	Assistant Attorney General
Albert Pilavin Mayer .....	Assistant Attorney General
John D. McChesney .....	Assistant Attorney General
Patrick A. McDade .....	Assistant Attorney General
Robert B. McEntee Jr .....	Assistant Attorney General
Erin R. McNeill .....	Assistant Attorney General
Mikie F. Melis .....	Assistant Attorney General
Charis A. Mitchell .....	Assistant Attorney General
Christy W. Monolo .....	Assistant Attorney General
Elaine S. Moore .....	Assistant Attorney General
Ishneila G. Moore .....	Assistant Attorney General
Sean J. Murphy .....	Assistant Attorney General
Valerie L. Myers .....	Assistant Attorney General
Carrie S. Nee .....	Assistant Attorney General
Adele M. Neiburg .....	Assistant Attorney General
James W. Noel III .....	Assistant Attorney General
G. William Norris Jr .....	Assistant Attorney General
Kevin C. Nunnally .....	Assistant Attorney General
Andrew C. O’Brion .....	Assistant Attorney General
Margaret Anne O’Shea .....	Assistant Attorney General
Joseph C. Obenshain .....	Assistant Attorney General
J. Michael Parsons .....	Assistant Attorney General
Keven B. Patchett .....	Assistant Attorney General
Elizabeth B. Peay .....	Assistant Attorney General
Kiva Bland Pierce .....	Assistant Attorney General
Christopher J. Pitera .....	Assistant Attorney General
J. Duncan Pitchford .....	Assistant Attorney General
Ellen M. Porter .....	Assistant Attorney General
Lori L. Pound .....	Assistant Attorney General

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Charles A. Quagliato .....	Assistant Attorney General
Ann M. Reardon .....	Assistant Attorney General
William T. Reisinger .....	Assistant Attorney General
Rodolfo R. Remigio .....	Assistant Attorney General
Eric J. Reynolds .....	Assistant Attorney General
Gregory Lee Richards .....	Assistant Attorney General
Sarah F. Robb .....	Assistant Attorney General
Wendell Charles Roberts .....	Assistant Attorney General
Stacey Elizabeth Rohrs .....	Assistant Attorney General
Carly Luisa Rush .....	Assistant Attorney General
James E. Rutkowski .....	Assistant Attorney General
Tracey D.S. Sanders .....	Assistant Attorney General
Christopher P. Schandavel .....	Assistant Attorney General
Noëlle L. Shaw-Bell .....	Assistant Attorney General
Lisa Han Shin .....	Assistant Attorney General
Nicholas F. Simopoulos .....	Assistant Attorney General
Jessica Morgan Smith .....	Assistant Attorney General
Stephen John Sovinsky .....	Assistant Attorney General
Craig W. Stallard .....	Assistant Attorney General
Kenneth B. Swartz .....	Assistant Attorney General
C. Nicole Sydnor .....	Assistant Attorney General
Mathew A. Taylor .....	Assistant Attorney General
Farnaz Farkish Thompson .....	Assistant Attorney General
Lara K.J. Todd .....	Assistant Attorney General
David M. Uberman .....	Assistant Attorney General
Vincent J. Vaccarella .....	Assistant Attorney General
Erin Dugan Whealton .....	Assistant Attorney General
Colette M. Wilcox .....	Assistant Attorney General
Megan Alma Winfield .....	Assistant Attorney General
William E. Winters Jr. ....	Assistant Attorney General
Randall H. Wintory .....	Assistant Attorney General
Corie Tillman Wolf .....	Assistant Attorney General
Daniel S. Wolf .....	Assistant Attorney General
Erin M. Kulpa .....	Asst. Att’y Gen./Anti-Human Trafficking Coordinator
Susan B. Curwood .....	Asst. Att’y Gen./Dir., Tobacco Enforcement Unit
Michael A. Jagels .....	Assistant Attorney General/CPEU Director
Shannon Dion Taylor .....	Assistant Attorney General/CPEU Director
James F. Entas .....	Assistant Attorney General/Gang Prosecutor
Vaso Tahim Doubles .....	Assistant Attorney General/Prosecutor
Steven W. Grist .....	Assistant Attorney General/Prosecutor
Janine M. Myatt .....	Assistant Attorney General/Prosecutor
Amanda McGuire .....	Assistant Attorney General/Publications Coordinator
Phillip O. Figura .....	Chief Prosecutor
David W. Tooker .....	Chief Prosecutor

Joseph E.H. Atkinson .....	Chief of Fraud & Corporate Neglect Investigations
Shawri Jenica King-Casey.....	Compliance & Transparency Counsel
R. Thomas Payne II.....	Dir., Civil Rights Unit/Asst. Att’y Gen., Fair Housing
Kimberly M. Bolton .....	Lead Attorney/Assistant Attorney General
Candice M. Deisher.....	Lead Attorney/Assistant Attorney General
W. Clay Garrett .....	Lead Attorney/Assistant Attorney General
Frederick S. Fisher .....	Special Assistant Attorney General
Crystal V. Adams .....	Legal Secretary Senior
Michelle Powell Ahearn .....	Paralegal
Lauren Ashworth Ainsley .....	Legal Secretary
Sameer Ali.....	Network Engineer
J. Hunter Allen Jr.....	Investigator
S. Elizabeth Allen.....	Legal Secretary Senior Expert
Brittany A. Anderson .....	Dir., Legislative & Constituent Affairs
Esther Welch Anderson.....	MFCU Administrative Manager
James W. Anderson.....	Investigator
Matthew Patrick Anderson.....	eDiscovery Analyst
Susan M. Antonelli.....	Claims Representative
Leigh E. Archer .....	Director of Administration
Kristine E. Asgian .....	Chief Auditor & Grants Manager
Christine Renee Aubin .....	Investigator
Sheerie C. Ayres.....	Administrative Coordinator
Juanita Balenger .....	Community Outreach and TRIAD Director
David S. Barber .....	Investigator
Joseph Gregory Barlow .....	Investigator
James A. Barr .....	Law Clerk
Andrew P. Barone .....	Investigative Supervisor
Nicolette Stumpf Bateson.....	MFCU Legal Secretary
Delilah Beaner.....	Legal Secretary Senior Expert
Kiana M. Beekman.....	Investigator
Deborah Hurley Bell .....	Community Outreach Coordinator
Rakeisha Pearson Benn .....	Community Outreach Coordinator
Elizabeth K. Beverly .....	Investigator
Yongsheng Bian .....	Data Analyst
Erin Blair Bishop.....	Dispute Resolution Specialist
Mary H. Blackburn.....	Senior Financial Investigator
Heather K. Blanchard.....	eDiscovery Project Manager
Althea Ann Boling.....	Intake Specialist Senior
Kevin Marcelle Boone.....	eDiscovery Analyst
Daniel M. Booth.....	Financial Investigator
Donna M. Brown.....	Financial Manager
Linda F. Browning .....	Employee Relations and Training Manager
Tanya L. Buresh-Werby .....	Deputy Director of Office Operations

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Timothy Paul Burke .....	Investigative Supervisor
Howard K. Burkhalter .....	Investigator
Charles R. Calton .....	Claims Representative
Diana Tas Cardelino .....	EEO Investigator/Mediator
Laura Jean Carman .....	Investigator/Forensic Examiner
Lera L. Champagne-Andriani .....	Nurse Investigator
Jason E. Chandler .....	Investigator
Pamela Renee Charles .....	IT Support Specialist I
Addison L. Cheeseman .....	MFCU Computer Forensic-IT Supervisor
Cory K. Chenard .....	Deputy Scheduler & Press Assistant
Gloria A. Clark .....	Legal Secretary Senior
Randall L. Clouse .....	Director & Chief, Medicaid Fraud Control Unit
Betty S. Coble .....	Legal Secretary Senior Expert
Christina I. Coen .....	Legal Secretary Senior Expert
Sharon T. Colescott .....	Legal Secretary Senior
Joseph J. Conahan .....	Investigator
Deborah P. Cook .....	Claims Specialist Senior Expert
John K. Cook Jr. ....	Facilities Supervisor
Jill S. Costen .....	Deputy Director, Investigations & Audits
Katherine A. Courain .....	Scheduler
Billy Jack Cox Jr. ....	Investigator
Donna D. Creekmore .....	Legal Secretary Senior
Charles E. Crute Jr. ....	Senior Criminal Investigator
Thomasina Margaret Cunningham .....	Auditor
Deborah Diane Daniels .....	Executive Assistant to Senior Counsel
Beverly B. Darby .....	Investigator
Jennifer S. Dautzier .....	Criminal Analyst Senior
Demetrice A. Davis .....	Dispute Resolution Specialist
Diane W. Davis .....	Legal Secretary
J. Randall Davis .....	Community Outreach Coordinator
Tunisia M. Dean .....	Accountant Senior
Robert A. DeGroot .....	Investigative Supervisor
Doyle W. DeGuzman .....	Deputy Dir., Information Systems
Linda A. Dickerson .....	Unit Manager, CIRU
Polly B. Dowdy .....	Paralegal Senior Expert
Edward J. Doyle .....	Director, FCIC
Kelly Ford Ecimovic .....	Senior Expert Claims Representative
Elizabeth A. Edmond .....	Paralegal Senior
Melinda S.C. Edwards .....	Paralegal
Sonya L. Edwards .....	Paralegal Senior
Devin A. England .....	Financial Investigator
David Buck Farmer .....	Investigator
Tosha A. Feild .....	Investigator
Mark S. Fero .....	Public Safety Financial Manager

Vivian B. Ferry	Legal Secretary Senior Expert
Teresa J. Finch	Intake Specialist Senior
Arian N. Fisher	Administrative Assistant
Hunter W. Fisher	Program Coordinator
Cheryl D. Fleming	Administrative Legal Secretary Senior
Caren Yeager Flick	Investigator
Judith B. Frazier	Legal Secretary Senior
April Shannon Freeman	Program Coordinator
Lisa Garren Furr	Program Coordinator
Shannon Marie Gammel	Financial Investigator
William W. Gentry	Criminal Investigator
Sharon K. Goggin	Paralegal
Montrua H. Goldfarb	Paralegal Senior
Brian J. Gottstein	Director of Communication
David C. Graham	Director, Computer Forensics Unit
LaToya S. Gray	Executive Assistant to the Attorney General
Karl E. Grotos	Business Manager
Johnetta Hill Guishard	Community Outreach Coordinator
Steven F. Hadra	Investigative Supervisor
Tracy Lee Hall	Web Specialist
Lyn J. Hammack	Administrative Legal Secretary Senior
Paul Gabriel Hastings Jr.	Investigator
Euticha B. Hawkins	Publications Assistant
Thomas E. Haynesworth	Facilities Assistant
Jennifer Peterson Heatherington	Investigator
Regina M. Hedman	Investigator
Deborah J. Henderson	Legal Secretary Senior
Rebecca L. Hensby	Legal Secretary Senior Expert
Howard J. Hicks III	Investigative Supervisor
Shaquita I. Hicks	Receptionist
Michael T. Hnatowski	eDiscovery Project Manager
Margaret C. Horn	Chief of Multi-State Investigations
Sandra W. Hott	Legal Secretary Senior
Elizabeth E. Hudnall	Nurse Investigator
Wendy Renee Hupp	Financial Manager
Steven D. Irons	Investigative Supervisor
Judith G. Jesse	Paralegal Senior Expert
Douglas A. Johnson	Deputy Director of Investigations & Audits
Genea C.P. Johnson	Paralegal
Kevin M. Johnson	Senior Investigator
Shawne Moore Johnson	Legal Secretary Senior
Tierra G. Johnson	Legal Secretary Senior
Jon M. Johnston	Senior Criminal Investigator

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Whitney W. Jones.....	Legal Secretary
Tammy P. Kagey.....	Paralegal Senior Expert
Hyo J. Kang.....	Senior Database Administrator/Developer
Michael G. Keen.....	Investigator
Amy Saucier Kelley.....	Analyst
Michael K. Kelly.....	Director of Communication
Debra M. Kilpatrick.....	Administrative Coordinator
Chrystal L. Knighton.....	Programmer Supervisor
Jennifer Lynn Krajewski.....	Paralegal Senior
Nichole Sarah Krol.....	Financial/Senior Procurement Manager
Mary Anne Lange.....	Paralegal Senior Expert
Donna Lynn Lanno.....	Deputy Director of Finance
Wailing Lau.....	Asset Forfeiture Coordinator
Rachel Anne Lawless.....	Director of Scheduling
Laura Ann LeBlanc.....	Paralegal
Patricia M. Lewis.....	Unit Program Coordinator
William T. Ludwig.....	Data Analyst
Deborah L. Madison.....	Director of Information Systems
Deborrah W. Mahone.....	Paralegal Senior Expert/Legislative Specialist
Jason A. Martin.....	Computer Forensic Specialist
Madrika Lavona Martin.....	Procurement Manager
Sara I. Martin.....	Human Resources Analyst
Tomisha R. Martin.....	Claims Specialist Senior
Joshua A. Marwitz.....	Investigator
Stephanie B. Maye.....	Legal Secretary Senior
LaToya L. Mayo.....	Administrative Assistant
Angela M. McCoy.....	Administrative Legal Secretary Senior
Lauren Perry McDaniel.....	Claims Representative
Judy O. McGuire.....	Claims Representative
George T. McLaughlin.....	Investigator/Forensic Examiner
Melissa A. McMenemy.....	Statewide Facilitator
Katelyn E. Melo.....	MFCU Community Outreach Coordinator
Jacqlyn W. Melson.....	Investigator
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
Nicole Danielle Monroe.....	Director of Information Systems
Eda M. Montgomery.....	Investigative Supervisor
Terrie Darnell Montour.....	Legal Secretary
Jonah F. Morrison.....	Senior IT Support Specialist
Patricia A. Morrison.....	Unit Manager, DRIU
Zachary H. Moyer.....	Criminal Investigator/Computer Forensic Examiner

Howard M. Mulholland.....	FCIC Financial Investigator
Eric W. Myer.....	Computer Programmer
Janice M. Myer.....	Analyst
Mary C. Nevetral.....	Receptionist
Connie J. Newcomb.....	Director of Office Operations
Meaghan E. O'Brien.....	Outside Counsel Program Coordinator
Kevin C. O'Holleran.....	Chief of Staff
Trudy A. Oliver-Cuoghi.....	Paralegal
Christopher M. Olson.....	Investigator
Timothy J. Ortwein.....	Financial Investigator/Computer Forensic Examiner
Janice R. Pace.....	Financial Manager
Hailey Jeanine Paladino.....	Human Resources Assistant
Sharon P. Pannell.....	Legal Secretary Senior Expert
Doris M. Parham.....	Intake Specialist
John W. Peirce.....	Investigative Supervisor
Coty D. Pelletier.....	Senior Investigator
Duncan Allen Pence.....	Investigator
Jonathan W.T. Peters.....	Financial Investigator
Nicole Therese Phelps.....	Administrative Coordinator
Lynette R. Plummer.....	Exec. Ass't to Att'y Gen. & Chief Dep. Att'y General
Sandra L. Powell.....	Legal Secretary Senior
Sara Duvall Powers.....	Paralegal
Syed A. Rahman.....	Auditor
N. Jean Redford.....	Legal Secretary Senior Expert
Christine Wendy Reed.....	Legal Secretary
David A. Ridsen.....	Investigator
Joseph M. Rusek.....	Investigative Supervisor
Frank Matthew Sasser III.....	Investigator
Kevin R. Satterfield.....	Network Engineer
Constance S. Saupé.....	Administrative Legal Secretary Senior
Tyler J. Saupé.....	IT Support Analyst
Lauri A. Schinzer.....	Claims Specialist
Matthew Z. Scott.....	Computer Programmer
Michelle S. Scott.....	Legal Secretary
Elizabeth G. Sherron.....	Senior Financial Investigator
Sara J. Skeens.....	eDiscovery Supervisor
Alexander Ross Smith.....	Paralegal
Faye H. Smith.....	Human Resource Manager
Jameen C. Smith.....	Claims Specialist Senior Expert
Marian B. Smith.....	Financial Manager
Ruth Ann Smith.....	Paralegal Senior Expert
Tierra Monet Smith.....	Office Assistant
Gerald B. Snead II.....	EEO Manager
Carol Snodgrass.....	Data Analyst Supervisor

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Eva A. Stuart .....	Constituent Services Administrator
Rhonda H. Suggs .....	Investigator
Kaci Cummings Sutherlin .....	Consumer Specialist
Tara N. Talbott .....	Nurse Investigator
Gregory G. Taylor .....	Claims Representative
Jeannette T. Taylor .....	Legal Secretary
Kimberly Edwards Taylor .....	Executive Assistant to the Solicitor General
Susan W. Terry .....	Paralegal Senior
Daniel W. Thaw .....	Investigator
Patricia S. Thomas .....	Nurse Investigator
Erin K. Thompson .....	Investigator
Kimberly D. Tinsley-Strauss .....	Claims Representative
Mary E. Trapp .....	Intake Specialist
Ashley C. Trowbridge .....	Investigator
Lynda Turrieta-McLeod .....	Administrative Legal Secretary Senior
Latarsha Y. Tyler .....	Paralegal
Patricia L. Tyler .....	Paralegal Senior Expert/Manager
David M. Varcoe .....	Investigator
Corrine Vaughan .....	Program Director, Victim Notification Program
Laura C. Verser .....	Paralegal
Kathleen B. Walker .....	Program Assistant, Victim Notification Program
Megan Lee Wallmeyer Rose .....	Paralegal Senior
Jonathan Glenn Ward .....	Confidential Assistant & Executive Aide
Mary Vail Ware .....	Director, Programs & Community Outreach
Christie A. Wells .....	Director of Finance
Nanora W. Westbrook .....	Program Asst. Sr., Victim Notification Program
Amy R. Wight .....	Special Projects Coordinator/GRIP Director
Kimberly Wilborn .....	Paralegal
Carlisle M. Williams .....	Auditor
Tiffany D. Williams .....	Intake Specialist
Timothy L. Wilson .....	Administration/Operations Manager
Tonya Ellis Woodson .....	Director of Human Resources
Michael J. Wyatt .....	Senior Investigator
Whitney B. Yarchin .....	Investigator
Abigail T. Yawn .....	Legal Secretary Senior
Adam J. Yost .....	Special Projects Assistant
James A. Zamparello .....	Investigator
Apryl T. Ziegler .....	Paralegal



ATTORNEYS GENERAL OF VIRGINIA  
1776 – PRESENT

Edmund Randolph.....	1776–1786
James Innes .....	1786–1796
John J. Marshall <sup>1</sup> .....	1794–1795
Robert Brooke .....	1796–1799
Philip Norborne Nicholas .....	1799–1819
John Robertson.....	1819–1834
Sidney S. Baxter.....	1834–1852
Willis P. Bocock.....	1852–1857
John Randolph Tucker.....	1857–1865
Thomas Russell Bowden.....	1865–1869
Charles Whittlesey (military appointee).....	1869–1870
James C. Taylor.....	1870–1874
Raleigh T. Daniel .....	1874–1877
James G. Field .....	1877–1882
Frank S. Blair .....	1882–1886
Rufus A. Ayers.....	1886–1890
R. Taylor Scott .....	1890–1897
R. Carter Scott.....	1897–1898
A.J. Montague .....	1898–1902
William A. Anderson .....	1902–1910
Samuel W. Williams.....	1910–1914
John Garland Pollard.....	1914–1918
J.D. Hank Jr. <sup>2</sup> .....	1918–1918
John R. Saunders.....	1918–1934
Abram P. Staples <sup>3</sup> .....	1934–1947
Harvey B. Apperson <sup>4</sup> .....	1947–1948
J. Lindsay Almond Jr. <sup>5</sup> .....	1948–1957
Kenneth C. Patty <sup>6</sup> .....	1957–1958

<sup>1</sup> The Honorable John J. Marshall served as acting Attorney General in absence of James Innes from mid-October 1794 until late March 1795.

<sup>2</sup> The Honorable J.D. Hank Jr. was appointed Attorney General on January 5, 1918, to fill the unexpired term of the Honorable John Garland Pollard, and served until February 1, 1918.

<sup>3</sup> The Honorable Abram P. Staples was appointed Attorney General on March 22, 1934, to fill the unexpired term of the Honorable John R. Saunders, and served until October 6, 1947.

<sup>4</sup> The Honorable Harvey B. Apperson was appointed Attorney General on October 7, 1947, to fill the unexpired term of the Honorable Abram P. Staples, and served until his death on January 31, 1948.

<sup>5</sup> The Honorable J. Lindsay Almond Jr. was elected Attorney General by the General Assembly on February 11, 1948, to fill the unexpired term of the Honorable Harvey B. Apperson, and resigned September 16, 1957.

<sup>6</sup> The Honorable Kenneth C. Patty was appointed Attorney General on September 16, 1957, to fill the unexpired term of the Honorable J. Lindsay Almond Jr., and served until January 13, 1958.

A.S. Harrison Jr. ....	1958–1961
Frederick T. Gray <sup>7</sup> .....	1961–1962
Robert Y. Button .....	1962–1970
Andrew P. Miller.....	1970–1977
Anthony F. Troy <sup>8</sup> .....	1977–1978
John Marshall Coleman.....	1978–1982
Gerald L. Baliles .....	1982–1985
William G. Broaddus <sup>9</sup> .....	1985–1986
Mary Sue Terry .....	1986–1993
Stephen D. Rosenthal <sup>10</sup> .....	1993–1994
James S. Gilmore III.....	1994–1997
Richard Cullen <sup>11</sup> .....	1997–1998
Mark L. Earley .....	1998–2001
Randolph A. Beales <sup>12</sup> .....	2001–2002
Jerry W. Kilgore.....	2002–2005
Judith Williams Jagdmann <sup>13</sup> .....	2005–2006
Robert F. McDonnell.....	2006–2009
William C. Mims <sup>14</sup> .....	2009–2010
Kenneth T. Cuccinelli II.....	2010–2014
Mark R. Herring .....	2014–

<sup>7</sup> The Honorable Frederick T. Gray was appointed Attorney General on May 1, 1961, to fill the unexpired term of the Honorable A.S. Harrison Jr. upon his resignation on April 30, 1961, and served until January 13, 1962.

<sup>8</sup> The Honorable Anthony F. Troy was elected Attorney General by the General Assembly on January 26, 1977, to fill the unexpired term of the Honorable Andrew P. Miller upon his resignation on January 17, 1977, and served until January 14, 1978.

<sup>9</sup> The Honorable William G. Broaddus was appointed Attorney General on July 1, 1985, to fill the unexpired term of the Honorable Gerald L. Baliles upon his resignation on June 30, 1985, and served until January 10, 1986.

<sup>10</sup> The Honorable Stephen D. Rosenthal was elected Attorney General by the General Assembly on January 29, 1993, to fill the unexpired term of the Honorable Mary Sue Terry upon her resignation on January 28, 1993, and served until noon, January 15, 1994.

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

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

<sup>13</sup> The Honorable Judith Williams Jagdmann was elected Attorney General by the General Assembly on January 27, 2005, and was sworn into office on February 1, 2005, to fill the unexpired term of the Honorable Jerry W. Kilgore upon his resignation on February 1, 2005.

<sup>14</sup> The Honorable William C. Mims was elected Attorney General by the General Assembly on February 26, 2009, and was sworn into office on February 27, 2009, to fill the unexpired term of the Honorable Robert F. McDonnell upon his resignation on February 20, 2009.

**CASES**  
**IN THE**  
**SUPREME COURTS**  
**OF**  
**VIRGINIA**  
**AND THE**  
**UNITED STATES**

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**CASES DECIDED IN SUPREME COURT OF VIRGINIA<sup>1</sup>**

*Alexander v. Commonwealth.* Affirming a decision of the Court of Appeals that the evidence was sufficient to convict the defendant of telephone harassment.

*Allen v. Commonwealth.* Reversing decision of the Court of Appeals due to insufficient corroboration of the defendant's confession to aggravated sexual battery.

*American Tradition Institute v. University of Virginia.* Affirming the decision of the trial court that the email records of a former university faculty member were exempt from disclosure under FOIA.

*Blake v. Commonwealth.* Reversing decision of the Court of Appeals that had upheld the defendant's convictions for violating compulsory school attendance law.

*Brown v. Commonwealth.* Affirming decision of the Court of Appeals that the trial court did not violate the indigent defendant's right to counsel when it denied his day-of-trial request for a continuance to retain counsel.

*Commonwealth of Virginia v. Windsor Plaza Condominium Association.* Affirming in part and reversing in part the trial court's rulings with regard to reasonable accommodations under the Virginia Fair Housing Law and sovereign immunity; reversing the trial court's ruling that the Commonwealth was not protected by the doctrine of sovereign immunity for actions it files and maintains under § 36-96.16 pursuant to the issuance of a charge of discrimination by either the Fair Housing Board or the Real Estate Board.

*D'Amico v. Commonwealth.* Affirming the defendant's conviction for unreasonably refusing to submit to a breath test.

*Eggleston v. Commonwealth.* Reversing the Court of Appeals' dismissal of an appeal for an insufficient assignment of error, and holding that an appellant's reference to the place in the record where the error was preserved is not itself part of his assignment of error.

*Farhoumand v. Commonwealth.* Affirming in part and reversing in part a decision of the Court of Appeals that had upheld the defendant's convictions for taking indecent liberties with a minor.

*Findlay v. Commonwealth.* Reversing the Court of Appeals dismissal of an appeal for an insufficient assignment of error and holding that an assignment of error that identifies the particular ruling being challenged is sufficient.

*Hausen v. Commonwealth.* Affirming the decision of the Court of Appeals and upholding the defendant's convictions for distribution of child pornography by electronic transmission.

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<sup>1</sup> 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.

*Jones v. Commonwealth.* Affirming the trial court's dismissal of motion to vacate alleging that judgment of life without parole for a juvenile was void.

*KEPA, Inc. v. VDH.* Reversing a decision of the Court of Appeals holding that hookah lounges that sell retail tobacco are not subject to Virginia's ban on smoking in restaurants.

*Kuchinsky v. Virginia State Bar.* Affirming in part, and reversing in part, an appeal of a public reprimand issued by the Virginia State Bar against Kuchinsky. The Court affirmed the Rule 1.8(a) and 8.4(a) violations, reversed the Rule 3.4(d) violation, and remanded the case to determine sanctions.

*Lawlor v. Davis.* Dismissing habeas corpus case challenging convictions and capital murder sentence of death from trial court.

*Linnon v. Commonwealth.* Affirming decision of the Court of Appeals and upholding the defendant's convictions for taking indecent liberties with a minor in a custodial relationship.

*Maldonado-Mejia v. Commonwealth.* Affirming the Court of Appeals' decision holding that a person remains under indictment pending a deferred adjudication.

*Maxwell v. Commonwealth.* Reversing the holding of the Court of Appeals that Rule 5A:18 barred consideration of the case on the merits.

*Office of the Attorney General, Division of Consumer Counsel v. State Corporation Commission.* Affirming the holding of the State Corporation Commission that an electric utility's enhanced rate of return on common equity authorized by the *Code of Virginia* applies not only to the costs of the electric generating facility itself, but also to associated transmission infrastructure.

*Rowe v. Commonwealth.* Affirming decision of the Court of Appeals upholding convictions for grand larceny and grand larceny with intent to sell.

*Shifflett v. Commonwealth.* Affirming the Court of Appeals' holding that error was harmless in a case against the defendant for aggravated sexual battery.

#### CASES PENDING IN THE SUPREME COURT OF VIRGINIA<sup>2</sup>

*Bailey v. Spangler.* Certified question in a § 1983 civil rights action brought by a surface landowner in federal court alleging that the General Assembly took her mine voids when it amended a statute concerning the ownership of mine voids.

*Chincoteague Inn v. VMRC.* Appeal of the Court of Appeals' decision finding that federal maritime law does not preempt state law with respect to the authority of VMRC.

*Hicks v. Barksdale.* Habeas corpus petition alleging ineffective assistance of counsel.

*Hicks v. Director, Department of Corrections.* Appeal from the trial court's dismissal of habeas corpus petition as untimely.

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<sup>2</sup> Although these cases were pending in the Supreme Court in 2014, some have reached decision in 2015, prior to publication of this Report. Those case decisions will be included in the 2015 Annual Report's Cases Decided.

*In re Chase Carmen Hunter.* Petition for writ of prohibition and writ of mandamus seeking to vacate orders entered by two circuit court judges.

*In re Simon Banks.* Petition for writ of mandamus and/or prohibition seeking relief from a circuit court judge with regard to a criminal prosecution, as well as relief from various employees of the Virginia State Bar related to his punishment for the unauthorized practice of law.

*In re Steven Roy Arnold.* Merits-stage amicus brief in support of a transgender inmate's appeal of the denial of her name-change application filed under *Virginia Code Ann.* § 8.01-217.

*Kaminsky v. VPI State University.* Petition for rehearing of a dismissal of claimant's appeal in a workers' compensation case.

*Lau v. Commonwealth of Virginia.* Appealing the decision of the trial court holding that the plaintiff had contractually agreed with the university's decision to suspend her; and its decision dismissing her breach of contract claim.

*McClary v. Commonwealth,* facial and as-applied challenge to the constitutionality of Virginia's sodomy law where appellant was convicted of committing sex acts with minors.

*Mowbray v. Commonwealth.* Reversing a Court of Appeals' decision that had upheld the defendant's convictions under *Virginia Code Ann.* §§ 18.2-57 and 18.2-137; and finding that the Court of Appeals had erred in its determination that defendant did not sufficiently define his assignments or error in his petition for appeal before the Court of Appeals.

*PCC Technology Group v. State Corporation Commission.* Petition for a writ of mandamus to compel the Commission to stay the award of a contract, and to compel certification of a record for appeal of the Commission's denial of the petitioner's procurement protest.

*Pendleton v. Newsome.* Appealing the trial court's dismissal of a defamation case filed by the parent of an elementary school student who died at school as the result of a peanut allergy.

*Plofchan v. Judicial Inquiry and Review Commission.* Petition for writ of mandamus to compel the JIRC to investigate a complaint filed against a judge by the petitioner, a practicing attorney.

*Powell v. Commonwealth.* Appeal from Court of Appeals' holding that distribution of an imitation Schedule I or II controlled substance occurs where the substance distributed was a Schedule VI controlled substance.

*Ramsey v. Commissioner.* Appealing the issue of the admissibility of certain appraisals in condemnation actions.

*Saunders v. Commonwealth,* facial and as-applied challenge to the constitutionality of Virginia's sodomy law where appellant was convicted of engaging in a public sex act.

*Stuart v. Virginia Commonwealth University.* Petition for Rehearing following the refusal of the Virginia Supreme Court to hear Stuart's appeal of the trial court's decision to uphold the university's decision to deny him in-state tuition.

*Toghill v. Commonwealth.* Facial and as-applied challenge to the constitutionality of Virginia's sodomy law where appellant was convicted of computer solicitation of a minor.

*Tyson v. Virginia Department of Alcoholic Beverage Control.* Petition for rehearing to appeal a Court of Appeals' decision that reinstated a hearing officer's decision to terminate a state employee for cause.

*Wagoner v. Commonwealth.* Appeal from the Court of Appeals' judgment upholding the defendant's conviction for abuse and neglect of an incapacitated adult.

*Walker v. Commonwealth.* Appeal from the decision of the Court of Appeals that the trial court did not abuse its discretion in trying four drug distribution charges together.

*Williams v. Commonwealth.* Appeal from the Court of Appeals' finding that the trial court implicitly took judicial notice that an address was within the City of Norfolk, in a case where defendant is charged with possession with the intent to deliver cocaine

*Zemene v. Commonwealth.* Appeal of an order of a trial court denying habeas relief.

*Ramsey v. Commissioner.* Appealing the issue of the admissibility of certain appraisals in condemnation actions.

#### **CASES REFUSED OR DISMISSED ON PROCEDURAL GROUNDS BY THE SUPREME COURT OF VIRGINIA**

*1st Stop Health Services v. DMAS.* Denying plaintiff's appeal from a decision of the Court of Appeals finding that its documentation errors constituted a material breach of its participation agreement with DMAS.

*Bonney v. Virginia State Bar.* Dismissing on procedural grounds an attorney's appeal from a decision of the Second District Committee to revoke the his license to practice law.

*Christian v. Commonwealth.* Dismissing on procedural grounds a petition for appeal by a homeless person who claimed the Department of Treasury's Unclaimed Property Division held property that was his and would not turn it over.

*Coggeshall v. Virginia Department of the Treasury.* Refusing a petition for appeal in a case involving a dispute about the compensation provided to a court-appointed attorney.

*Davis v. McDonnell.* Dismissing on procedural grounds an appeal of a case against state and city officials involving citations for property maintenance ordinances.

*Harbeck v. Boyle.* Refusing petition for appeal in a case alleging legal malpractice of the petitioner's former public defender.

*Haskins v. McCoy.* Dismissing a mandamus petition requesting that the Clerk of the Court of Appeals vacate a decision of that court.

*In re Aikido Graves-Bey.* Refusing mandamus petition in a case alleging various constitutional wrongs associated with petitioner's criminal and custody matters.

*In re Chase Carmen Hunter.* Refusing petition for mandamus and writ of prohibition against a judge for cooperating with attempts to extradite petitioner and enforce a Florida judgment.

*In re Donald Marro.* Refusing a mandamus petition to compel a general district court judge reconsider a ruling.

*In re Donald Marro.* Granting withdrawal of a petition for writ of prohibition against a general district court judge whom the petitioner claimed was exceeding his jurisdiction by considering a motion for sanctions.

*Irby v. Cavan.* Refusing petition for appeal by former faculty members of Southside Virginia Community College in a case alleging breach of contract and fraudulent concealment after their positions were eliminated due to budget cuts and low enrollment.

*Jafari v. City of Richmond.* Refusing petition for appeal by a non-lawyer who had filed suit on behalf of his business, an LLC, against various defendants alleging restraint of trade and trademark infringement.

*Kane v. Virginia State Bar Disciplinary Board.* Dismissal on procedural grounds of an appeal made by an attorney whose license to practice law was suspended for one year.

*Livingston v. Virginia State Bar Disciplinary Board.* Dismissing the appeal of a prosecutor who challenged the propriety of sanctions he received from the Virginia State Bar's Disciplinary Board. (The prosecutor had withdrawn the appeal.)

*McAllister v. Commonwealth.* Granting plaintiff's withdrawal of petition for appeal in a personal injury lawsuit.

*Nelson v. University of Virginia.* Denying plaintiff's appeal from trial court's summary judgment in favor of the University of Virginia Medical Center in an action to collect on debts for medical services rendered.

*Painter v. Virginia State Bar.* Dismissing on procedural grounds an appeal arising from an attorney's challenge to the Virginia State Bar's suspension of his law license.

*Romero v. West Creek Medical Center, Inc.* Refusing to hear appeal challenging West Creek's standing to appeal an award of a certificate-of-public need to another party.

*Rompalo v. Simmons.* Dismissing on procedural grounds a petition for appeal brought by a party who sought an extraordinary writ in the circuit court to vacate a plea bargain entered in the general district court.

*Smith v. Schiavone.* Refusing petition for appeal by an incarcerated plaintiff seeking return of farm equipment from state police officer.

*Supinger v. Herring.* Refusing petition for appeal from a judgment denying injunction and writ of mandamus to challenge the Attorney General’s appointment of outside counsel to handle the petitioners’ grievance hearings.

*Swart v. Commonwealth.* Refusing petition for appeal after a prisoner sought a writ of mandamus to compel the circuit court to vacate his plea bargain.

*Town & Country Veterinary Clinic v. Virginia-Maryland Regional College of Veterinary Medicine.* Refusing petition for appeal in a lawsuit filed against a state agency alleging business torts.

*Virginia Department of Juvenile Justice v. Coffey.* Refusing petition for appeal seeking to reverse a ruling of the Court of Appeals that had restored a teacher to employment who had been fired for striking a juvenile in a Department of Juvenile Justice facility.

*Vuyyuru v. Virginia Board of Medicine.* Refusing to hear appeal of trial court decision upholding an order of the Board of Medicine denying Petitioner’s application for reinstatement.

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

*Bond v. United States.* Merits-stage amicus brief filed in support of petitioner’s successful challenge of her conviction of violating the Chemical Weapons Convention Implementation Act.

*Bostic v. Rainey.* Denying certiorari petitions to review the Fourth Circuit’s decision affirming the decision of the United States District Court for the Eastern District of Virginia that the Commonwealth’s constitutional and statutory bans on the licensing and recognition of marriage between persons of the same sex violate the Fourteenth Amendment to the United States Constitution.

*Cantor v. Personhuballah.* Pending appeal by Virginia’s Republican congressional delegation—intervenor-defendants in suit brought against members of the State Board of Elections—of decision by a three-judge panel of the U.S. District Court for the Eastern District of Virginia that Virginia’s 3rd Congressional District is a racial gerrymander in violation of the Fourteenth Amendment to the United States Constitution.

*Corr v. Metropolitan Washington Airports Authority.* Pending petition of certiorari in case in which Virginia has sought to intervene to defend the constitutionality of the MWAA compact between Virginia and the District of Columbia.

*Doe v. Virginia Department of State Police.* Denying a petition for writ of certiorari by sex offender challenging the constitutionality of a statute that prevented her access to school grounds as a result of her offender status, where offender failed to avail herself of post-deprivation procedures.

*King v. Burwell.* Merits-stage amicus brief filed in support of affirming the Fourth Circuit’s decision that the Patient Protection and Affordable Care Act makes tax credits available to eligible citizens in all States, regardless of whether the State opted to rely on a federally-facilitated health insurance Exchange, as Virginia did, or to create its own Exchange.

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*Vuyyuru v. Harp.* Denying certiorari following refusal of the Supreme Court of Virginia to hear an appeal involving an order of the Board of Medicine.

*Waters v. Clarke* - Denying certiorari of the Fourth Circuit's decision affirming the district court's dismissal of Waters' habeas corpus petition.

*Willis v. Commonwealth.* Petition for certiorari in a case involving the question of whether the Commonwealth bears *respondeat superior* liability for alleged civil rights abuses committed by police officers in Virginia Beach.

**OFFICIAL OPINIONS**  
**OF THE**  
**ATTORNEY GENERAL**



Section 2.2-505 of the *Code of Virginia* authorizes the Attorney to render official written advisory Opinions only when requested to do so by the Governor; members of the General Assembly; judges; clerks of courts of record; the State Corporation Commission; Commonwealth's attorneys; county, city or town attorneys; sheriffs, treasurers and commissioners of the revenue; 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: 2014 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.ag.virginia.gov](http://www.ag.virginia.gov). 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. 13-033****TAXATION: ENFORCEMENT, COLLECTION, REFUNDS, REMEDIES AND REVIEW OF LOCAL TAXES - BILL IN EQUITY FOR SALE OF DELINQUENT TAX LANDS**

When a suit is brought by a locality's private attorney under § 58.1-3965 for the judicial sale of real property to satisfy a tax delinquency, and the real property is redeemed prior to sale, attorney's fees are collectable only if set by the court.

STEPHEN W. MULLINS, ESQUIRE  
COUNTY ATTORNEY FOR DICKENSON COUNTY  
APRIL 11, 2014

**ISSUES PRESENTED**

You inquire regarding the authority of a locality to collect from a taxpayer attorney's fees incurred by the locality in its efforts to recover delinquent real estate taxes. Specifically, you ask whether such fees are collectable in a situation where suit for judicial sale is initiated by the locality, but the property is redeemed prior to sale, and the case is dismissed with no order providing for attorney's fees.

**RESPONSE**

It is my opinion that when a suit is brought by a private attorney retained by a locality for delinquent taxes and the property is redeemed prior to sale, attorney's fees are collectable only if set by the court.

**BACKGROUND**

You relate that, in 1998, Dickenson County engaged the services of an attorney to file suits for the sale of tax-delinquent lands. The attorney filed suit<sup>1</sup> for the sale of one parcel, but was unable to continue his work in the proceedings due to being appointed to a judgeship. The County paid him approximately \$1,600.00 in fees for his services up to that point. The County did not hire another attorney to continue the proceedings. You advise further that the owner of the parcel entered into an agreement with the County Treasurer to pay the real estate taxes owed on the property and has paid all of the taxes that had been owed on the parcel. Accordingly, no sale of the property occurred. The suit against the parcel owner was stricken from the docket on June 14, 2004. You state the Treasurer recently billed the owner for the \$1,600.00 in attorney's fees.

**APPLICABLE LAW AND DISCUSSION**

The governing law applicable to your inquiry is contained in Article 4 of Title 58.1 of the *Code of Virginia*, entitled "Bill in Equity for Sale of Delinquent Tax Lands."<sup>2</sup> Section 58.1-3965(A) authorizes the sale of real estate "for the purpose of collecting all delinquent taxes on such property" when taxes are owed for more than two years. Section 58.1-3965(A) further provides, in relevant part, that in addition to the tax, "all other costs, including *reasonable attorneys' fees set by the court* . . .

shall be collected if payment is made by the owner in redemption of the real property . . . .”<sup>3</sup> Section 58.1-3974, which deals with such redemption, provides, in relevant part, that an owner “shall have the right to redeem such real estate prior to the date set for a judicial sale thereof by paying into court all taxes, penalties, and interest owed . . . together with all costs including costs of publication *and a reasonable attorney fee set by the court.*”<sup>4</sup>

There is no provision related to judicial sales to collect delinquent taxes that allows for recovery of fees that are not set by the court. Accordingly, because the suit for the subject property was dismissed without a court order imposing attorney fees for redemption, there is no authority for collection of the attorney fees under the facts you present.<sup>5</sup>

Although there is statutory authority for imposing an administrative fee when an attorney or collection agency is hired to undertake collection activities generally,<sup>6</sup> that statute is inapplicable here. In your inquiry, the specific collection remedy chosen by the locality was a bill in equity for the sale of delinquent tax lands filed pursuant to the provisions of § Article 4 of Title 58.1. As concluded above, this enforcement mechanism requires a court order prior to imposition of an attorney fee in such suits. “In construing statutes, if one section addresses a subject in a general way and the other section speaks to part of the same subject in a more specific manner, the latter prevails.”<sup>7</sup>

## CONCLUSION

Accordingly, it is my opinion that when property subject to a judicial sale is redeemed by a taxpayer and there is no court order imposing attorney’s fees for the collection of delinquent taxes, any attorney fees charged to the locality may not be assessed against the taxpayer.

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<sup>1</sup> Specifically, you relate that the attorney filed a bill in equity pursuant to VA. CODE ANN § 58.1-3967 (2013).

<sup>2</sup> Sections 58.1-3965 through 58.1-3975 (2013).

<sup>3</sup> Emphasis added.

<sup>4</sup> Emphasis added.

<sup>5</sup> In Virginia, localities have only those powers granted them by statute: “In Virginia the powers of boards of supervisors are fixed by statute and are limited to those conferred expressly or by necessary implication. This rule is a corollary to Dillon’s Rule that municipal corporations have only those powers expressly granted, those necessarily or fairly implied therefrom, and those that are essential and indispensable.” Bd. of Supvrs. v. Horne, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975) (citations omitted); accord Bd. of Supvrs. v. Countryside Inv. Co., 258 Va. 497, 503, 522 S.E.2d 610, 613 (1999).

<sup>6</sup> See § 58.1-3958 (2013).

<sup>7</sup> Beard Plumbing & Heating v. Thompson Plastics, 254 Va. 240, 245, 491 S.E.2d 731, 734 (1997).

OP. NO. 13-050

**GAME, INLAND FISHERIES, AND BOATING: LICENSES/WILDLIFE AND FISH LAWS**

A Virginia hunter with a valid hunting license from the Virginia Department of Game and Inland Fisheries cannot transfer his hunting tags to another Virginia-licensed hunter to be used to harvest animals on behalf of the transferor.

THE HONORABLE SCOTT A. SUROVELL  
MEMBER, HOUSE OF DELEGATES  
FEBRUARY 21, 2014

**ISSUE PRESENTED**

You inquire whether a Virginia hunter with a valid hunting license from the Virginia Department of Game and Inland Fisheries (“DGIF”) can transfer his hunting “tags” to another Virginia-licensed hunter, who may then use those transferred tags to harvest animals on behalf of the transferor.

**RESPONSE**

It is my opinion that a Virginia hunter with a valid hunting license from DGIF cannot transfer his hunting tags to another Virginia-licensed hunter to be used to harvest animals on behalf of the transferor.

**BACKGROUND**

You relate that one of your constituents is an 80-year-old, retired military officer who is an avid hunter. You indicate that, due to mobility issues, your constituent no longer can field dress an animal once he has killed it, but he would like to continue harvesting fresh venison meat. You further relate that this constituent has informed you that some other states have a proxy program that allows a hunter to request hunting tags on behalf of a disabled hunter. After reviewing the *Code of Virginia*, you are unsure whether Virginia has such a program allowing the transfer of hunting tags. You therefore would like to know whether Virginia law allows Virginia hunters, disabled or not, to transfer their hunting tags.

**APPLICABLE LAW AND DISCUSSION**

The Virginia Constitution provides that “[t]he people have a right to hunt, fish, and harvest game, subject to such regulations and restrictions as the General Assembly may prescribe by general law.”<sup>1</sup> The Board of Game and Inland Fisheries (“BGIF”) administers hunting licenses in the Commonwealth pursuant to its authority to “[e]xercise powers it may deem advisable for conserving, protecting, replenishing, propagating and increasing the supply of game birds, game animals, fish and other wildlife of the Commonwealth”<sup>2</sup> and its power to promulgate regulations establishing the fees charged for hunting licenses.<sup>3</sup> In addition, § 29.1-300 provides

that it is “unlawful to hunt, trap or fish in or on the lands or inland waters” of the Commonwealth without a license, subject to exceptions set forth in § 29.1-301.

As part of a license to hunt bear, deer, or turkey in the Commonwealth,<sup>4</sup> a hunter receives “tags” attached to the license, one for each animal the hunter is permitted to harvest per license year.<sup>5</sup> Upon killing an animal, a licensed hunter is required to remove the notch area from one of the tags on his license.<sup>6</sup> There is no statutory or regulatory provision, or DGIF policy, allowing the transfer of hunting tags from one licensed hunter to another for any purpose. Furthermore, there is nothing in Title 29.1 of the *Code of Virginia* or in current BGIF regulations that would permit a hunter to transfer his license to another hunter. Section 29.1-328 establishes the general terms for hunting licenses, and it does not contain any provision allowing for the transfer of a hunting license for any purpose. There are, in fact, a few statutory provisions that provide specifically for the nontransferability of special types of hunting licenses,<sup>7</sup> but there are no statutes or regulations permitting the transfer of a hunting license from one hunter to another.<sup>8</sup>

Please note that, pursuant to the authority set forth in § 29.1-305.1, BGIF has established bonus deer permits that allow the killing of antlerless deer<sup>9</sup> in addition to the license year bag limit.<sup>10</sup> These permits do not allow the daily bag limit to be exceeded, but there is no restriction on the number of bonus permits that a hunter may purchase and use per license year.<sup>11</sup> Thus, for example, a hunter such as your constituent who finds it difficult to field dress animals could ask a licensed hunter in the Commonwealth to purchase bonus permits to harvest an unlimited number of antlerless deer, subject to other applicable hunting laws, and share the venison meat with him.

Additionally, there are some situations where individuals are permitted to assist other hunters with certain tasks. For example, § 29.1-521(A)(3) allows any properly licensed person, or a person exempt from having to obtain a license, who has obtained the daily bag or season limit to assist others who are hunting game by calling game, retrieving game, handling dogs, or conducting drives in certain situations; and § 29.1-301(N) provides that no hunting license shall be required of any person who is not hunting but is aiding a disabled person to hunt when such disabled person possesses a valid Virginia hunting license. Consequently, your constituent could receive assistance from other persons in those statutorily-established circumstances. Furthermore, § 29.1-521.3 provides that any person otherwise properly licensed to hunt, upon application to a conservation police officer and the presentation of a medical doctor’s written statement based on a physical examination that such person is permanently unable to walk due to impaired mobility, may be issued a lifetime, nontransferable permit to shoot wild birds and wild animals from a stationary vehicle during established open hunting seasons and in accordance with other laws and regulations.

## CONCLUSION

Accordingly, it is my opinion that a Virginia hunter with a valid hunting license from DGIF cannot transfer his hunting tags to another Virginia licensed hunter to be used to harvest animals on behalf of the transferor.

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<sup>1</sup> VA. CONST. art. XI, § 4.

<sup>2</sup> VA. CODE ANN. § 29.1-103(11) (2011).

<sup>3</sup> Section 29.1-303 (2011); *and see* § 29.1-103(16).

<sup>4</sup> DGIF issues a license authorizing the hunting of small game, in addition to which hunters who wish to hunt for bear, deer and turkey must purchase a separate big game license. *See* § 29.1-305 (2011); 4 VA. ADMIN. CODE § 15-20-65.

<sup>5</sup> For example, licensed hunters in Virginia currently are permitted to kill six deer per license year east of the Blue Ridge Mountains and five deer per license year west of the Blue Ridge Mountains. *See* 4 VA. ADMIN. CODE § 15-90-90. Therefore, current hunting licenses include six tags, with one marked to indicate that it is valid for use east of the Blue Ridge Mountains only.

<sup>6</sup> *See* 4 VA. ADMIN. CODE § 15-90-231(A): “Any person killing a deer shall, before removing the carcass from the place of kill, validate an appropriate tag on his special license for hunting bear, deer, and turkey, bonus deer permit, or special permit by completely removing the designated notch area from the tag.” This tag validation requirement is echoed for elk in 4 VA. ADMIN. CODE § 15-90-85 (elk are treated as deer for harvest purposes, as they are of the same *Cervidae* family as deer); for bear in 4 VA. ADMIN. CODE § 15-50-81; and for turkey in 4 VA. ADMIN. CODE § 15-240-81.

<sup>7</sup> *See, e.g.*, § 29.1-302.1 (2011), which authorizes lifetime hunting licenses and includes a specific prohibition against transfer; § 29.1-301(E) (2011), which provides that Virginia residents 65 years of age or older may, upon providing satisfactory proof of age and paying a \$1 fee, apply for and receive a nontransferable annual license permitting them to hunt or trap in all cities and counties of the Commonwealth; and § 29.1-302 (Supp. 2013), which provides for a nontransferable lifetime hunting license for certain resident disabled veterans who are totally and permanently disabled due to a service-connected disability.

<sup>8</sup> In fact, § 29.1-337.1 (2011) provides that it shall be unlawful for any person to, among other things, borrow or lend or attempt to use, borrow or lend a license.

<sup>9</sup> The term “antlerless deer” refers to does, button bucks (male fawns approximately six months old), and deer that have shed their antlers. VA. DEP’T OF GAME AND INLAND FISHERIES, HUNTING & TRAPPING IN VIRGINIA 33 (July 2013 - June 2014), *available at* <http://www.dgif.virginia.gov/hunting/regulations/2013-2014-virginia-hunting-and-trapping-regulations-digest.pdf>.

<sup>10</sup> Section 29.1-305.1 (2011) (“The Board shall establish by regulation a procedure for selling bonus deer permits. Each bonus deer permit purchased shall entitle the holder thereof to take additional deer under conditions prescribed by the Board.”). *See also* VA. ADMIN. CODE §§ 15-20-65, 15-90-90 (establishing the fees for bonus deer permits and setting forth conditions for taking deer under such bonus permits).

<sup>11</sup> *See* 4 VA. ADMIN. CODE § 15-90-90(D) (“Bonus deer permits shall be valid for antlerless deer only. Deer taken on bonus permits shall count against the daily bag limit but are in addition to the seasonal bag limit.”).

OP. NO. 13-077

**TAXATION: STATE RECORDATION TAX**

A deed or contract offered for recording is exempt from the taxes enumerated in §§ 58.1-801 and 58.1-807, and neither the grantor nor the grantee is required to pay such taxes, if the grantor is an organization meeting the criteria set forth in § 58.1-811(A)(14).

THE HONORABLE MICHÈLE B. MCQUIGG  
CLERK OF THE CIRCUIT COURT OF PRINCE WILLIAM COUNTY  
MARCH 14, 2014

**ISSUE PRESENTED**

You ask whether the exemption provided by § 58.1-811(A)(14) to the recordation taxes imposed by §§ 58.1-801 and 58.1-807 is available to the grantor, to the grantee, or to both, when the grantor of the deed or contract filed for recording is an organization that meets the criteria set forth in § 58.1-811(A)(14).

**RESPONSE**

It is my opinion that, so long as the grantor is an organization that meets the criteria set forth in § 58.1-811(A)(14), a deed or contract offered for recording is exempt from the taxes enumerated in §§ 58.1-801 and 58.1-807, and neither the grantee nor the grantor is required to pay those taxes.

**BACKGROUND**

You advise that your office routinely receives filings for deeds on properties where the grantor is Habitat for Humanity, a nonprofit organization, the stated mission of which is to build and repair houses using volunteer labor and donations, and then to sell those houses without profit to families in need of shelter, using innovative financing mechanisms. You also relate that, based on § 58.1-811(A)(14), various parties maintain the following divergent views regarding these filings:

- 1) Both the grantor and grantee are exempt from the taxes enumerated in §§ 58.1-801 and 58.1-807.
- 2) The grantor is exempt, but the grantee is not exempt from the taxes enumerated in §§ 58.1-801 and 58.1-807.
- 3) The grantor is not exempt, but the grantee is exempt from the taxes enumerated in §§ 58.1-801 and 58.1-807.
- 4) Neither party is exempt from the taxes enumerated in §§ 58.1-801 and 58.1-807.

**APPLICABLE LAW AND DISCUSSION**

The Virginia Recordation Tax Act (the “Act”) requires Circuit Court Clerks in Virginia to collect certain recordation taxes.<sup>1</sup> These taxes are based on the privilege of having access to the benefits of state recording and registration laws.<sup>2</sup> Your

inquiry specifically concerns the recordation tax imposed on deeds. The Act in § 58.1-801 provides:

On every deed admitted to record, except a deed exempt from taxation by law, there is hereby levied a state recordation tax. The rate of the tax shall be 25 cents on every \$100 or fraction thereof of the consideration of the deed or the actual value of the property conveyed, whichever is greater.<sup>[3]</sup>

This recordation tax is sometimes referred to as a “grantee’s tax,” as it is generally paid by the grantee of a deed at the time of recordation.<sup>4</sup>

You also request guidance on the tax on the recordation of contracts and leases relating to real or personal property. The Act in § 58.1-807 provides:

Except as hereinafter provided, on every contract or memorandum thereof relating to real or personal property admitted to record, a recordation tax is hereby levied at the rate of 25 cents on every \$100 or fraction thereof of the consideration or value contracted for.<sup>[5]</sup>

There are numerous exemptions to these taxes. Pertinent to your inquiry, the General Assembly has provided in § 58.1-811(A)(14) that:

[t]he taxes imposed by §§ 58.1-801 and 58.1-807 shall not apply to any deed conveying real estate or lease of real estate . . . [w]hen the grantor is an organization exempt from taxation under § 501(c)(3) of the Internal Revenue Code that is organized and operated primarily to acquire land and purchase materials to erect or rehabilitate low-cost homes on such land, which homes are sold at cost to persons who otherwise would be unable to afford to buy a home through conventional means.<sup>[6]</sup>

“When the language of a statute is unambiguous, we are bound by the plain meaning of that language.”<sup>7</sup> The clear and unambiguous language of § 58.1-811(A)(14) evidences that, so long as the grantor is an entity described therein,<sup>8</sup> the taxes imposed by §§ 58.1-801 and 58.1-807 do not apply to the recordation of any deed or lease conveying real estate. In that circumstance, neither the grantee nor the grantor is required to pay these two particular taxes.<sup>9</sup> Conversely, I conclude that if the grantor is not such an entity, then the statutory tax exemption is inapplicable to the recordation.

### CONCLUSION

Accordingly, it is my opinion that, so long as the grantor is an organization that meets the criteria set forth in § 58.1-811(A)(14), a deed or contract offered for recording is exempt from the taxes enumerated in §§ 58.1-801 and 58.1-807, and neither the grantee nor the grantor is required to pay those taxes.

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<sup>1</sup> See VA. CODE ANN. §§ 58.1-800 through 58.1-817 (2013).

<sup>2</sup> See Va. Tax Comm'r Priv. Ltr. Rul., Pub. Doc. 92-234 (Nov. 9, 1992), available at <http://www.policylibrary.tax.virginia.gov/OTP/policy.nsf>. See also *Pocahontas Consol. Collieries Co., Inc. v. Commonwealth*, 113 Va. 108, 112, 73 S.E. 446, 448 (1912); *Fed. Land Bank v. Hubbard*, 163 Va. 860, 864, 178 S.E. 16, 17 (1935).

<sup>3</sup> Section 58.1-801(A) (2013).

<sup>4</sup> See, e.g., *Fed. Land Bank v. Hubbard*, 163 Va. 860, 864, 178 S.E. 16, 17 (1935); 1992 Op. Va. Att'y Gen. 185, 186-87; Va. Tax Comm'r Priv. Ltr. Rul., Pub. Doc. 95-146 (June 9, 1995), available at <http://www.policylibrary.tax.virginia.gov/OTP/policy.nsf>.

<sup>5</sup> Section 58.1-807(A) (2013).

<sup>6</sup> Section 58.1-811(A)(14) (2013).

<sup>7</sup> *Kozmina v. Commonwealth*, 281 Va. 347, 349, 706 S.E.2d 860, 862 (2011) (quoting *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104, 639 S.E.2d 174, 178 (2007)).

<sup>8</sup> Whether Habitat for Humanity is an organization meeting the eligibility criteria set forth in § 58.1-811(A)(14) is a factual determination that must be made by the Clerk of Court. See, e.g., 1990 Op. Va. Att'y Gen. 255, 257 (whether a university's land acquisition is "for educational purposes" and thus meets a recordation tax exemption under § 58.1-811(A)(1) is a question of fact that must be resolved by the Clerk as the local taxing official); 1984-85 Op. Va. Att'y Gen. 391, 392 (Clerk may require such documentation believed necessary to allow the Clerk to determine a partner's percentage participation in "profits and surplus" for purposes of verifying eligibility for the exemptions provided in § 58.1-811(A)(10) and (11)).

<sup>9</sup> It should be noted that recordation taxes are imposed on the act of recording an instrument, not on a particular party to the instrument. This is so even when the legal incidence of the tax is statutorily prescribed, as is the case with the grantor's tax imposed by § 58.1-802. See 23 VA. ADMIN. CODE § 10-320-30(C) (2013). When the grantor of the instrument is a qualifying organization meeting the eligibility criteria set forth in § 58.1-811(A)(14), the act of recording is exempt from taxation, regardless of who bears the economic burden of the tax.

## OP. NO. 13-081

### TAXATION: ENFORCEMENT, COLLECTION, REFUNDS, REMEDIES AND REVIEW OF LOCAL TAXES - CORRECTION OF ASSESSMENTS, REMEDIES, AND REFUNDS

A locality may not by administrative action refund erroneously assessed real estate taxes after the three-year statutory limitation period has passed.

THE HONORABLE S. CHRIS JONES  
MEMBER, HOUSE OF DELEGATES  
MAY 16, 2014

### ISSUE PRESENTED

You inquire whether a locality may refund erroneously assessed real estate taxes for a period beyond the three-year period provided for tax refunds effected by administrative action.

## RESPONSE

It is my opinion that a locality may not by administrative action refund erroneously assessed real estate taxes after the three-year limitation period has passed.

## BACKGROUND

While you do not provide additional details about this tax refund, published news reports indicate that the Suffolk City Assessor was contacted by the owner of two commercial parcels who alleged that the assessments, and thus the taxes determined by the assessments, were erroneous. After investigation, the City Assessor determined that (i) the value of one building was accounted for twice by the value being listed for both parcels, and (ii) the value of a second building continued to be included in assessments despite having been destroyed in a hurricane in 2003. The City Assessor then corrected the assessments retroactively for nine years and authorized a tax refund for that entire period. These actions were taken administratively by the City Assessor. That is, no lawsuit was ever filed, there was no compromise settlement of pending litigation, and no court authorized the refund.<sup>1</sup>

The City Attorney and City Manager were not aware of the revised assessment and the refund until after they occurred. They later explained the matter by saying that the taxpayer had a right to sue the city for a refund of taxes paid based on the erroneous assessments, a court would have had the power, and sufficient evidence before it, to order the payments, and the city thus had the authority to reach a settlement with the taxpayer to avoid litigation.<sup>2</sup> However, there was no settlement document.<sup>3</sup>

While the city refunded taxes for nine years, it simultaneously learned that the taxpayer had received rehabilitation tax credits for which it did not qualify, but it billed the taxpayer for repayment for only three years.<sup>4</sup> No explanation was offered by any Suffolk official for this differential treatment.

Suffolk's Code of Ordinances, in Chapter 82, Article II, authorizes the City Treasurer to refund erroneous payments of taxes, and it authorizes the Commissioner of Revenue to certify to the Treasurer any erroneous assessment of taxes, with the Treasurer then being authorized to refund the excess, together with penalties and interest.<sup>5</sup> By separate law, the City Assessor is authorized to perform this function.<sup>6</sup> The City Code imposes a three-year limitation on the period for which such erroneous taxes may be repaid.<sup>7</sup>

## APPLICABLE LAW AND DISCUSSION

As a previous Opinion notes,<sup>8</sup> the Supreme Court of Virginia has stated that "there is no common law remedy by which to obtain a refund of taxes."<sup>9</sup> Rather, it is well established that "the procedure for correction of erroneous assessments is entirely

statutory.”<sup>10</sup> Further, “no assessment, however erroneous, can be corrected except by virtue of some statute.”<sup>11</sup> Accordingly, as this Office previously has concluded, “the authority to refund taxes must be derived from a statutory remedy.”<sup>12</sup>

Another previous Opinion explains that the General Assembly, in Article 5, Chapter 39 of Title 58.1, has established “three independent procedures for correcting erroneous tax assessments: (1) administrative correction pursuant to §§ 58.1-3980 and 58.1-3981; (2) administrative correction pursuant to a local ordinance adopted pursuant to § 58.1-3990; and (3) judicial correction pursuant to § 58.1-3984.”<sup>13</sup> Although these procedures are distinct, “[t]he several sections of the Code relating to relief against erroneous assessments of property must be considered together.”<sup>14</sup> Because the facts of this matter entail the issuance of refunds by administrative action and not judicial decision, this Opinion will focus on the application of the administrative procedures pursuant to Suffolk’s ordinance on this subject.

In the absence of a local ordinance, the procedure to be followed for a correction of assessment and a refund of taxes requires consent of the local governing body and the local government attorney. Adjustments and refunds made pursuant to these statutes are subject to an explicit three-year limitation.<sup>15</sup> Nonetheless, these consents need not be obtained if the locality, acting pursuant to § 58.1-3990, adopts an ordinance providing “for the refund of any local taxes or classes of taxes erroneously paid.” Under such an ordinance, if the person charged with assessing properties “is satisfied that he has erroneously assessed any applicant with any local taxes, he shall certify to the tax-collecting officer the amount erroneously assessed . . . , and if such taxes have been paid, the tax-collecting officer . . . shall refund to the applicant the amount erroneously paid . . . .” Critically, this statute provides that “[n]o refund shall be made in any case when application therefor was made more than three years after the last day of the tax year for which such taxes were assessed.” The sole exception to the three-year limit is where a particular tax is declared unconstitutional and that is not at issue here.<sup>16</sup> There is no authority under this statute to refund administratively more than three years of excessive taxes for erroneous double taxation of a structure, as allegedly occurred in the present situation. Time limits for tax refunds have been applied in various other contexts by the Supreme Court of Virginia.<sup>17</sup>

As authorized by § 58.1-3990, Suffolk has adopted an ordinance authorizing administrative refund of taxes, upon authority of the City Assessor, without requiring approval of either the City Attorney or City Council. Consistent with the authorizing statute, it contains a three-year limit on refunds, stating “No refund shall be made in any case when application was made more than three years after the last day for which such taxes were assessed.”<sup>18</sup>

In short, Suffolk has an administrative process authorized by state law by which the City Assessor unilaterally may adjust assessments and authorize refunds. Both the

enabling statute and the Suffolk ordinance enacted under its authority contain an explicit three-year limitation on refunds, with no exception made for double taxation or other errors in assessment. Under the Dillon Rule of strict construction, it is well established that political subdivisions of the Commonwealth have only those powers expressly granted or necessarily implied from express powers.<sup>19</sup> The Dillon Rule requires a narrow construction of all powers - such as this one - that have been conferred upon and exercised by local governments.<sup>20</sup> Further, any doubt as to the existence of a power must be resolved against the locality.<sup>21</sup> As is evident, the authorizing statute does not authorize refunds beyond the three-year limitation, and thus the Suffolk City Assessor does not have implied or inherent authority to grant such refunds.

While this assessment correction and refund process was initiated by the taxpayer, the result would be the same had it been an independent correction initiated by the assessor. Such corrections, under Virginia Code § 58.1-3981, must be made “as [t]herein provided.”<sup>22</sup> This includes being bound by the three-year limitation period. A previous Opinion concludes, based on the legislative history of these provisions, that “a correction of an assessment which is erroneous due to a mere clerical error or calculation is subject to a three-year statute of limitations.”<sup>23</sup> A later Opinion explicitly notes that “[t]he time limitation in § 58.1-3980(A) is applicable also to § 58.1-3981,”<sup>24</sup> and advised a commissioner that he was “no longer able to correct the assessment under § 58.1-3981, even if [he] believe[d] the assessment to have been erroneous,” because “§ 58.1-3980(A) places a time limitation on the ability of a commissioner of the revenue, or other official performing the duties of a commissioner, to correct erroneous assessments.”<sup>25</sup>

Finally, as to the statements that a lawsuit could have been filed, that a court could have ordered the full nine-year refund, and therefore the City Assessor had authority to reach a settlement for that full refund, the analysis is simple. No lawsuit was ever filed, the City Assessor does not have authority to settle lawsuits, there was no settlement document, and the City Attorney (who does have inherent authority to settle lawsuits) was not even aware of the correction and the refund until after it occurred. The City Assessor chose a particular remedy to correct the assessments and refund the taxes. The remedy was administrative adjustment pursuant to the City Code. Having chosen that remedy, the City Assessor and the City were bound by the three-year limitation. There was no legal basis to refund more than three years of erroneously assessed taxes under the procedure that was followed here.

The three-year restriction that exists in both state law and the Suffolk City Code cannot be rendered meaningless by hypothetical statements made after conclusion of the refund that there might have been a lawsuit, and it might have been settled under the same terms that the City Assessor authorized administratively. This is

particularly true where the parties making the hypothetical statements were not even aware of the adjustment and refund until after they occurred.

### CONCLUSION

Accordingly, I conclude that a locality, having adopted an ordinance authorizing administrative correction of assessments that imposes a three-year limitation on tax refunds pursuant to an enabling statute imposing that same limitation, lacks legal authority to administratively refund taxes in excess of three years.<sup>26</sup>

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<sup>1</sup> See, e.g., Matthew Ward, *City flouts rules in tax refund*, Suffolk News-Herald, July 13, 2013, available at <http://www.suffolknewsherald.com/2013/07/13/city-flouts-rules-in-tax-refund/>.

<sup>2</sup> See, e.g., R. E. Spears, III, *City changes tax refund policy*, Suffolk News-Herald, July 18, 2013, available at <http://www.suffolknewsherald.com/2013/07/18/city-changes-tax-refund-policy/>.

<sup>3</sup> See, e.g., Matthew Ward, *Refund, not repayment*, Suffolk News-Herald, Aug. 3, 2013, available at <http://www.suffolknewsherald.com/2013/08/3/refund-not-repayment/>.

<sup>4</sup> *Id.* See also Spears, *supra* note 2.

<sup>5</sup> CITY OF SUFFOLK, VA., CODE OF ORDINANCES, § 82-31(a) & (b).

<sup>6</sup> The City Charter authorizes City Council to enact ordinances to have assessments made by an assessor, rather than the Commissioner of Revenue. See CHARTER FOR THE CITY OF SUFFOLK, VA., § 8.06. The City Code implements this transfer of authority to the City Assessor. CITY OF SUFFOLK, VA., CODE OF ORDINANCES, § 82-427. Thus, any laws discussed in this Opinion granting certain powers to, and imposing certain restrictions upon, the Commissioner of Revenue grant the same powers and impose the same restrictions on the City Assessor.

<sup>7</sup> CITY OF SUFFOLK, VA., CODE OF ORDINANCES, § 82-31(c).

<sup>8</sup> 2001 Op. Va. Att’y Gen. 187, 187 n.2.

<sup>9</sup> Commonwealth v. Shell Oil, Co., 210 Va. 163, 164, 169 S.E.2d 434, 436 (1969).

<sup>10</sup> Smith v. Bd. of Supvrs., 234 Va. 250, 255, 361 S.E.2d 351, 353 (1987).

<sup>11</sup> Commonwealth v. Conner, 162 Va. 406, 409, 174 S.E. 862, 863 (1934).

<sup>12</sup> 2001 Op. Va. Att’y Gen. at 187.

<sup>13</sup> 1990 Op. Va. Att’y Gen. 251, 253.

<sup>14</sup> Commonwealth v. Pembroke Limestone Works, 145 Va. 476, 486, 134 S.E. 717, 720 (1926).

<sup>15</sup> VA. CODE ANN. §§ 58.1-3980; 58.1-3981 (2013).

<sup>16</sup> This process is discussed in 2000 Op. Va. Att’y Gen. 194, 196, *accord* 1996 Op. Va. Att’y Gen. 197, 199.

<sup>17</sup> See, for example, Commonwealth v. Richmond-Petersburg Bus Lines, Inc., 204 Va. 606, 609, 132 S.E.2d 728, 731 (1963), where the Court, quoting Commonwealth v. Cross, 196 Va. 375, 83 S.E.2d 722 (1954), held that the “application [for a tax refund] must be made within the time required by the authorizing statute and in accordance with such restrictions or conditions as may be contained therein.”

<sup>18</sup> CITY OF SUFFOLK, VA., CODE OF ORDINANCES, § 82-31(c).

<sup>19</sup> See, e.g., Richmond v. Confre Club of Richmond, Inc., 239 Va. 77, 79, 387 S.E.2d 471, 473 (1990) (“[M]unicipal corporations possess and can exercise only those powers expressly granted by the General

Assembly, those necessarily or fairly implied therefrom, and those that are essential and indispensable.”) (citations omitted).

<sup>20</sup> 2002 Op. Va. Att’y Gen. 176, 178; 2002 Op. Va. Att’y Gen. 77, 77 (citing Bd. of Supvrs. v. Countryside Invest. Co., 258 Va. 497, 522 S.E.2d 610 (1999)).

<sup>21</sup> *Confreere Club of Richmond*, 239 Va. at 79, 387 S.E.2d at 473.

<sup>22</sup> Section 58.1-3981(B), (C). I further note that these exceptions to the taxpayer application requirement are to be strictly construed. *See* 1982-83 Op. Va. Att’y Gen. 525; 1982-83 Op. Va. Att’y Gen. 509, 510; 1984-85 Op. Va. Att’y Gen. 316.

<sup>23</sup> 1985-86 Op. Va. Att’y Gen. 256, 257, n.1 (quoting legislative impact statement stating that the purpose and effect of an adopted amendment was to “remove[] the indefinite time allowed for the correction of [such] assessments”).

<sup>24</sup> 2004 Op. Va. Att’y Gen. 218, n.9.

<sup>25</sup> *Id.* at 221.

<sup>26</sup> In addressing related, yet distinguishable issues, previous Opinions have suggested the same conclusion: *see* 2004 Op. Va. Att’y Gen. at 221, n.18; 1990 Op. Va. Att’y Gen. at 253; 1986-87 Op. Va. Att’y Gen. at 318; 1983-84 Op. Va. Att’y Gen. 405A, 406; 1982-83 Op. Va. Att’y Gen. at 510; 1982-83 Op. Va. Att’y Gen. at 527; 1980-81 Op. Va. Att’y Gen. 64, 65; 1975-76 Op. Va. Att’y Gen. 393, 394; 1957-58 Op. Va. Att’y Gen. 282. *See also* *Mayfair Investment Props. v. Alexandria*, 5 Va. Cir. 155, 157 (Alexandria 1984) (upholding a provision of a tax refund ordinance and distinguishing the provision at issue from one that would have extended the three year filing deadline). I also note that, while a particular locality’s Charter could provide greater authority to the locality to make additional tax refunds, *see* VA. CODE ANN. § 15.2-1103 (2012), the Charter for the City of Suffolk contains no provision for any such enhanced authority.

## OP. NO. 13-091

### COURTS OF RECORD: GENERAL PROVISIONS/CLERKS, CLERKS’ OFFICES AND RECORDS

A circuit court electronic case management system that provides that contents of an order book, that is created using an electronic recording process compliant with the archival standards as recommended by the Library of Virginia, and that follows state electronic records guidelines, fulfills the requirement of an order book as described in § 17.1-124.

THE HONORABLE MICHÈLE B. MCQUIGG  
CLERK OF THE CIRCUIT COURT  
PRINCE WILLIAM COUNTY  
JANUARY 10, 2014

### ISSUE PRESENTED

You inquire whether an electronic case management system, which indexes all cases in the circuit court and maintains copies of the indexed orders for all cases, fulfills the requirements for an order book as described in § 17.1-124 of the *Code of*

Virginia.

## RESPONSE

It is my opinion that an electronic case management system that provides the contents of an order book as prescribed in § 17.1-124, that is created using an electronic recording process compliant with the archival standards as recommended by the Library of Virginia, and that follows state electronic records guidelines as provided in § 42.1-82,<sup>1</sup> fulfills the requirement of an order book as described in § 17.1-124.

## APPLICABLE LAW AND DISCUSSION

The General Assembly prescribed in § 17.1-123(A) that “[a]ll orders that make up each day’s proceedings of every circuit court shall be recorded by the clerk in a book known as the order book.” The General Assembly further prescribed the contents of an order book in § 17.1-124, which provides in relevant part:

Except as otherwise provided herein, each circuit court clerk shall keep order books recording all proceedings, orders and judgments of the court in all matters, all decrees, and decretal orders of such court and all matters pertaining to trusts, the appointment and qualification of trustees, committees, administrators, executors, conservators and guardians shall be recorded, except when the same are appointed by the clerk of court, in which event the order appointing such administrators or executors, shall be made and entered in the clerk’s order book. *In any circuit court, the clerk may, with the approval of the chief judge of the court, by order entered of record, divide the order book into two sections, to be known as the civil order book and the criminal order book.* All proceedings, orders and judgments of the court in all matters at civil law shall be recorded in the civil order book, and all proceedings, orders and judgments of the court in all matters at criminal law shall be recorded in the criminal order book. In any proceeding brought for the condemnation of property, all proceedings, orders, judgments and decrees of the court shall be recorded in the civil order book of the court. . . .

*The clerk shall ensure that these order books have been microfilmed or converted to or created in an electronic format.* Such microfilm and microphotographic processes and equipment shall meet state microfilm standards, and such electronic format shall follow state electronic records guidelines, pursuant to § 42.1-82.<sup>[2]</sup>

Also relevant to your inquiry is § 17.1-240, which relates to using an electronic process for recording purposes. Section 17.1-240 provides, in relevant part, as

follows:

A procedural microphotographic process, digital reproduction, or any other micrographic process which stores images of documents in reduced size or in electronic format, *may be used to accomplish the recording of writings otherwise required by any provision of law to be spread in a book or retained in the circuit court clerk's office, including, but not limited to, the civil and criminal order books . . . .* Any such micrographic, microphotographic or electronic recording process shall meet archival standards as recommended by The Library of Virginia.<sup>[3]</sup>

In construing a statute, the plain meaning of the language determines the legislative intent unless a literal construction would lead to a manifest absurdity.<sup>4</sup> 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.”<sup>5</sup> Additionally, “a statute is not to be construed by singling out a particular phrase,” but must be construed as a whole.<sup>6</sup> Related statutes must be considered together in construing their various material provisions.<sup>7</sup>

Section 17.1-124 expressly requires a circuit court clerk to “ensure” that an order book has been “microfilmed or converted to or created in an electronic format.” If a circuit court clerk does not microfilm an order book, a circuit court clerk either must create the order book in an electronic format or must convert the order book to such a format. While “convert” means to change from one form to another,<sup>8</sup> “create” means to bring into existence.<sup>9</sup> Pursuant to § 17.1-124, an order book may be created in electronic format so long as the electronic format follows the state electronic records guidelines as provided in § 42.1-82.

Section 17.1-124, construed in conjunction with § 17.1-240, confirms that an order book may be in electronic format. Section 17.1-240 expressly permits “a digital reproduction, or any other micrographic process which stores . . . documents . . . in electronic format” to accomplish the recording of writings “to be spread in a book” or “retained in the circuit court clerk's office.” Section 17.1-240 specifies that a recording of writings to be spread in a book or retained in the circuit court clerk's office include the civil and criminal order books. Section 17.1-124 provides that an order book may be divided into two sections: the civil order book and the criminal order book. Pursuant to § 17.1-240, documents in electronic format may constitute the requisite recording of writings in an order book as long as the electronic recording process meets the archival standards as recommended by the Library of Virginia.

## CONCLUSION

Accordingly, it is my opinion that an electronic case management system that

provides the contents of an order book as prescribed in § 17.1-124, that is created using an electronic recording process compliant with the archival standards as recommended by the Library of Virginia, and that follows state electronic records guidelines as provided in § 42.1-82, fulfills the requirement of an order book as described in § 17.1-124.

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<sup>1</sup> VA. CODE ANN. § 42.1-82 (2013).

<sup>2</sup> VA. CODE ANN. § 17-124 (2010) (emphasis added).

<sup>3</sup> Section 17.1-240 (2010) (emphasis added).

<sup>4</sup> Halifax Corp. v. First Union Nat'l Bank, 262 Va. 91, 99-100, 546 S.E.2d 696, 702 (2001).

<sup>5</sup> Signal Corp. v. Keane Fed. Sys., 265 Va. 38, 46, 574 S.E.2d 253, 257 (2003).

<sup>6</sup> Virginia Elec. & Power Co. v. Citizens for Safe Power, 222 Va. 866, 869, 284 S.E.2d 613, 615 (1981).

<sup>7</sup> Prillaman v. Commonwealth, 199 Va. 401, 405-06, 100 S.E.2d 4, 7 (1957); see Colbert v. Commonwealth, 47 Va. App. 390, 395, 624 S.E.2d 108, 110-11 (2006).

<sup>8</sup> THE AMERICAN HERITAGE DICTIONARY 320 (2d ed. 1985).

<sup>9</sup> *Id.* at 338.

## OP. 13-099

### CONSTITUTION OF VIRGINIA: BILL OF RIGHTS

#### EMINENT DOMAIN: GENERAL PROVISIONS/CONDEMNATION PROCEDURES

The Virginia Supreme Court's holding in *State Highway & Transportation Commissioner v. Linsly* remains valid after the adoption of § 25.1-230.1.

The "reasonableness" standard for access to real property articulated by the Virginia Supreme Court in *State Highway & Transportation Commissioner v. Dennison* is not in conflict with the definition of "lost access" in § 25.1-100 as being "a material impairment of direct access to property" and, thus, the reasonableness standard and the statutory definition may be read together in determining whether a change in access constitutes compensable lost access caused by the taking or damaging of private property for public use.

The Virginia Supreme Court's holding in *State Highway Commissioner v. Easley* remains valid after the enactment of the General Assembly's definition of "lost access" in § 25.1-230.1(B); where a loss of access occurs conjointly with a taking or damaging of private property, just compensation may include damages for lost access unless the body determining just compensation finds that the injury sustained is one the property owner experiences in common with the general community.

Whether there is a material impairment of direct access and whether a property owner is entitled to just compensation for lost access are questions of fact, unless the facts in a specific case lead the court to conclude that reasonable persons cannot differ, in which circumstance the court may proceed with the determination as a matter of law.

HONORABLE J. CHAPMAN PETERSEN  
MEMBER, SENATE OF VIRGINIA  
JANUARY 10, 2014

### ISSUES PRESENTED

You ask several questions regarding the recently amended Article I, § 11, of the Constitution of Virginia, the related legislation contained in §§ 25.1-100 and 25.1-230.1 of the *Code of Virginia*, and a previous opinion of this Office (“Prior Opinion”)<sup>1</sup> that concern the power of eminent domain as it relates to just compensation owing for lost access. Specifically,

1. You ask how I reconcile my Prior Opinion and the award of damages in *State Highway & Transportation Commissioner v. Linsly*,<sup>2</sup> where direct access to a public highway was replaced by indirect access via a service road, with the statement in newly enacted § 25.1-230.1 that “[t]he body determining just compensation may not consider an injury or benefit that the property owner experiences in common with the general community, including off-site circuitry of travel and diversion of traffic, arising from an exercise of the police power;”
2. You ask whether a landowner, whose “particular entrance onto his property may be unchanged, is entitled to compensation if the road to which he has direct access is changed to a service drive;”
3. You ask whether the “reasonableness” standard in *State Highway & Transportation Commissioner v. Dennison*<sup>3</sup> remains applicable or whether it has been replaced with “material impairment” under § 25.1-100;
4. You ask whether my Prior Opinion, concluding that the holding of *State Highway Commissioner v. Easley*<sup>4</sup> would not bar a damage claim due to installation of a median or other traffic regulation in a case where the loss of access occurs conjointly with a taking or damaging of the property, still applies in light of the definition of “lost access” provided in §§ 25.1-100 and 25.1-230.1;<sup>5</sup> and
5. You ask if the determinations of whether there is a material impairment of access and/or whether property owners are entitled to just compensation for lost access, as defined under §§ 25.1-100 and 25.1-230.1, will be made by judges as legal findings or by juries/commissioners as factual findings.

## RESPONSE

It is my opinion that:

1. The holding in *Linsly* and the views expressed in my Prior Opinion remain valid after the adoption of § 25.1-230.1, especially in light of the express statement made in § 25.1-100 by the General Assembly that its statutory definition of “lost access” neither diminishes any existing right or remedy nor creates any new right or remedy, other than to allow the body determining just compensation to consider a change in access in awarding just compensation;
2. Whether any particular change in access to a specific landowner’s property constitutes compensable lost access is a fact-dependent question and, therefore, is properly a matter for the body determining just compensation to resolve, based on the evidence in each case;
3. The “reasonableness” standard articulated in *Dennison* is not in conflict with the new statutory definition of “lost access” in § 25.1-100 as being a “material impairment of direct access to property” and, thus, the reasonableness standard and the statutory definition may be read together in determining whether a change in access constitutes compensable lost access caused by the taking or damaging of private property for public use;
4. The holding in *Easley* and the views expressed in my Prior Opinion remain valid after the enactment of the General Assembly’s definition of “lost access” in § 25.1-230.1(B); where a loss of access occurs conjointly with a taking or damaging of private property, just compensation may include damages for lost access unless the body determining just compensation finds that the injury sustained is one “the property owner experiences in common with the general community, including off-site circuitry of travel and diversion of traffic, arising from an exercise of the police power;” and
5. Whether there is a material impairment of direct access and whether a property owner is entitled to just compensation for lost access are questions of fact properly left to the body determining just compensation, unless the facts in a specific case lead the court to conclude that reasonable persons cannot differ, in which circumstance the court may proceed with the determination as a matter of law.

## BACKGROUND

After passage in the 2011 and 2012 Sessions of the General Assembly, and successful presentation to the voters of the Commonwealth, Article I, § 11, of the Constitution of Virginia was amended as follows:

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.<sup>[6]</sup>*

On January 1, 2013, complementary legislation defining the term "lost access" and providing procedures to determine the just compensation related thereto also became law.<sup>7</sup> These new statutory provisions now provide, in pertinent part, that

"Lost access" means a material impairment of direct access to property, a portion of which has been taken or damaged as set out

in subsection B of § 25.1-230.1. This definition of the term “lost access” shall not diminish any existing right or remedy, and shall not create any new right or remedy other than to allow the body determining just compensation to consider a change in access in awarding just compensation.<sup>[8]</sup>

The body determining just compensation shall include in its determination of damage to the residue any loss in market value of the remaining property from lost access caused by the taking or damaging of the property. The body determining just compensation shall ascertain any reduction in value for lost access, if any, that may accrue to the residue (i) beyond the enhancement in value, if any, to such residue as provided in subdivision A 1 of § 25.1-230, or (ii) beyond the peculiar benefits, if any, to such other property as provided in subdivision A 2 of § 25.1-230, by reason of the taking and use by the petitioner. If such peculiar benefit or enhancement in value shall exceed the reduction in value, there shall be no recovery against the landowner for such excess. The body determining just compensation may not consider an injury or benefit that the property owner experiences in common with the general community, including off-site circuitry of travel and diversion of traffic, arising from an exercise of the police power. The body determining just compensation shall ensure that any compensation awarded for lost access shall not be duplicated in the compensation otherwise awarded to the owner of the property taken or damaged.<sup>[9]</sup>

Any and all liability for lost access and lost profits shall be established and made a part of the award of just compensation for damage to the residue of the property taken or damaged.<sup>[10]</sup>

### **APPLICABLE LAW AND DISCUSSION**

On January 26, 2012, subsequent to the passage of the first reference of the constitutional amendment, but prior to the enactment of legislation defining “lost access,” I answered several questions related to the impact of the proposed constitutional amendment on existing eminent domain jurisprudence.<sup>11</sup> In light of the Prior Opinion and the passage of the legislation, I turn now to your specific queries.

#### **I.**

First, you ask whether the principles stated in *Linsly* remain valid law after the General Assembly enacted § 25.1-230.1 to provide that “[t]he body determining just compensation [for a taking or damaging of private property] may not consider an

injury or benefit that the property owner experiences in common with the general community, including off-site circuity of travel and diversion of traffic, arising from an exercise of the police power.”<sup>12</sup> I see no conflict between the established precedent contained in *Linsly* and the new statutory provisions defining “lost access.”

*Linsly* concerned the conversion of an existing highway into a limited access highway. As a result of the project, the Commissioner of Highways (the “Commissioner”) acquired 0.48 acre of land and easements resulting in the extinguishment of the landowner’s direct highway access.<sup>13</sup> The Commissioner planned to substitute direct highway access with indirect access via a newly constructed service road.<sup>14</sup> The Court found that just compensation to the landowner for the damaged residue “is the difference between the value of the residue immediately before and immediately after the taking” and that the determination should include any change of value to the residue resulting from the substituted access.<sup>15</sup> The Court distinguished the substitute access at issue in *Linsly* from other cases where direct access was merely reduced or limited.<sup>16</sup> As discussed in the Prior Opinion of this Office:

[a]n 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 . . . *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.<sup>17</sup>

Prior to the amendment of Article I, § 11 and the new statutory provisions defining “lost access,” courts declined to permit a property owner to submit to the body determining just compensation (jury or commission)<sup>18</sup> evidence of damages caused by lost access unless the case involved an extinguishment of direct access.<sup>19</sup> The Virginia Constitution now expressly states that lost access is a component of just compensation to be provided in the taking or damaging of private property and directs the General Assembly to define the term “lost access” by statute.<sup>20</sup> The General Assembly now has defined compensable “lost access” more broadly than the extinguishment of direct access.<sup>21</sup> The effect of the new law, as I discuss below, is that a jury or commission determining just compensation now will consider evidence regarding lost access damages even in cases where direct access is not extinguished. The legislature signaled that intention with its qualification in § 25.1-100 that the new “lost access” definition “shall not diminish any existing right or remedy, and shall not create any new right or remedy *other than* to allow the body determining just compensation to consider a change in access in awarding just compensation.”<sup>22</sup> This qualification also signals the legislature’s intention that,

except in instances of conflicts (notably, for example, the question of when a jury or commission may consider evidence of damage sustained by lost access), existing eminent domain statutes and the related body of case law remain applicable, including *Linsly*.<sup>23</sup>

It will be the responsibility of the empanelled jury or commission determining just compensation to weigh the evidence and make the necessary findings of fact, guided by instructions from the court consistent with Article I, § 11, the eminent domain statutes, and the related body of case law. In accordance with directions provided by the General Assembly in its new enactments, this fact finding will include determinations of whether the taking or damaging of the property has resulted in “a material impairment of direct access to property”<sup>24</sup> and whether that impairment is “an injury ... that the property owner experiences in common with the general community, including off-site circuitry of travel and diversion of traffic, arising from an exercise of the police power.”<sup>25</sup>

In your question, you highlight one sentence from the new enactments; however, “[a] statute is not to be construed by singling out a particular phrase[, for] every part is presumed to have some effect and is not to be disregarded unless absolutely necessary.”<sup>26</sup> Principles of statutory construction require that statutes related to a similar subject be construed together in order to achieve a harmonious result.<sup>27</sup> Consequently, the sentence to which you point is properly interpreted in the context of both the amended Article I, § 11 and the related statutory provisions in §§ 25.1-100 and 25.1-230.1.

In my opinion, the new statute’s provision related to injuries experienced in common with the general community and arising from an exercise of the police power would not have changed the result in *Linsly*. *Linsly* involved the extinguishment of an abutter’s easement of access - a property interest, and the court held that the extinguishment constituted a compensable taking. *Linsly* did not address an injury arising from the exercise of police power and experienced in common with the general community; therefore, the provisions you emphasize in the new statute would not have applied in that case. A landowner’s right to just compensation arises from the taking or damaging of property, not the exercise of the police power by the regulation of traffic. Accordingly, under both *Linsly* and the new statute, there is a right to just compensation where there is a taking or damaging of property, but not where there is only the exercise of the police power in the regulation of traffic.

## II.

Your second question asks whether a landowner is entitled to just compensation for lost access if the entrance to his property remains unchanged, but the road to which he has access is changed. Such a determination may involve a number of factors

based on more detailed information than you have provided.<sup>28</sup> Accordingly, an answer to your question would require factual determinations that, under current law, a jury or commission now will make. Attorneys General decline to render opinions where the request involves a matter that requires a factual determination or is a question of fact rather than of law.<sup>29</sup> Consequently, I respectfully must decline to render an opinion on whether a landowner would be entitled to just compensation for lost access in the circumstance you present. Instead, as the Virginia Supreme Court has observed, “[i]t will be for commissioners and juries, under the supervision of the courts, to determine upon the facts of each case whether or not there has been such damage to property as should be compensated.”<sup>30</sup>

### III.

Your third question asks whether the “reasonableness” standard relating to access has been replaced with a “material impairment” standard from the new statutory definition of “lost access.” The “reasonableness” standard arises, in part, from the Virginia Supreme Court’s ruling in *State Highway & Transportation Commissioner v. Dennison*.<sup>31</sup> In *Dennison*, the Court agreed with a jury instruction providing that:

[T]he owner of land abutting a public highway is only entitled to *reasonable access* to his property. His rights of access are subordinate to the right of the State to control traffic over its highways. If you find that the landowners in this case will have *reasonable access* to the property after the construction of this project, you shall not make any awards for residue damages that might result from a change in access.<sup>[32]</sup>

Although the new constitutional and statutory language does not employ the same terminology as the reasonableness standard stated in *Dennison*, it is unnecessary to find a conflict between the two. Indeed, it is quite possible to read the provisions together as complementary.

While the *Dennison* rule bars compensation if reasonable access remains, the new statutory language requires compensation if the taking includes a material impairment of direct access. The General Assembly has not provided a definition for either “material” or “reasonable.” In the absence of such a statutory definition, the plain and ordinary meaning of a term is controlling.<sup>33</sup> The word “material” means “having real importance or great consequences,” and the word “reasonable” means “moderate” or “fair.”<sup>34</sup> I am of the opinion that the standards may be read together. If a jury or commission were to find reasonable access to remain after a taking, the jury or commission logically also could conclude the impairment not to be material. Alternatively, if a jury or commission were to find the impairment to be of real importance or great consequence, the jury or commission likely would not find remaining direct access to be moderate or fair considering the circumstances of the taking.

## IV.

You also ask for confirmation of my Prior Opinion as it related to the holding in *Easley*, which I restate here for the purpose of clarity:

The proposed [constitutional] 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 [constitutional] Amendment provides that just compensation will include damages for the lost access. Under the [constitutional] 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.<sup>[35]</sup>

These conclusions remain unchanged. As discussed in the Prior Opinion, “[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,”<sup>36</sup> and 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.”<sup>37</sup> Neither the recent constitutional amendment nor the accompanying statutes appear to have changed 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.”<sup>38</sup> To be clear, “the abutter has no property right in the continuance or maintenance of the flow of traffic past his property.”<sup>39</sup> In its definition of “lost access,” the General Assembly chose to continue this distinction by prohibiting compensation for “an injury . . . that the property owner experiences in common with the general community, including off-site circuity of travel and diversion of traffic, arising from an exercise of the police power.”<sup>40</sup>

## V.

Your final two inquiries address whether certain findings are legal questions to be determined by the court or factual questions to be presented to the finder of fact. Specifically, you ask if the determination of whether there is a material impairment of access and/or whether property owners are entitled to just compensation for lost access, are legal findings or factual findings. To reiterate the current law, a property owner is entitled to just compensation related to lost access if he suffers a material impairment of direct access to his property arising from an exercise of eminent domain.<sup>41</sup> Necessarily, if the taking or damaging has caused a material impairment to direct access, then the property owner is entitled to just compensation calculated as the loss of value to the residue.<sup>42</sup> The threshold question, then, is whether there has been a material impairment of access to the property caused by the taking or damaging.

Although the General Assembly did not explicitly state whether the determination of material impairment is a factual or legal finding, determining “materiality” or the state of having “real importance or great consequences”<sup>43</sup> would appear to be an inherently fact-dependent exercise.<sup>44</sup> Generally, “[i]t is only when the issue is one about which reasonable persons cannot differ—the question so plain in the meaning and interpretation that should be given to it—that no doubt is admitted of its legal significance and effect, that it becomes a question of law for the courts to determine.”<sup>45</sup> The question of material impairment, then, in my opinion, is one of fact unless the facts in a specific case lead the court to find that reasonable persons cannot differ, in which case the court may proceed with the determination as a matter of law.<sup>46</sup> Once the fact finder, or the court, finds a material impairment of direct access amounting to lost access, “[t]he body determining just compensation shall include in its determination of damage to the residue any loss in market value of the remaining property from lost access caused by the taking or damaging of the property.”<sup>47</sup>

### CONCLUSION

Accordingly, it is my opinion that:

1. The holding in *Linsly* and the views expressed in my Prior Opinion remain valid after the adoption of § 25.1-230.1, especially in light of the express statement made in § 25.1-100 by the General Assembly that its statutory definition of “lost access” neither diminishes any existing right or remedy nor creates any new right or remedy, other than to allow the body determining just compensation to consider a change in access in awarding just compensation;
2. Whether any particular change in access to a specific landowner’s property constitutes compensable lost access is a fact-dependent

question and, therefore, is properly a matter for the body determining just compensation to resolve, based on the evidence in each case;

3. The “reasonableness” standard articulated in *Dennison* is not in conflict with the new statutory definition of “lost access” in § 25.1-100 as being a “material impairment of direct access to property” and, thus, the reasonableness standard and the statutory definition may be read together in determining whether a change in access constitutes compensable lost access caused by the taking or damaging of private property for public use;
4. The holding in *Easley* and the views expressed in my Prior Opinion remain valid after the enactment of the General Assembly’s definition of “lost access” in § 25.1-230.1(B); where a loss of access occurs conjointly with a taking or damaging of private property, just compensation may include damages for lost access unless the body determining just compensation finds that the injury sustained is one “the property owner experiences in common with the general community, including off-site circuity of travel and diversion of traffic, arising from an exercise of the police power;” and
5. Whether there is a material impairment of direct access and whether a property owner is entitled to just compensation for lost access are questions of fact properly left to the body determining just compensation, unless the facts in a specific case lead the court to conclude that reasonable persons cannot differ, in which circumstance the court may proceed with the determination as a matter of law.

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<sup>1</sup> 2012 Op. Va. Att’y Gen. 37.

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

<sup>3</sup> State Highway & Transp. Comm’r v. Dennison, 231 Va. 239, 343 S.E.2d 324 (1986).

<sup>4</sup> State Highway Comm’r v. Easley, 215 Va. 197, 207 S.E.2d 870 (1974).

<sup>5</sup> I respectfully disagree with your inquiry’s characterization of the Prior Opinion. I previously stated that the holding in *Easley* would allow a damage claim due to lost access—not traffic regulation—occurring conjointly with a taking or damaging of the property. See 2012 Op. Va. Att’y Gen. 37, 45.

<sup>6</sup> See 2011 Va. Acts ch. 757; and 2012 Va. Acts chs. 736, 738.

<sup>7</sup> See 2012 Va. Acts chs. 699, 719.

<sup>8</sup> VA. CODE ANN. § 25.1-100 (Supp. 2013).

<sup>9</sup> Section 25.1-230.1(B) (Supp. 2013).

<sup>10</sup> Section 25.1-230.1(D).

<sup>11</sup> 2012 Op. Va. Att’y Gen. 37.

<sup>12</sup> Section 25.1-230.1(B).

<sup>13</sup> *Linsly*, 223 Va. at 439, 290 S.E.2d at 835.

<sup>14</sup> *Id.* at 439-40, 290 S.E.2d at 835-36.

<sup>15</sup> *Id.* at 444, 290 S.E.2d at 839.

<sup>16</sup> *Id.* at 441-44, 290 S.E.2d at 837-39.

<sup>17</sup> 2012 Op. Va. Att’y Gen. at 44.

<sup>18</sup> “Body determining just compensation” is defined in § 25.1-100 to mean “a panel of commissioners empanelled pursuant to § 25.1-227.2, jury selected pursuant to § 25.1-229, or the court if neither a panel of commissioners nor a jury is appointed or empanelled.” This statutory definition applies to the legal analysis and discussion of this Opinion.

<sup>19</sup> *See Easley*, 215 Va. at 203, 207 S.E.2d at 874-75 (finding that the trial court erred in permitting commissioners to consider as an element of damages the reduction in access of the parcels to Route 58).

<sup>20</sup> VA. CONST. art. I, § 11 (“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.”).

<sup>21</sup> Section 25.1-100 (“‘Lost access’ means a material impairment of direct access to property, a portion of which has been taken or damaged as set out in subsection B of § 25.1-230.1.”).

<sup>22</sup> Section 25.1-100 (emphasis added).

<sup>23</sup> *See* 2012 Op. Va. Att’y Gen. at 42 (“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.”).

<sup>24</sup> Section 25.1-100.

<sup>25</sup> Section 25.1-230.1(B). I note that this latter determination is a codification of existing case law and does not represent a change in how just compensation is determined as regards lost access damages. *See State Highway Comm’r v. Howard*, 213 Va. 731, 732, 195 S.E.2d 880, 881 (1973) (“[A]n abutting landowner cannot recover damages for interference with his right of access by the installation of a median strip on a four-lane highway because the abutter has no property right in the continuance or maintenance of the flow of traffic past his property. Circuity of route imposed upon the abutter, resulting from the exercise of a police power in the regulation of traffic, is an incidental result of a lawful act. It is not the taking or damaging of a property right.”).

<sup>26</sup> *See Jeneary v. Commonwealth*, 262 Va. 418, 430, 551 S.E.2d 321, 327 (2001) (quoting *Commonwealth v. Zamani*, 256 Va. 391, 395, 507 S.E.2d 608, 609 (1998)).

<sup>27</sup> *See Prillaman v. Commonwealth*, 199 Va. 401, 405, 100 S.E.2d 4, 7 (1957) (“statutes are not to be considered as isolated fragments of law, but as a whole, or as parts of ... a single and complete statutory arrangement”).

<sup>28</sup> For example, it is unclear from your inquiry whether your hypothetical situation envisions a circumstance where no land is taken. Nonetheless, I note that a property owner may be able to recover just compensation if the jury or commission determines that, as a result of lost access, irrespective of any taking of land, a damaging of the property has occurred in the legal sense. *See Potomac Elec. Power Co. v. Fugate*, 211 Va. 745, 749-50, 180 S.E.2d 657, 660 (1971) (“[T]he word ‘damaged’ as used in [the Virginia Constitution’s eminent domain provision] means damaged in the legal sense, that is, damage resulting from a legal invasion, as opposed to a mere physical invasion, of property or property rights. The constitutional requirement of compensation does not ... import the necessity of payment in every

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case where financial loss, giving the word ‘damage’ its ordinary rather than its legal meaning, might be shown as the result of a public undertaking.”); *Richmeade, L.P. v. City of Richmond*, 267 Va. 598, 602-03, 594 S.E.2d 606, 609 (2004) (“Taking or damaging property in the constitutional sense means that the governmental action adversely affects the landowner’s ability to exercise a right connected to the property.”). Since 1902, when the Virginia Constitution first included the term “damaged” in its eminent domain provision, VA. CONST. of 1902, art. IV, § 58 (“The General Assembly ... shall not enact any law whereby private property shall be taken or *damaged* for public uses, without just compensation.”) (emphasis added), Virginia has recognized that just compensation may be appropriate in some circumstances where no taking of property occurs. See *Tidewater Ry. Co. v. Shartzter*, 107 Va. 562, 572-73, 59 S.E. 407, 411 (1907) (finding a property owner, no part of whose land is taken, nevertheless entitled to compensation for diminished value of property from a railroad whose nearby operation generated smoke, noise, dust and cinders). But see *Byler v. Va. Elec. & Power Co.*, 284 Va. 501, 731 S.E.2d 916 (2012) (rejecting property owners’ claims for damages for diminished value of their properties from the blighting effects of nearby electric transmission lines; “[t]here must be some ‘damage to the property itself, [that] does not include a mere infringement of the owner’s personal pleasure or enjoyment. Merely rendering private property less desirable for certain purposes, or even causing personal annoyance or discomfort in its use, will not constitute the damage contemplated by the constitution.’”) (quoting *Shartzter*, 107 Va. at 571, 59 S.E. at 410).

<sup>29</sup> See, e.g., *Ops. Va. Att’y Gen.*: 2009 at 77, 79; 2006 at 19, 24; 1999 at 132, 132-33; 1991 at 122, 124; 1986-87 at 1, 6.

<sup>30</sup> *Tidewater Ry. Co. v. Shartzter*, 107 Va. 562, 574, 59 S.E. 407, 411 (1907).

<sup>31</sup> *Dennison*, 231 Va. at 246, 343 S.E.2d at 328-29.

<sup>32</sup> *Id.* (emphasis added).

<sup>33</sup> See, e.g., *Sansom v. Bd. of Supvrs.*, 257 Va. 589, 594-95, 514 S.E.2d 345, 349 (1999); *Commonwealth v. Orange-Madison Coop. Farm Serv.*, 220 Va. 655, 658, 261 S.E.2d 532, 533-34 (1980).

<sup>34</sup> MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 717, 974 (10th ed. 1994).

<sup>35</sup> 2012 Op. Va. Att’y Gen. at 45.

<sup>36</sup> *Easley*, 215 Va. at 203, 207 S.E.2d at 875 (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)).

<sup>37</sup> *Id.*

<sup>38</sup> 2012 Op. Va. Att’y Gen. 37, 44-45.

<sup>39</sup> *Howard*, 213 Va. at 732, 195 S.E.2d at 881.

<sup>40</sup> Section 25.1-230.1(B).

<sup>41</sup> *Id.*

<sup>42</sup> *Id.*

<sup>43</sup> See *supra* note 46 and accompanying text.

<sup>44</sup> See e.g. *Panther Coal Co. v. Looney*, 185 Va. 758, 768, 40 S.E.2d 298, 303 (1946) (“Whether an owner’s use of the water on his own land that afterwards flows through a neighbor’s land is a reasonable use, and whether damage resulting to a lower riparian owner is material and substantial, are in their nature primarily jury questions, and where there is evidence which the jury might reasonably believe and from which they may draw reasonable inferences, their verdict, approved by the trial court, may not properly be disturbed.”).

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<sup>45</sup> *Speer v. Kellam*, Adm’r, 204 Va. 893, 898, 134 S.E.2d 300, 304 (1964) (quoting *Whitfield v. Dunn*, 202 Va. 472, 476, 117 S.E.2d 710, 713 (1961)).

<sup>46</sup> *Moses v. Southwestern Va. Transit Mgmt. Co.*, 273 Va. 672, 678, 643 S.E.2d 156, 160 (2007) (“The issue becomes one of law for the circuit court to decide only when reasonable minds could not differ about what conclusion could be drawn from the evidence.”) (quoting *Jenkins v. Pyles*, 269 Va. 383, 389, 611 S.E.2d 404, 407 (2005)).

<sup>47</sup> Section 25.1-230.1(B).

## OP. NO. 13-102

### CONSTITUTION OF VIRGINIA: BILL OF RIGHTS

United States Department of Labor “Technical Release 2013-04” should not be considered as legally binding to the extent that it conflicts with Section 2 of DOMA and Article I, § 15-A of the *Constitution of Virginia*.

THE HONORABLE JOHN A. COSGROVE  
MEMBER, SENATE OF VIRGINIA  
JANUARY 10, 2014

### ISSUE PRESENTED

You inquire whether a document produced by the United States Department of Labor, Technical Release 2013-04, requires public sector health plan sponsors in Virginia to offer benefits to an employee’s “same-sex spouse,” where the employee and spouse entered into a marriage in a jurisdiction that recognizes “same-sex marriage;” and, if so, when must such benefits be made available.

### RESPONSE

Because there is pending litigation that touches on the issue you present,<sup>1</sup> the Office cannot provide an opinion on this matter.<sup>2</sup> Nonetheless, in light of the need of public entities to make benefit decisions, I offer legal commentary that may prove helpful to you pending the outcome of the current litigation.

### BACKGROUND

You indicate that on September 18, 2013, the United States Department of Labor issued Technical Release 2013-04 entitled, “Guide to Employee Benefits Plans on the Definition of ‘Spouse’ and ‘Marriage’ under ERISA and the Supreme Court’s decision in *United States v. Windsor*” (“Technical Release”). It is applicable not only to ERISA plans, but also to public sector health plans through the Public Health Service Act (“PHSA”).<sup>3</sup> The Technical Release states that plans subject to PHSA should use a definition of spouse that includes “same-sex spouses” if the marriage took place in a jurisdiction that recognizes “same-sex marriage.” It also

purports to address issues raised by the recent Supreme Court finding that a section of the federal Defense of Marriage Act<sup>4</sup> (“DOMA”) is unconstitutional.

### APPLICABLE LAW AND DISCUSSION

On June 26, 2013, the Supreme Court of the United States ruled in *United States v. Windsor*,<sup>5</sup> that Section 3 of DOMA was unconstitutional. That provision defined marriage to mean a legal union between one man and one woman as a comprehensive definition for federal statutes and regulations. Although the Court struck down Section 3 of DOMA, it specifically did *not* limit a state’s authority to define marriage to prohibit “same-sex marriage” or dictate how state benefits could be paid.<sup>6</sup> In fact, Section 2 of DOMA remains valid law, and it provides that a state is not required to recognize a “same-sex marriage” performed in another state.<sup>7</sup> Accordingly, the Commonwealth of Virginia’s constitutional provision limiting recognition of “marriage” to unions between one man and one woman<sup>8</sup> remains in force under current law. I therefore conclude that the Technical Release is not consistent with the provisions of Section 2 of DOMA.

### CONCLUSION

Accordingly, subject to the outcome of litigation that may, or may not, change the status of current law, it is my conclusion that the Technical Release should not be considered as legally binding to the extent that it conflicts with Section 2 of DOMA and Article I, § 15-A of the *Constitution of Virginia*.

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<sup>1</sup> There now are two pending cases in Virginia that challenge the existing ban on “same-sex marriage” in the Commonwealth; the ability to access benefits clearly is implicated within the issues of this litigation. See *Bostic v. Rainey*, No. 2:13-cv-00395 (E.D. Va.) and *Harris v. Rainey*, No. 5:13-cv-00077 (W.D. Va.).

<sup>2</sup> It is the longstanding policy of this Office to refrain from expressing an opinion about a matter currently in litigation, unless requested by the court before which the issue is pending. See, e.g., 1977-78 Op. Va. Att’y Gen. 31.

<sup>3</sup> 42 U.S.C. § 201, *et seq.*

<sup>4</sup> Defense of Marriage Act, 104 Pub. L. No. 199, 110 Stat. 2419 (codified as amended in scattered sections of 28 U.S.C.).

<sup>5</sup> 570 U.S. \_\_\_, 133 S. Ct. 2675 (2013).

<sup>6</sup> *Id.*, 133 S. Ct. at 2682.

<sup>7</sup> See 28 U.S.C. § 1738C (providing that “No State, territory, or possession of the United States, or Indian tribe, shall be required to give effect to any public act, record, or judicial proceeding of any other State, territory, possession, or tribe respecting a relationship between persons of the same sex that is treated as a marriage under the laws of such other State, territory, possession, or tribe, or a right or claim arising from such relationship”).

<sup>8</sup> VA. CONST. art. I, § 15-A.

Op. 13-105

**TAXATION: STATE RECORDATION TAX**

Pursuant to the exemption provided by 12 U.S.C. § 1768, Federal credit unions are exempted from paying the recordation tax imposed on grantees by § 58.1-801.

THE HONORABLE FAYE W. MITCHELL  
CLERK OF COURT, CHESAPEAKE CIRCUIT COURT  
JANUARY 3, 2014

**ISSUE PRESENTED**

You ask whether Federal credit unions are exempted from paying the recordation tax imposed upon grantees by § 58.1-801 of the *Code of Virginia* pursuant to the exemption provided by 12 U.S.C. § 1768.

**RESPONSE**

It is my opinion that, pursuant to the exemption provided by 12 U.S.C. § 1768, Federal credit unions are exempted from paying the recordation tax imposed on grantees by § 58.1-801 of the *Code of Virginia*.

**APPLICABLE LAW AND DISCUSSION**

The Virginia Recordation Tax Act<sup>1</sup> levies a tax on “every deed admitted to record, except a deed exempt from taxation by law.”<sup>2</sup> Previous opinions of this Office have noted, however, 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.’”<sup>3</sup>

The United States Code provides Federal credit unions with a statutory exemption from taxation. Specifically, the United States Code states:

The Federal credit unions organized [under 12 U.S.C. Chapter 14], their property, their franchises, capital, reserves, surpluses, and other funds, and their income shall be exempt from all taxation now or hereafter imposed by the United States or by any State, Territorial, or local taxing authority; except that any real property and any tangible personal property of such Federal credit unions shall be subject to Federal, State, Territorial, and local taxation to the same extent as other similar property is taxed.<sup>[4]</sup>

Congress therefore permits the taxation of real or tangible personal property held by Federal credit unions to the extent similar property is taxed, but otherwise exempts the Federal credit unions from “all taxation” by state and local governments.

The Virginia Administrative Code indicates that “[t]he recordation tax is not a tax on property but on civil privilege.”<sup>5</sup> The Supreme Court of Virginia also has

concluded that the recordation tax is “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.”<sup>6</sup> As such, the recordation tax does not fall within the bounds of the exception stated in 12 U.S.C. § 1768 that applies to state and local taxation of Federal credit unions’ real and personal property.

Previous opinions of this Office have concluded 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 wherever it is a principal to the transaction.”<sup>7</sup> When acting as either a grantee or a grantor, Federal credit unions serve as principals to a transaction, and accordingly are exempt from Virginia’s recordation tax.<sup>8</sup> Most recently, as noted in your request, an opinion of this Office determined that Federal credit unions are exempt from the recordation tax imposed on grantors by § 58.1-802.<sup>9</sup>

In conformity with this Office’s prior opinions, 12 U.S.C. § 1768 must be interpreted as exempting Federal credit unions from the recordation tax imposed by § 58.1-801 when such entity is the grantee in the transaction.

### CONCLUSION

Accordingly, it is my opinion that, pursuant to the exemption provided by 12 U.S.C. § 1768, Federal credit unions are exempted from paying the recordation tax imposed on grantees by § 58.1-801 of the *Code of Virginia*.

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<sup>1</sup> VA. CODE ANN. §§ 58.1-800 through 58.1-817 (2013).

<sup>2</sup> Section 58.1-801(A). *See also* § 58.1- 802(A) (regarding tax to be paid by grantors).

<sup>3</sup> 2013 Op. Va. Att’y Gen. No. 13-010 at 1 (quoting 2012 Op. Va. Att’y Gen. 137 at 138), *available at* <http://www.oag.state.va.us/Opinions%20and%20Legal%20Resources/Opinions/2013opns/13-010%20Whittle.pdf>. *See also* 2003 Op. Va. Att’y Gen. 177, 179; 2002 Op. Va. Att’y Gen. 328, 329.

<sup>4</sup> 12 U.S.C. § 1768.

<sup>5</sup> 23 VA. ADMIN. CODE § 10-320-10.

<sup>6</sup> *See* Pocahontas Consol. Collieries Co., Inc. v. Commonwealth, 113 Va. 108, 112, 73 S.E. 446, 448 (1912). *See also* Fed. Land Bank v. Hubard, 163 Va. 860, 864, 178 S.E. 16, 17 (1935).

<sup>7</sup> 2012 Op. Va. Att’y Gen. 137, 141. *See also* 1993 Op. Va. Att’y Gen. 260, 262.

<sup>8</sup> 2012 Op. Va. Att’y Gen. at 141.

<sup>9</sup> 2013 Op. Va. Att’y Gen. No. 13-010 at 1.

## OP. 13-106

### PROPERTY AND CONVEYANCES: PROPERTY OWNERS’ ASSOCIATION ACT

### MOTOR VEHICLES: GENERAL PROVISIONS / MOTOR VEHICLE AND EQUIPMENT SAFETY

Virginia law limits the manner in which a Property Owners' Association may regulate traffic on its private streets. A vehicle driver may be compelled to stop only if enforcement of the traffic laws is done by a local law enforcement agency or by a private security service that is properly licensed by the Department of Criminal Justice Services, and whose employees have been appointed as conservators of the peace.

A Property Owners' Association may request that a local law enforcement agency enforce traffic laws on its private streets, or the local governing body may designate the streets as "highways" for law enforcement purposes.

The use of blue or green lights on a private patrol vehicle is strictly prohibited; amber lights may be used only if the patrol is operated by a licensed private security business or an approved neighborhood watch group.

THE HONORABLE BRYCE E. REEVES  
MEMBER, SENATE OF VIRGINIA  
AUGUST 13, 2014

### **ISSUES PRESENTED**

You present several questions related to the extent of the authority of a property owners' association ("POA") to regulate traffic on its privately owned streets. You specifically ask whether a POA may enforce violations of state or local traffic laws on its private streets and whether and how a POA may adopt and enforce its own rules regulating traffic. You further inquire whether, in enforcing its rules, a POA may compel a vehicle to stop or use a safety patrol vehicle that employs flashing red, blue, or amber lights.

### **RESPONSE**

It is my opinion that Virginia law limits the manner in which a POA may regulate traffic on its private streets. A vehicle driver may be compelled to stop only if enforcement of the traffic laws is done by a local law enforcement agency or by a private security service that is properly licensed by the Department of Criminal Justice Services, and whose employees have also been appointed as conservators of the peace. Otherwise, a POA may not compel a vehicle driver to stop. As to how traffic laws can be enforced on privately owned streets, a POA may request the local law enforcement agency to do so, or the local governing body may designate the private streets as "highways" for law enforcement purposes. It is further my opinion that the use of blue or green lights on a private patrol vehicle is strictly prohibited, and that amber lights may be used only if the patrol is operated by a licensed private security business or an approved neighborhood watch group.

### **BACKGROUND**

You relate that a POA within your district is using a safety patrol to maintain traffic safety on its privately owned streets. The safety patrol is authorized by the POA to

stop moving vehicles and issue citations for certain traffic infractions, including reckless driving, failing to obey traffic signs and failure to adhere to posted speed limits. In executing its duties, the safety patrol employs a vehicle with flashing lights to compel drivers to pull over.<sup>1</sup> According to documents attached to your request, if a driver does not pull over as directed, he is mailed a citation for the underlying traffic violation, in addition to a citation for failure to stop. The host property owner is ultimately responsible for each violation committed by a guest. Your request also indicates that all homeowners facing private penalties for traffic rule citations are given the opportunity to appear with counsel before the POA Violations Review Panel.

### APPLICABLE LAW AND DISCUSSION

The Virginia Property Owners' Association Act (the "Act")<sup>2</sup> governs generally the operation and management of property owners' associations in Virginia. A POA has no inherent power; it has only those powers that have been delegated to it by the General Assembly.<sup>3</sup> The Act does not grant POAs the authority to enforce violations of state or local traffic laws that occur on its property, nor does the Act otherwise specifically address the regulation of traffic on POA streets.

Rather, Title 46.2 of the *Code of Virginia* contains laws governing the operation of motor vehicles in the Commonwealth, including numerous provisions creating a statewide scheme for the regulation and enforcement of traffic violations.<sup>4</sup> In accordance with § 46.2-102, the enforcement of statutory traffic violations is limited to "[s]tate police officers and law-enforcement officers of every county, city, town, or other political subdivision of the Commonwealth."<sup>5</sup> With respect to private streets in particular, § 46.2-102 further provides that

With the consent of the landowner, any such officer or other uniformed employee of the local law-enforcement agency may patrol the landowner's property to enforce state, county, city, or town motor vehicle registration and licensing requirements . . . . Any law-enforcement officer may patrol the streets and roads within subdivisions of real property . . . which streets and roads are maintained by . . . any association of owners, on the request or with the consent of the owners or association of owners, to enforce the provisions of this title punishable as felonies, misdemeanors, or traffic infractions.

Private entities, other than an individual who has been appointed as a conservator of the peace, are not empowered to enforce motor vehicle laws.<sup>6</sup> Thus, in the absence of any statutory authority enabling them to do so, I must conclude that a POA is without power to cite motor vehicle operators for failing to abide by state and local traffic laws<sup>7</sup>.

Although POAs lack the power to enforce the traffic laws of the Commonwealth or the surrounding locality, the board of directors of a POA, pursuant to the Act, has broad power “to establish, adopt, and enforce rules and regulations with respect to the use of the common areas and with respect to such other areas of responsibility assigned to the association by the declaration, except where expressly reserved by the declaration to the members.”<sup>8</sup> Based on the information provided in your request, the private streets of the POA development constitute “common areas” under the Act.<sup>9</sup> Accordingly, the POA’s board of directors may “establish, adopt, and enforce rules and regulations” with respect to the use of these streets, except where expressly reserved by the declaration to its members and as otherwise limited by statute.<sup>10</sup> Nevertheless, such rules must be in accord with state law, including § 46.2-102,<sup>11</sup> and their enforcement is prescribed by statute: “Rules and regulations may be enforced by any method normally available to the owner of private property in Virginia, including, but not limited to, application for injunctive relief or damages, during which the court may award to the association court costs and reasonable attorney fees.”<sup>12</sup> In addition, the board may “assess charges against any member [of the association] for any violation of the declaration or rules and regulations for which his family members, tenants, guests, or other invitees are responsible.”<sup>13</sup> The Act contains no explicit or implicit authority to make arrests or otherwise stop vehicles to enforce traffic regulations. In fact, the methods that are provided for enforcement of the rules and regulations are tailored specifically to correction of violations and the imposition and collection of monetary penalties after the fact, neither of which require arrests or stops.<sup>14</sup>

The Code does establish specific methods by which POAs can provide for the safety of their private streets. One option is to request assistance from a local law enforcement agency pursuant to § 46.2-102, as set forth above. Another is to have the locality designate the streets as “highways” for law enforcement purposes.<sup>15</sup> Alternatively, the board of directors may hire a properly licensed private security service<sup>16</sup> whose employees have also qualified as special conservators of the peace.<sup>17</sup> A conservator of the peace may enforce traffic regulations within his established jurisdiction.<sup>18</sup> To the extent permitted by his appointment order from a court of competent jurisdiction, he has authority to effect arrests, provided he has completed the minimum training standards established by the Department of Criminal Justice Services.<sup>19</sup> Members of a private security patrol who do not qualify as conservators of the peace do not possess these powers; thus, such patrol members serving a POA may not conduct traffic stops. That the Code sets out these specific methods evinces a legislative intent that it not be done otherwise.<sup>20</sup> I therefore conclude that the POA’s powers are limited to these methods for regulating their private streets.

With regard to the use of flashing colored lights on safety patrol vehicles, I note that a prior Opinion concluded that, as a general rule, “motor vehicles may only be

operated with the lighting devices required or permitted by state or federal law.”<sup>21</sup> Virginia law is clear that flashing blue lights are permitted only on law-enforcement or designated Department of Corrections vehicles,<sup>22</sup> while flashing green lights are permitted only on vehicles used by police, fire-fighting or rescue personnel as command centers at the scene of incidents.<sup>23</sup> Thus, a private security patrol may not use flashing blue or green lights.<sup>24</sup> State law, however, does allow the use of amber lights on vehicles owned and used by businesses providing security services<sup>25</sup> and on vehicles “used in patrol work by members of neighborhood watch groups approved by the chief law-enforcement officer of the locality in their assigned neighborhood watch program area.”<sup>26</sup> I note that, to be a “business providing security services” authorized to use such lights, the enterprise must be one that is licensed as such by the Department of Criminal Justice Services.<sup>27</sup>

### CONCLUSION

Accordingly, it is my opinion that Virginia law limits the manner in which a POA may regulate traffic on its private streets. A vehicle driver may be compelled to stop only if enforcement of the traffic laws is done by a local law enforcement agency or by a private security service that is properly licensed by the Department of Criminal Justice Services, and whose employees have also been appointed as conservators of the peace. Otherwise, a POA may not compel a vehicle to stop. As to how traffic laws can be enforced on privately owned streets, a POA may request the local law enforcement agency to do so, or the local governing body may designate the private streets as “highways” for law enforcement purposes. It is further my opinion that the use of blue or green lights on a patrol vehicle is strictly prohibited, and that amber lights may be used only if the patrol is operated by a licensed private security business or an approved neighborhood watch group.

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<sup>1</sup> You indicate in your request that the safety patrol’s vehicles feature “yellow and blue” lights, but documents accompanying your request refer to the use of “green and amber” lights. Regardless, this Opinion addresses the authorized use of various colored lights.

<sup>2</sup> VA. CODE ANN. §§ 55-508 through 55-516.2 (2012 & Supp. 2014).

<sup>3</sup> See *Skeen v. Indian Acres Club of Thornburg, Inc.*, 15 Va. Cir. 167 (1992) (citing *Unit Owners Association of Buildamerica v. Gillman*, 223 Va. 752 (1982)).

<sup>4</sup> See, e.g., VA. CODE ANN. § 46.2-102 (2010) (describing the classes of traffic violations established by Title 46.1 as “felonies, misdemeanors, [and] traffic infractions”).

<sup>5</sup> Applicable here is the maxim *expressio unius est exclusio alterius*, which “provides that mention of a specific item in a statute implies that omitted items were not intended to be included within the scope of the statute.” *GEICO v. Hall*, 260 Va. 349, 355, 533 S.E.2d 615, 617 (2000) (quoting *Turner v. Wexler*, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992)).

<sup>6</sup> See 1977-78 Op. Va. Att’y Gen. 178; 1981-82 Op. Va. Att’y Gen. 280; 1986-87 Op. Va. Att’y Gen. 233; 1995 Op. Va. Att’y Gen. 205.

<sup>7</sup> Absent such authority, the actions of the “safety patrol” described in the opinion request could be considered an attempt at false imprisonment or unlawful detention, where the safety patrol, by

representing itself as an authoritative entity, “. . . imposing by force or threats an unlawful restraint upon a man’s freedom of locomotion,” transgresses the bounds of acceptable behavior. *Jordan v. Sands*, 255 Va. 492, 497, 500 S.E. 2d 215, 218 (1998).

<sup>8</sup> Section 55-513(A) (2012).

<sup>9</sup> The Act defines a “common area” as “property within a development which is owned, leased or required by the declaration to be maintained or operated by a property owners’ association for the use of its members and designated as common area in the declaration.” Section 55-509 (2012).

<sup>10</sup> I note, moreover, that the plain language of § 55-513(B) provides that POA rules and regulations may be made applicable to guests, in addition to property owners, although property owners ultimately are responsible for the violations of their guests. Nevertheless, § 55-513(B) and 55-514(C) both provide that neither violations of rules and regulations nor failure to pay special assessments shall be sufficient to deny a homeowner access to his or her property across commonly held roads. Also, as stated above, all rules and regulations must be consistent with any express reservations made in the declaration. Although regulated by statute, the relationship between property owners and a POA is primarily contractual, and the governing documents of a POA, including the declaration, constitute a contract entered into between a POA and its constituent members. *See White v. Boundary Ass’n, Inc.*, 271 Va. 50, 55, 624 S.E.2d 5, 8 (2006) (stating that the declaration constitutes a contract “collectively entered into” by all members of a POA); *Sully Station II Cmty. Ass’n v. Dye*, 259 Va. 282, 284, 525 S.E.2d 555, 556 (2000) (finding that the governing documents of a POA constitute a contract between a POA and its members).

<sup>11</sup> *See* VA. CODE ANN. § 1-248 (2011) (“Any ordinance, resolution, bylaw, rule, regulation, or order of any governing body or any corporation, board, or number of persons shall not be inconsistent with the Constitution and laws of the United States or of the Commonwealth.”). *Cf.* 1987-88 Op. Va. Att’y Gen. 492, 495 (stating bylaws of condominium association incorporated under Condominium Act must be consistent with federal and state constitutions and statutes).

<sup>12</sup> Section 55-513(A).

<sup>13</sup> *Id.* The imposition of such charges requires a hearing with at least 14 days prior notice. Section 55-513(C).

<sup>14</sup> Section 55-513(C), for example, states that “Before any action authorized in this section is taken, the member shall be given a reasonable opportunity to correct the alleged violation after written notice of the alleged violation to the member . . . .” This is not possible if a traffic stop resulting in an immediate citation is authorized.

<sup>15</sup> *See* § 46.2-1307 (Supp. 2014) (“The governing body of any county, city, or town may adopt ordinances designating the private roads, within any residential development containing 100 or more lots or residential dwelling units, as highways for law-enforcement purposes.”).

<sup>16</sup> Private security services must be licensed by the Virginia Department of Criminal Justice Services. VA. CODE ANN. §9.1-139.

<sup>17</sup> The circuit court of any county or city is authorized to appoint special conservators of the peace upon application of the sheriff or chief of police of a locality “or any corporation authorized to do business in the Commonwealth . . . and the showing of a necessity for the security of property or the peace.” VA. CODE ANN. § 19.2-13(A) (Supp. 2014).

<sup>18</sup> 1977-78 Op. Va. Att’y Gen at 180; 1981-82 Op. Va. Att’y Gen at 281.

<sup>19</sup> Section 19.2-13(A).

<sup>20</sup> *See, e.g.*, 2005 Op. Va. Att’y Gen. 62, 67 (citing *Grigg v. Commonwealth*, 224 Va. 356, 364, 297 S.E.2d 799, 803 (1982)). *Cf. supra* note 5 (explaining the maxim *expressio unius est exclusio alterius*).

<sup>21</sup> 2006 Op. Va. Att’y Gen. 150, 151. *See also* 2000 Op. Va. Att’y Gen. 126, 126 and citations therein (finding that “permissible vehicular lighting devices for emergency vehicles are limited to those specified by statute”).

<sup>22</sup> *See* § 46.2-1022 (2010).

<sup>23</sup> *See* § 46.2-1025(D) (Supp. 2014).

<sup>24</sup> The maxim *expressio unius est exclusio alterius*, *see supra* note 5, also is applicable here.

<sup>25</sup> Section 46.2-1025(A)(9).

<sup>26</sup> Section 46.2-1025(A)(21). The other uses of flashing amber lights permitted by § 46.2-1025 are inapplicable to the facts at hand and therefore not set out here.

<sup>27</sup> *See* VA. CODE ANN. §§ 91-138 through 9.1-150 ( 2012 & Supp. 2014). From the facts presented, because it is unknown whether the safety patrol you describe functions as a “business providing security services” or an approved “neighborhood watch group,” I am unable to determine whether the safety patrol lawfully may use amber lights. The Attorney General “refrain[s] from commenting on matters that would require additional facts[.]” 2010 Op. Va. Att’y Gen. at 58.

## OP. NO. 13-107

### COUNTIES, CITIES, AND TOWNS: GENERAL POWERS AND PROCEDURES OF COUNTIES - COUNTY PROCUREMENT BY A COUNTY PURCHASING AGENT

Members of a county board of supervisors are not subject to the provisions of §§ 15.2-1239 and 15.2-1240, which pertain to improper conduct in county procurement procedures.

THE HONORABLE JEFFREY W. HAISLIP  
COMMONWEALTH’S ATTORNEY, COUNTY OF FLUVANNA  
MARCH 14, 2014

### ISSUE PRESENTED

You ask whether members of a county board of supervisors are subject to the provisions of §§ 15.2-1239 and 15.2-1240 of the *Code of Virginia*, which pertain to improper conduct in county procurement procedures.<sup>1</sup>

### RESPONSE

It is my opinion that, because a county board of supervisors constitutes neither a “department” nor an “agency” within the scope of the relevant statutory provisions, its members are not subject to the provisions of §§ 15.2-1239 and 15.2-1240.

### APPLICABLE LAW AND DISCUSSION

Section 15.2-1240 provides that a “violation of . . . § 15.2-1239 shall be a misdemeanor and shall be punishable as provided by § 18.2-12.”<sup>2</sup> Section 15.2-1239 provides that

If any *department* or *agency* of the county government purchases or contracts for any supplies or contractual services contrary to the provisions of this article or the rules and regulations made thereunder, such order or contract shall be void and the head of such department or agency shall be personally liable for the costs of such order or contract.<sup>[3]</sup>

Statutes are to be interpreted according to their plain language.<sup>4</sup> The plain meaning of words in a statute is “binding,” when the language of the statute “is clear and unambiguous.”<sup>5</sup> Moreover, a criminal statute is construed “strictly against the Commonwealth” in order to “confine the statute to those offenses clearly proscribed by its plain terms.”<sup>6</sup> “Any ambiguity or doubt as to [a criminal statute’s] meaning must be resolved in [the defendant’s] favor.”<sup>7</sup>

By its plain language, § 15.2-1239 applies only to a “department” or “agency” of the county government. Accordingly, the answer to your inquiry turns on whether the county board is a “department” or “agency” of the county government. The *Code of Virginia* does not define “department” or “agency” for purposes of these sections; I therefore look to other provisions<sup>8</sup> and principles of statutory construction for guidance.

Under Virginia law, a county board of supervisors is the “governing body” of a county.<sup>9</sup> The “powers and duties of a county as a body politic and corporate [are] vested in [the] board of county supervisors.”<sup>10</sup> The board is empowered to “provide for all the governmental functions of the [county], including, without limitation, the organization of all *departments*, offices, boards, commissions and *agencies* of government, and the organizational structure thereof, which are necessary and the employment of the officers and other employees needed to carry out the functions of government.”<sup>11</sup> I find no provision stating, or otherwise supporting a conclusion, that the board of supervisors itself is either a “department” or “agency” of the county. The legislature is presumed to have chosen its words with care;<sup>12</sup> therefore, the governing body is an entity qualitatively distinct from a department or agency of the county government. Additionally, because the General Assembly did not insert “governing body” or “board of supervisors” into § 15.2-1239, the maxim *expressio unius est alterius* is applicable, and I conclude that the General Assembly did not intend to include the board of supervisors within the scope of the statute.<sup>13</sup>

### CONCLUSION

Accordingly, it is my opinion that, because a county board of supervisors constitutes neither a “department” nor an “agency” within the scope of the relevant statutory provisions, its members are not subject to the provisions of §§ 15.2-1239 and 15.2-1240.

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<sup>1</sup> Your inquiry arises from a specific factual scenario involving certain particular allegedly improper procurement activities of the board of supervisors of a county that employs a “county purchasing agent.” See VA. CODE ANN. §§ 15.2-1233 (2012) and 15.2-1543 (2012). This opinion is limited to the purely legal question presented, and the correct construction of the statutes about which you inquire. I make no comment regarding the propriety or wisdom of any action taken by a board member, individually or in conjunction with other board members.

<sup>2</sup> Because this section does not specify the class of misdemeanor, the offense is a Class 1 misdemeanor. See VA. CODE ANN. § 18.2-12 (2009).

<sup>3</sup> Emphasis added. I note that the provisions of §§ 15.2-1239 and 15.2-1240 do not apply until there is a “county purchasing agent,” or someone designated to perform the duties of that office. See § 15.2-1233.

<sup>4</sup> Signal Corp. v. Keane Fed. Sys., 265 Va. 38, 47-47, 574, S.E.2d 253, 257 (2003).

<sup>5</sup> See Falls Church v. Protestant Episcopal Church in the United States, 285 Va. 651, 665, 740 S.E.2d 530, 538 (2013).

<sup>6</sup> See Thompson v. Commonwealth, 277 Va. 280, 291, 673 S.E.2d 473, 474 (2009) (citations omitted).

<sup>7</sup> See Morris v. Commonwealth, 269 Va. 127, 130-31, 607 S.E.2d 110, 112 (2005).

<sup>8</sup> 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. See First Nat’l Bank of Richmond v. Holland, 99 Va. 495, 504-05, 39 S.E. 126, 129-30 (1901).

<sup>9</sup> Section § 15.2-102 (2012).

<sup>10</sup> Section 15.2-402 (2012).

<sup>11</sup> Section 15.2-1500(A) (2012) (emphasis added).

<sup>12</sup> See Barr v. Town & Country Props., Inc., 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990).

<sup>13</sup> The maxim “*expressio unius est exclusio alterius*” provides that the mention of specific items in a statute implies that the General Assembly did not intend to include omitted items within the scope of that statute. See *Virginian-Pilot v. Dow Jones & Co.*, 280 Va. 464, 468-69, 698 S.E.2d 900, 902 (2010). Rather, the intent of §§ 15.2-1233 through 15.2-1240 is to ensure that department and agency heads who are the mid-level managers of a county follow policies and procedures established by the board of supervisors and the county purchasing agent. See 2010 Op. Va. Att’y Gen. 7, 9 (quoting *Covington Virginia, Inc. v. Woods*, 182 Va. 538, 548-49, 29 S.E.2d 406, 411 (1944)) (“In the construction of statutes, the courts have but one object, to which all rules of construction are subservient, and that is to ascertain the will of the legislature, the true intent and meaning of the statute . . .”).

## OP. NO. 13-109

### CONSTITUTION OF VIRGINIA: BILL OF RIGHTS - LAWS SHOULD NOT BE SUSPENDED

### CONSTITUTION OF VIRGINIA: BILL OF RIGHTS - SEPARATION OF LEGISLATIVE, EXECUTIVE, AND JUDICIAL DEPARTMENTS; PERIODICAL ELECTIONS

### CONSTITUTION OF VIRGINIA: DIVISION OF POWERS - DEPARTMENTS TO BE DISTINCT

### CONSTITUTION OF VIRGINIA: EXECUTIVE - EXECUTIVE AND ADMINISTRATIVE POWERS

The Virginia Constitution prohibits the Governor from unilaterally suspending the operation of state regulations that have the force of law.

THE HONORABLE ROBERT G. MARSHALL  
MEMBER, HOUSE OF DELEGATES  
JANUARY 3, 2014

### **ISSUE PRESENTED**

You inquire whether the Governor has the power to issue a policy directive to suspend a regulation that was properly adopted pursuant to a statutory mandate.

### **RESPONSE**

It is my opinion that, while the Governor has a significant role to play in the formulation of regulations promulgated by executive branch agencies, the Virginia Constitution prohibits the Governor from unilaterally suspending the operation of regulations that have the force of law.<sup>1</sup>

### **BACKGROUND**

The legislative power of the Commonwealth is and has been vested in the General Assembly.<sup>2</sup> Nevertheless, as the scope and reach of government increased, some thought it necessary to create administrative agencies (sometimes referred to as “executive branch agencies”) to promulgate regulations to provide for specific applications of the broader policy concerns addressed in legislation passed by the General Assembly. The authority for the existence of such agencies is found in Article III, § 1 of the Virginia Constitution,<sup>3</sup> which provides in pertinent part that “administrative agencies may be created by the General Assembly with such authority and duties as the General Assembly may prescribe.”

The grant of power to administrative agencies is limited. “[D]elegations 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. Delegations of legislative power that lack such policies and standards are unconstitutional and void.”<sup>4</sup> Furthermore, administrative agencies are often required to adopt regulations pursuant to the Virginia Administrative Process Act (“APA”).<sup>5</sup> Pursuant to the APA, agency regulations are, prior to becoming effective, subject to public notice, and potentially, public hearings,<sup>6</sup> subject to public comment and, potentially, the taking of evidence,<sup>7</sup> subject to review by both the Attorney General and the Governor,<sup>8</sup> and subject to legislative review.<sup>9</sup> If an agency enacts a regulation consistent with its statutory charge<sup>10</sup> and that regulation has gone through the required regulatory processes for promulgation, it has the force of law.<sup>11</sup>

### **APPLICABLE LAW AND DISCUSSION**

Before addressing the specific issue of whether the Governor has the authority to suspend a validly adopted regulation, it is important to recognize that the Governor

has a significant ability to affect the issuance of regulations *prospectively*. As noted above, he has a statutory role in the adoption of regulations under the APA.<sup>12</sup> Additionally, the Governor affects the composition of administrative agencies through his appointments of the heads of administrative agencies<sup>13</sup> and their respective boards.<sup>14</sup> Furthermore, the Virginia Constitution explicitly authorizes the Governor to require certain officers and employees within state agencies to provide him with reports of the agency's activities and to allow him to inspect the agencies financial and other records.<sup>15</sup>

Another method governors have employed to influence the operations of state government is through the issuance of written directions. Whether called executive orders, executive directives, or guidance documents, these directions have been used by governors to have administrative agencies pursue the governor's policy objectives. Before turning to whether the Governor unilaterally may issue such directions to suspend a validly adopted regulation, it is helpful to review the Governor's general authority to issue such orders, directives, or guidance documents.

The Supreme Court of Virginia has noted that “[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.”<sup>16</sup> No provisions of the Constitution of Virginia or any statute explicitly grant to the Governor the authority to issue executive orders. Governors historically have issued executive orders based upon the authority inherent in the constitutional duty of the Governor to “take care that the laws be faithfully executed.”<sup>17</sup> Prior opinions of the Attorney General recognize that the Constitution grants to the Governor a general reservoir of powers as chief executive of the Commonwealth.<sup>18</sup> Thus, the authority of the Governor to issue executive orders is well established in the law and history of the Commonwealth.

The scope of such authority, however, is limited. The Governor may not use an executive order (or any other means)<sup>19</sup> to exercise legislative power, which is vested solely in the General Assembly. Furthermore, the Governor may not issue executive orders or take other action that is contrary to express provisions of the Virginia Constitution.<sup>20</sup> Thus, if an executive order or other written direction amounts to an exercise of legislative power or violates a provision of the Virginia Constitution, the Governor is without power to issue it and the written direction necessarily is void.

Applying this legal background to your specific inquiry, it becomes clear that the Governor may not unilaterally (whether by executive order, executive directive or guidance opinion<sup>21</sup>) suspend the operation of a validly enacted regulation. As explained below, any attempt to do so would represent a violation of Article V, § 7, Article I, § 7, and the separation of powers provisions of the Virginia Constitution.

Prohibiting the executive from suspending duly enacted laws has long been part of Virginia's constitutional history. The drafters of both the Virginia Constitution and the United States Constitution were very familiar with claims that the executive had the authority to suspend or dispense with duly enacted laws, and both sets of framers sought to borrow from the English experience and prevent the executive from claiming such a power in the New World. As one scholar has noted regarding the drafting of the United States Constitution,

In 1689, following the forced abdication of James II, Parliament enacted the English Bill of Rights. The first declaration of that momentous statute was “that the pretended Power of Suspending of Laws, or the Execution of Laws, by regal Authority, without Consent of Parliament, is illegal.” The royal dispensing prerogative was also declared illegal.

The English Bill of Rights became a template for American constitution drafting. Virtually every secular provision in that statute was incorporated into the U.S. Constitution. The prohibition on the suspending and dispensing powers was encoded in Article II's requirement that the President must “take Care that the Laws be faithfully executed.” Thus, these rejected royal prerogatives were denied to the President.<sup>[22]</sup>

The drafters of Virginia's Constitution adopted nearly identical language, seeking to effectuate the same prohibition.<sup>23</sup> Article V, § 7 of the Virginia Constitution provides, in pertinent part, that “[t]he Governor shall take care that the laws be faithfully executed.”<sup>24</sup>

Validly implemented regulations carry the force of law;<sup>25</sup> thus, it should be self-evident that unilaterally issuing a directive that suspends or ignores such a regulation is inconsistent with the Governor's duty to “take care that the laws be faithfully executed.” To conclude otherwise would grant the Governor a suspending power that has been denied to the English King since at least 1689 and would render the “take care” clause of the Virginia Constitution a mere nullity. Simply stated, the Virginia Constitution's “take care” clause prohibits the Governor from issuing instructions (whether by executive order, executive directive or guidance opinion) that a valid regulation be suspended or ignored.

While the framers of the federal constitution apparently believed that the federal “take care” clause was sufficient to make clear that the executive could not suspend validly enacted laws, Virginia went one step further. Article I, § 7 of the Virginia Constitution expressly provides “[t]hat all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.”<sup>26</sup> Thus, the prohibition that is implicit in Article V, § 7's “take care” clause is made explicit by

Article I, § 7: the Governor may not unilaterally direct, by any means, that a validly adopted regulation that has the force of law be suspended or ignored.

Irrespective of the prohibitions found in Article V, § 7 and Article I, § 7, the Virginia Constitution nonetheless would prohibit the Governor from unilaterally suspending a validly adopted regulation carrying the force of law. Specifically, such action would violate the separation of powers provisions found in Article I, § 5 (“That the legislative, executive, and judicial departments of the Commonwealth should be separate and distinct . . . .”) and Article III, § 1 (“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 . . .”).<sup>27</sup>

It must be remembered that, when adopting a regulation, an administrative agency is not engaged in an executive function, but rather, it is exercising legislative authority that has been delegated to it by the General Assembly. As noted above, the authority for the existence of such agencies is found in Article III, § 1 of the Virginia Constitution, which provides in pertinent part that “administrative agencies may be created by the General Assembly with such authority and duties as the General Assembly may prescribe.” Because administrative agencies are exercising delegated legislative authority, a unilateral attempt<sup>28</sup> by the Governor to suspend a validly enacted regulation is as much a violation of the separation of powers as if the Governor sought to suspend the operation of a Virginia statute. It is simply beyond a Governor’s power to do so, and any such attempt is void.

This conclusion is consistent with the APA’s provisions regarding withdrawal of regulations. Section 2.2-4016 provides that

[n]othing in this chapter shall prevent any agency from withdrawing any regulation at any time prior to the effective date of that regulation. A regulation may be repealed after its effective date only in accordance with the provisions of this chapter that govern the adoption of regulations.

Thus, for regulations promulgated under the APA, it is clear that the executive branch (in this case the relevant agency itself) has the ability to dispense with a regulation at any time prior to its effective date; however, once it becomes effective, the executive no longer may dispense with the regulation unilaterally. Rather, the regulation can be changed or suspended only by going through the full APA process, as a result of a change in the authorizing statute being passed by the General Assembly and becoming law, or by order of a court of competent jurisdiction. Thus, a guidance opinion from the Governor is not legally sufficient to effectuate a change in or suspension of a validly enacted regulation.

## CONCLUSION

Accordingly, it is my opinion that that, while a Governor has a significant role to play in the formulation of regulations promulgated by executive branch agencies, the Virginia Constitution prohibits a Governor from unilaterally suspending the operation of regulations that have the force of law.

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<sup>1</sup> Your inquiry is stated in general terms; however, you then specifically reference a statement made by the Governor-elect, when he was a candidate, about regulations regarding the treatment of abortion facilities as hospitals. The same conclusion results regardless of the particular subject matter.

<sup>2</sup> VA. CONST. art. IV, § 1.

<sup>3</sup> Article III, § 1 also is one of the two provisions of the Virginia Constitution that mandates the separation of powers among the three branches of government. The dispensation for the creation of administrative agencies is the limited “exception to the basic principle” of separation of powers. 1 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 433 (1974).

<sup>4</sup> *Bell v. Dorey Elec. Co.*, 248 Va. 378, 380, 448 S.E.2d 622, 623 (1994) (internal citation and quotation marks omitted).

<sup>5</sup> VA. CODE ANN. §§ 2.2-4000 through 2.2-4031 (2011 & Supp. 2013).

<sup>6</sup> Section 2.2-4007.01 (2011).

<sup>7</sup> Sections 2.2-4007 (2011); 2.2-4009 (Supp. 2013).

<sup>8</sup> Section 2.2-4013 (2011).

<sup>9</sup> Section 2.2-4014 (2011).

<sup>10</sup> *Manassas Autocars, Inc. v. Couch*, 274 Va. 82, 87, 645 S.E.2d 443, 446 (2007) (citations omitted) (“Regulations . . . may not conflict with the authorizing statute.”).

<sup>11</sup> *Id.* at 445, 645 S.E.2d at 446 (citation omitted).

<sup>12</sup> Section 2.2-4013.

<sup>13</sup> VA. CONST. art. V, § 10 (“Except as may be otherwise provided in this Constitution, the Governor shall appoint each officer serving as the head of an administrative department or division of the executive branch of the government, subject to such confirmation as the General Assembly may prescribe. Each officer appointed by the Governor pursuant to this section shall have such professional qualifications as may be prescribed by law and shall serve at the pleasure of the Governor.”).

<sup>14</sup> VA. CODE ANN. § 2.2-107 (2011).

<sup>15</sup> VA. CONST. art. V, § 8.

<sup>16</sup> *Lewis v. Whittle*, 77 Va. 415, 420 (1883).

<sup>17</sup> VA. CONST. art. V, § 7.

<sup>18</sup> See 1983-84 Op. Va. Att’y Gen. 180; 1945-46 Op. Va. Att’y Gen. 144.

<sup>19</sup> See VA. CONST. art. I, § 5; art. III, § 1; art. IV, § 1.

<sup>20</sup> *Lewis*, 77 Va. at 420.

<sup>21</sup> As they pertain to regulations, “guidance documents” are referenced in § 2.2-4008 of the *Code of Virginia*. Nothing in § 2.2-4008 would allow for a guidance document that was inconsistent with the regulation itself or the relevant authorizing statute. Rather, guidance documents, as properly understood,

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only may explain or amplify the relevant regulation or statute. Definitionally, suspending the operation of a regulation would neither explain nor amplify the regulation, but rather, only subvert it.

<sup>22</sup> Robert J. Reinstein, *The Limits of Executive Power*, 59 AM. U. L. REV. 259, 280 (2009) (footnotes omitted).

<sup>23</sup> Whether the nation borrowed from Virginia or whether Virginia borrowed from the nation is unclear. Virginia's "take care" clause first appears explicitly in the Virginia Constitution of 1830. VA. CONST. of 1830 art. IV, § 4. At least one scholar has suggested that the federal "take care" clause "descends to us from the English Bill of Rights, via the Virginia Constitution, and was intended to forbid the executive's suspension of statutes." Peter M. Shane, *Restoring Faith in Government: Presidents and the Separation of Powers, Pardons, and Prosecutors: Legal Accountability*, 11 YALE L. & POL'Y REV. 361, 393-94 (1993) (footnote omitted).

<sup>24</sup> As noted in note 23 *supra*, this language first appeared in the Virginia Constitution of 1830. It has appeared in every subsequent version of the Virginia Constitution. See VA. CONST. of 1851 art. V, § 5; VA. CONST. of 1864 art. V, § 5; VA. CONST. of 1870 art. IV, § 5; and VA. CONST. of 1902 § 73.

<sup>25</sup> See *Manassas Autocars, Inc.*, 274 Va. at 87, 645 S.E.2d at 445. See also VA. CODE ANN. § 2.2-4001 (2011) (defining a "regulation" under the Administrative Process Act as "any statement of general application, having the force of law, affecting the rights or conduct of any person, adopted by an agency in accordance with the authority conferred on it by applicable basic laws.").

<sup>26</sup> The explicit prohibition on suspending laws first appeared as § 7 of the Virginia Declaration of Rights of 1776. It has appeared in every subsequent version of the Virginia Constitution. See VA. CONST. of 1830 art. I, § 7; VA. CONST. of 1851 art. I, § 7; VA. CONST. of 1864 art. I, § 7; VA. CONST. of 1870 art. I, § 9; and VA. CONST. of 1902 § 7.

<sup>27</sup> The separation of powers is a bedrock principle of Virginia government. The concept of separation of powers in Virginia government first appears as § 5 of the Virginia Declaration of Rights of 1776. It has continued in every Virginia Constitution since then. See VA. CONST. of 1830 art. I, § 5 & art. II; VA. CONST. of 1851 art. I, § 5 & art. II; VA. CONST. of 1864 art. I, § 5 & art. II; VA. CONST. of 1870 art. I, § 7 & art. II; and VA. CONST. of 1902 §§ 5 & 39.

<sup>28</sup> It is conceivable that there could be circumstances where a statute or regulation allows for the regulation to be suspended under certain circumstances, and thus, such suspension would not necessarily violate the separation of powers. You do not inquire about such a scenario, and a review of all of the specific facts and circumstances would be necessary to determine if such a scenario violated some portion of the Virginia Constitution. Accordingly, such inquiry is beyond the scope of this opinion, and I do not address it in the abstract here.

## OP. NO. 13-111

### ELECTIONS: GENERAL PROVISIONS AND ADMINISTRATION - STATE BOARD OF ELECTIONS

#### ELECTIONS: VOTER REGISTRATION

#### TRADE AND COMMERCE: UNIFORM ELECTRONIC TRANSACTIONS ACT

Although no law requires a registrar to accept mailed voter registration applications with electronic signatures, the State Board of Elections is not precluded from directing that registrars accept them, and the Board, in its discretion, may do so. The Board also

has discretionary authority to establish criteria to preserve the security of confidential voter information and to ensure the authenticity and validity of electronic signatures.

MR. JAMES M. HINSHAW  
MR. DANIEL H. HAWORTH  
MR. W. DONALD BROWN  
CITY OF NORFOLK OFFICE OF ELECTIONS  
SEPTEMBER 26, 2014

### **ISSUE PRESENTED**

You inquire regarding whether applicable law requires, permits, or forbids the Norfolk Electoral Board from accepting mailed voter registration applications with electronically created signatures.<sup>1</sup> In the context of this inquiry, you express concerns about possible abuses of this new technological process.

### **RESPONSE**

It is my opinion that, although no law requires the acceptance of mailed voter registration applications with electronic signatures, the State Board of Elections is not precluded from directing that general registrars accept such applications, and the State Board, in its discretion, may do so. The State Board also has discretionary authority to establish criteria to preserve the security of confidential voter information and to ensure the authenticity and validity of electronic signatures.

### **BACKGROUND**

You express concern regarding a new technology, commonly referred to as an “electronic signature,”<sup>2</sup> that is now being used for voter registration by third-party voter registration organizations.

This technology uses the motion of a cursor, finger, stylus, or similar device moved by someone to capture his signature in an electronic device such as a computer, a tablet, or a cell phone. The device then transmits the signature over the Internet to a third party.

When this method is used for voter registration, the signature could be affixed to a registration form filled out by the potential voter on his electronic device, with the completed form then being transmitted to a voter registration organization, but this is not necessarily so. It is also possible for the potential voter to give all information needed to the voter registration organization via telephone so that the organization, rather than the voter, completes the form, with the potential voter then transmitting only his or her electronic signature to the organization. The organization then adds the electronic signature to the thus-completed form, which remains located only on the organization’s computer, and which the potential voter has never seen. The completed form then may be printed by the organization and mailed to the appropriate registrar’s office. When a registrar receives such a form,

it is not initially apparent whether the form was filled in by the voter or by the voter registration organization.

Provided all applicable registration requirements are met, local registrars must register qualified voters upon receipt of the voter registration application.<sup>3</sup> The law does not place any limits on who may submit valid application forms, so an organization mailing in completed applications to register Virginia voters could be located in Virginia, or it could be located anywhere else.<sup>4</sup>

You indicate that the State Board has advised Virginia general registrars to accept such electronic signatures on mailed voter registration applications.<sup>5</sup> The principal concerns you express involve the possible misuse of confidential voter information by voter registration organizations (including possible identity theft) and the ability to verify the authenticity of signatures on such registration applications.

### APPLICABLE LAW AND DISCUSSION

The General Assembly explicitly has provided that the State Board of Elections

shall supervise and coordinate the work of the county and the city electoral boards and of the registrars to obtain uniformity in their practices and proceedings and legality and purity in all elections. It shall make rules and regulations and issue instructions and provide information consistent with the election laws to the electoral boards and registrars to promote the proper administration of election laws.<sup>[6]</sup>

Local electoral boards and registrars shall follow rules and regulations of the State Board insofar as they do not conflict with Virginia law or federal law.<sup>7</sup>

In your request, you specifically ask about the application of the federal Electronic Signatures in Global and National Commerce Act (“ESIGN”),<sup>8</sup> which generally provides that signatures related to certain transactions “may not be denied legal effect, validity, or enforceability solely because it is in electronic form[.]”<sup>9</sup> ESIGN applies only to “transaction[s] in or affecting interstate commerce”<sup>10</sup> and defines “transaction” to mean “an action or set of actions relating to the conduct of business, consumer, or commercial affairs,” to include sales, leases, exchanges and other dispositions of property and services.<sup>11</sup> Because voter registration is civic or governmental in nature, and not “business, consumer or commercial,” I conclude that voter registration is not a “transaction” for purposes of ESIGN, and therefore this federal act does not require Virginia general registrars to accept the applications you describe.<sup>12</sup>

Nevertheless, Virginia has enacted its own statutes governing the use of electronic signatures: the Virginia Uniform Electronic Transactions Act (“UETA”)<sup>13</sup> applies to “electronic signatures relating to a transaction.”<sup>14</sup> Unlike ESIGN, UETA defines

“transaction” as “an action or set of actions occurring between two or more persons relating to the conduct of business, commercial, or *government affairs*.”<sup>15</sup> Voter registration is an action relating to government affairs and, therefore, it is a “transaction” for purposes of UETA. UETA’s actual impact, however, is governed by other applicable substantive law and circumstances.<sup>16</sup> Specifically, whether an “electronic signature has legal consequence is determined by [UETA] and other applicable law.”<sup>17</sup> UETA generally provides that, “[i]f a law requires a signature, or provides for certain consequences in the absence of a signature, an electronic signature satisfies the law[;]”<sup>18</sup> however, by its terms, UETA expressly “does not require public bodies of the Commonwealth to use or permit the use of electronic . . . signatures.”<sup>19</sup> Accordingly, I find nothing in UETA that specifically requires general registrars to process the voter registration applications about which you inquire.

Although UETA does not require applications featuring electronic signatures to be accepted, the law clearly contemplates that public bodies, such as the State Board of Elections, may accept electronic signatures. In recognizing this authority, UETA provides that

To the extent that public bodies of the Commonwealth use . . . electronic signatures . . . , the following rules apply:

\* \* \* \*

(2) Public bodies of the Commonwealth may specify the type of electronic signature required, the manner and format in which the electronic signatures must be affixed to the electronic record, and the identity of, or criteria that must be met by, any third party used by a person filing a document to facilitate the process.

\* \* \* \*

(4) Public bodies of the Commonwealth may establish other criteria to ensure the authenticity and validity of electronic signatures.<sup>[20]</sup>

Your inquiry concerns registering to vote by mail, which is one of three authorized means by which to register, with the other two being to apply in-person<sup>21</sup> or electronically.<sup>22</sup> Mail registration is governed by Article 3.1 of Title 24.2 of the *Code of Virginia* and related statutes.<sup>23</sup> Although the application must be signed,<sup>24</sup> the statutes do not require signatures to be made in a particular manner.<sup>25</sup> No statute either requires or prohibits the use of electronic signatures for mailed voter registration applications.

As prior Opinions of this Office have articulated, the State Board of Elections, through the Department of Elections, is vested with the administration of the Commonwealth’s election laws, and consequently, interpretations of such laws by

the Board are entitled to great weight.<sup>26</sup> Therefore, in the absence of a statutory mandate or prohibition providing otherwise, the State Board has the discretion to interpret the signature requirement applicable to voter registration applications submitted by mail to include signatures affixed to application forms by electronic means. I therefore conclude, because the applicable law neither requires nor prohibits the use of electronic signatures on mailed voter registration applications, that the State Board of Elections may direct general registrars to accept and to process applications containing such signatures.<sup>27</sup> I further conclude that under UETA, the State Board of Elections has authority to adopt reasonable rules in furtherance of the purposes set forth in UETA. Any such actions by the State Board of Elections should be followed by local registrars and electoral boards.

### CONCLUSION

Accordingly, it is my opinion that, although no law requires the acceptance of mailed voter registration applications with electronic signatures, the State Board is not precluded from directing that general registrars accept such applications, and the State Board may do so. The State Board also has authority to establish criteria to preserve the security of confidential voter information and to ensure the authenticity and validity of electronic signatures.

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<sup>1</sup> This opinion addresses only registration by non-military personnel and military personnel who are stationed in the United States. Registration and voting by overseas military personnel is covered by a separate body of law, the Uniform Military and Overseas Voters Act, VA. CODE ANN. §§ 24.2-451 through 24.2-467 (Supp. 2014).

<sup>2</sup> As applicable to your inquiry, under both federal and Virginia law, an “electronic signature” is defined as “an electronic sound, symbol, or process attached to or logically associated with” a record and “executed or adopted by a person with the intent to sign the record[.]” 15 U.S.C. §§ 7006(5); VA. CODE ANN. § 59.1-480(8) (2006), and “‘Electronic’ means relating to technology having electrical, digital, magnetic, wireless, . . . or similar capabilities, 15 U.S.C. §§ 7006(2); VA. CODE ANN. § 59.1-480(5).

<sup>3</sup> VA. CODE ANN. § 24.2-417 (2011). *See also* § 1973gg-6(1)(D) of the National Voter Registration Act of 1993, 42 U.S.C. §§ 1973gg through 1973gg-10.

<sup>4</sup> The statute governing voter registration organizations is VA. CODE ANN. § 24.2-416.6 (Supp. 2014). The requirements imposed by this statute are not relevant to your inquiry, for the facts you present involve Virginia activities of a voter registration organization in Oakland, California.

<sup>5</sup> An e-mail about electronic signatures on mail-in registrations dated September 25, 2013 from Justin Reimer, Deputy Secretary of the Virginia Board of Elections to all General Registrars stated, in relevant part, “SBE’s [the State Board of Elections’] advice is that general registrars should process these applications.”

<sup>6</sup> VA. CODE ANN. § 24.2-103 (Supp. 2014).

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

<sup>8</sup> Electronic Signatures in Global and National Commerce Act, 15 U.S.C. §§ 7001 through 7031 (2012).

<sup>9</sup> 15 U.S.C. § 7001(a)(1).

<sup>10</sup> 15 U.S.C. § 7001(a).

<sup>11</sup> 15 U.S.C. § 7006 (13).

<sup>12</sup> While ESIGN does not require acceptance of electronic signatures, Congress does have the power to determine the time, place, and manner of conducting federal elections, including the procedures by which voters register to vote in federal elections. *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. \_\_\_ (June 17, 2013).

<sup>13</sup> Uniform Electronic Transactions Act, VA. CODE ANN. §§ 59.1-479 through 59.1-498 (2006 & Supp. 2014).

<sup>14</sup> Section 59.1-481(a) (Supp. 2014). Section 59.1-481(b) provides exemptions to UETA not relevant here.

<sup>15</sup> Section 59.1-480(16) (emphasis added).

<sup>16</sup> Section 59.1-481(d).

<sup>17</sup> Section 59.1-483(e) (2006). *See also* Official Comment to the Act, stating in paragraph B, “Whether a record is attributed to a person is left to law outside this Act. Whether an electronic signature has any effect is left to the surrounding circumstances and other law.”

<sup>18</sup> Section 59.1-485(d) (2006).

<sup>19</sup> Section 59.1-496(c) (2006).

<sup>20</sup> Section 59.1-496.

<sup>21</sup> *See* VA. CODE ANN. §§ 24.2-411 through 24.2-412 (2011 & Supp. 2014).

<sup>22</sup> *See* § 24.2-416.7 (Supp. 2014).

<sup>23</sup> Sections 24.2-416.1 through 24.2-416.6 (2011 & Supp. 2014).

<sup>24</sup> Section 24.2-418

<sup>25</sup> The additional statutory conditions applicable to electronic registration that are contained in § 24.2-416.7, including having certain Department of Motor Vehicles records available for review by the general registrar, do not apply to mailed applications.

<sup>26</sup> *See, e.g.*, 2006 Op. Va. Att’y Gen. 124; 2005 Op. Va. Att’y Gen. 97; 2001 Op. Va. Att’y Gen. 125; 1999 Op. Va. Att’y Gen. 3; 1996 Op. Va. Att’y Gen. 124; 1983-84 Op. Va. Att’y Gen. 140; 1983-84 Op. Va. Att’y Gen. 152.

27 I note that permitting the use of electronic signatures does not alter the review process of these applications. The requirements established by Chapter 4 of Title 24.2 of the *Code of Virginia* govern the evaluation of voter registration applications, and to be approved an application also must meet the requirements of Chapter 4, regardless of the manner by which an application is signed.

## OP. NO. 13-112

### CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT

#### ELECTIONS: FEDERAL, COMMONWEALTH, AND LOCAL OFFICERS - REMOVAL OF PUBLIC OFFICERS FROM OFFICE

A provision in the Charter for the Town of Haymarket, which allows the Town Council to expel one of its members through a two-thirds vote, is constitutional.

Sections 24.2-230 through 24.2-238 of the *Code of Virginia*, which relate to the removal

of local elected officers, do not supersede the provision in the Town of Haymarket's Charter allowing the Town Council to expel one of its members through a two-thirds vote.

MARTIN CRIM, ESQUIRE  
TOWN ATTORNEY FOR THE TOWN OF HAYMARKET  
JULY 18, 2014

### **ISSUES PRESENTED**

You inquire whether a provision in Article III, § 1(4) of the Charter for the Town of Haymarket ("Charter"),<sup>1</sup> which allows the Haymarket Town Council to expel a member with the concurrence of two-thirds, is constitutional. You inquire further whether §§ 24.2-230 through 24.2-238, which relate to the removal of a local elected officers, supersede Article III, § 1(4) of the Charter. Lastly, you inquire whether the mayor may vote in expulsion proceedings, and whether the removal of a council member requires the concurrence of two-thirds of all voting members, or only of those present for the vote to expel.

### **RESPONSE**

It is my opinion that the provision in Article III, § 1(4) of the Charter, which allows the Town Council to expel a member by a two-thirds vote, is a constitutional exercise of legislative power. Sections 24.2-230 through 24.2-238, which relate to the removal of local elected officers, do not supersede this provision of the Charter. Further, the mayor may not vote in expulsion proceedings, and the concurrence of two-thirds of all council members eligible to vote is required in order to remove a council member.

### **APPLICABLE LAW AND DISCUSSION**

#### **I. THE CONSTITUTIONALITY OF THE CHARTER PROVISION ALLOWING EXPULSION BY TWO-THIRDS VOTE**

Article III, § 1(4) of the Charter provides that "[t]he council shall judge of the election, qualification, and returns of its members; may fine them for disorderly conduct, and, with the concurrence of two-thirds, expel a member."<sup>2</sup> The threshold inquiry is whether this provision is a constitutional exercise of legislative authority. "It is well settled in Virginia that the State Constitution does not grant powers to the legislature but, instead, restricts powers which otherwise are practically unlimited."<sup>3</sup> The General Assembly may enact any law that is not prohibited by the United States or Virginia Constitutions.<sup>4</sup> The United States and Virginia Constitutions do not expressly prohibit the General Assembly from granting power to a local legislative body to discipline or expel one of its members.<sup>5</sup>

Instead, the Constitution of Virginia explicitly grants the General Assembly certain powers of oversight over towns and other municipal corporations, including the

power to delegate governmental powers to those bodies. In particular, Article VII, § 2 of the Constitution of Virginia establishes that the General Assembly “shall provide *by general law* for the organization, government, powers, change of boundaries, consolidation, and dissolution of counties, cities, towns, and regional governments.”<sup>6</sup> In addition, Article VII, § 2 of the Constitution of Virginia establishes that the General Assembly “may . . . provide *by special act* for the organization, government, and powers of any county, city, town, or regional government.”<sup>7</sup>

General law provides that

*A municipal corporation shall have and may exercise all powers which it now has or which may hereafter be conferred upon or delegated to it under the Constitution and laws of the Commonwealth and all other powers pertinent to the conduct of the affairs and functions of the municipal government, the exercise of which is not expressly prohibited by the Constitution and the general laws of the Commonwealth, and which are necessary or desirable to secure and promote the general welfare of the inhabitants of the municipality . . . .*<sup>[8]</sup>

A town is a “municipal corporation” pursuant to the provisions of § 15.2-102. Accordingly, pursuant to general law, the Town of Haymarket is authorized to exercise all powers it now possesses under the laws of the Commonwealth, including all powers granted by special acts of the legislature.<sup>9</sup>

By special act, the General Assembly enacted the Charter for the Town of Haymarket, including the provision about which you inquire.<sup>10</sup> This provision mirrors the provisions in Article IV, § 7 of the Constitution of Virginia, and Article I, § 5 of the Constitution of the United States, which permit each house of the General Assembly and Congress, respectively, to expel a member with the concurrence of two-thirds.<sup>11</sup> In addition, it conforms to legislative practice inasmuch as the General Assembly has enacted several other town charters expressly permitting a town council, with the concurrence of two-thirds, to expel a member.<sup>12</sup>

Accordingly, I conclude that the provision in Article III, § 1(4) of the Haymarket Town Charter that allows the Town Council to expel a member with the concurrence of two-thirds is a constitutional exercise of legislative power, and the Town Council is authorized thereby to exercise such power.

## **II. THE STATUTORY SUPERSESION OF THE CHARTER PROVISION**

You further inquire whether §§ 24.2-230 through 24.2-238 of the *Code of Virginia*, which relate to the method and grounds for removal of local elected officers, supersede Article III, § 1(4) of the Charter.<sup>13</sup> It is well-established that “[t]he

implied repeal of an earlier statute by a later enactment is not favored.”<sup>14</sup> “There is a presumption against a legislative intent to repeal where the later statute does not amend the former or refer expressly to it.”<sup>15</sup> In addition, “where the subsequent general law and prior special law, charter or ordinance provisions do not conflict, they both stand.”<sup>16</sup> Moreover, the legislature may enact provisions in town charters that confer “rights and privileges different from, and in addition to, those conferred by general statutes.”<sup>17</sup> Accordingly, “when there is a conflict in the provisions of a special or local act and the general law on the subject[,] the special or local act is controlling.”<sup>18</sup>

The General Assembly has not provided expressly that §§ 24.2-230 through 24.2-238 constitute the sole method or grounds for removal of an elected, local officer. Moreover, §§ 24.2-230 through 24.2-238, unlike other provisions within Title 24 of the Code, do not amend or expressly refer to any charter provisions.<sup>19</sup> Absent language amending or expressly referring to separate charter provisions, §§ 24.2-230 through 24.2-238 do not conflict with Article III, § 1(4) of the Charter. Even if a conflict existed, §§ 24.2-230 through 24.2-238, which are general laws, could not be construed as superseding Article III, § 1(4) of the Charter, which is a special act.<sup>20</sup>

Accordingly, §§ 24.2-230 through 24.2-238 of the *Code of Virginia*, which relate to the removal of a local elected officer, do not supersede Article III, § 1(4) of the Charter.

### **III. THE VOTE REGARDING THE REMOVAL OF A COUNCIL MEMBER**

Lastly, you inquire whether the mayor may vote in expulsion proceedings, and whether the removal of a council member requires the concurring votes of two-thirds of all council members, or only those present for the vote to expel.

Article III, § 1(4) of the Charter provides that “[t]he council shall judge of the election, qualification, and returns of its members; may fine them for disorderly conduct, and, with the concurrence of two-thirds, expel a member.”<sup>21</sup> With respect to the role of the mayor in expulsion proceedings, Article III, § 1(2) of the Charter states that “the mayor and councilmen shall constitute the Town council.”<sup>22</sup> This section deems the mayor a member of the council and therefore subject to the removal provision. Nonetheless, despite making him a member, the Charter explicitly prohibits the mayor from voting except to break a tie, stating, “The Mayor shall have no right to vote in the council, except in case of a tie he shall have the right to break the same by his vote.”<sup>23</sup> The Charter provides for six councilmen who are eligible to vote.<sup>24</sup> Because the removal of a member requires the concurring vote of two-thirds, there could not be a tie. That is, if there are four votes to expel, the member is expelled. If there are fewer than four votes, the member is not expelled. There can be no tie. Because there can be no tie, the mayor may not vote. Accordingly, I conclude that the intent of the Charter is to

exclude the mayor from voting in all expulsion proceedings, whether for his office or for the office of another member of the council.

With regard to your inquiry as to whether all council members must vote in expulsion proceedings, I note that a proceeding to remove a public officer is “highly penal in nature” and statutes relating to such removal must be strictly construed.<sup>25</sup> Although Article III, § 1(5) of the Charter provides generally that business may be conducted in the presence of a quorum,<sup>26</sup> Article III, § 1(4) does not specify whether the “two-thirds” necessary to expel a member refers to two-thirds of those present and constituting a quorum, or two-thirds of all voting members of the council.<sup>27</sup> In the absence of an express provision to the contrary, a strict construction of Article III, § 1(4) of the Charter requires for expulsion the concurrence of two-thirds of all councilmen eligible to vote - that is, an affirmative vote of at least four of the six council members - not the concurrence of two-thirds of those members who are present.<sup>28</sup>

### CONCLUSION

It is my opinion that the provision in Article III, § 1(4) of the Charter, which allows the Town council to expel a member with the concurrence of two-thirds, is a constitutional exercise of legislative power. Sections 24.2-230 through 24.2-238, which relate to the removal of local elected officers, do not supersede Article III, § 1(4) of the Charter. Further, the mayor may not vote in expulsion proceedings, and the concurrence of two-thirds of all council members eligible to vote is required in order to remove a council member.

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<sup>1</sup> CHARTER FOR THE TOWN OF HAYMARKET, VA., art. III, §1(4), *available at* <http://dls.virginia.gov/charters/Haymarket.pdf>.

<sup>2</sup> *Id.*; *see* 1950 Va. Acts ch. 540.

<sup>3</sup> 1983-84 Op. Va. Att’y Gen. 176, 177; *see* VA. CONST. art. IV, § 14; Fairfax Cnty. Indus. Dev. Auth. v. Coyner, 207 Va. 351, 355, 150 S.E.2d 87, 91 (1966); Lewis Trucking Corp. v. Commonwealth, 207 Va. 23, 29, 147 S.E.2d 747, 751-52 (1966); Morgan v. Commonwealth, 168 Va. 731, 736-37, 191 S.E. 791, 793 (1937).

<sup>4</sup> FFW Enters. v. Fairfax Cnty., 280 Va. 583, 590, 701 S.E.2d 795, 800 (2010) (quoting Dean v. Paolicelli, 194 Va. 219, 227, 72 S.E.2d 506, 511 (1952)). Furthermore, “[t]here is no stronger presumption known to the law than that which is made by the courts with respect to the constitutionality of an act of Legislature.” Whitlock v. Hawkins, 105 Va. 242, 248, 53 S.E. 401, 403 (1906). The Supreme Court of Virginia “will not invalidate a statute unless that statute clearly violates a provision of the United States or Virginia Constitutions.” Marshall v. N. Va. Transp. Auth., 275 Va. 419, 427, 657 S.E.2d 71, 75 (2008).

<sup>5</sup> I note in this regard that “a legislative body’s discipline of one of its members is a core legislative act.” Whitener v. McWatters, 112 F.3d 740, 741 (4th Cir. 1997); *see also* Pine v. Commonwealth, 121 Va. 812, 825, 93 S.E. 652, 655-56 (1917); 1980-81 Op. Va. Att’y Gen. 186, 187. This legislative power is the “primary power by which legislative bodies preserve their institutional integrity without compromising the principle that citizens may choose their representatives.” *Whitener*, 112 F.3d at 744

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(internal quotation marks omitted) (citing *Powell v. McCormack*, 395 U.S. 486, 548 (1969)). Because the discipline of members of the legislature is a core legislative function, legislators may be afforded total immunity from suits alleging violations of procedural due process guarantees in disciplinary proceedings. *See id.* at 741. Moreover, because the Charter may be applied in a manner that upholds procedural due process guarantees, every reasonable doubt regarding its constitutionality must be resolved in its favor. *See Marshall*, 275 Va. at 428, 657 S.E.2d at 75 (citing *Hess v. Snyder Hunt Corp.*, 240 Va. 49, 53, 392 S.E.2d 817, 820 (1990)).

<sup>6</sup> VA. CONST. art. VII, § 2 (emphasis added).

<sup>7</sup> *Id.* (emphasis added).

<sup>8</sup> VA. CODE ANN. § 15.2-1102 (2012) (emphasis added).

<sup>9</sup> The laws of the Commonwealth include both its general laws and special acts. *See* VA. CONST. art. VII, § 2.

<sup>10</sup> *See* 1950 Va. Acts ch. 540 (establishing the Charter for the Town of Haymarket). The General Assembly last amended the Charter in 1972, with no change to the pertinent provision. *See* 1972 Va. Acts ch. 46.

<sup>11</sup> *See* VA. CONST. art. IV, § 7 (“Each house shall judge of the election, qualification, and returns of its members, may punish them for disorderly behavior, and, with the concurrence of two-thirds of its elected membership, may expel a member.”); U.S. CONST. art. I, § 5 (“Each House may determine the Rules of its Proceedings, punish its Members for disorderly Behaviour, and, with the Concurrence of two thirds, expel a Member.”).

<sup>12</sup> *See, e.g.*, CHARTER FOR THE TOWN OF AMHERST, VA., art. III, § 1(4), available at <http://dls.virginia.gov/charters/Amherst.pdf>; CHARTER FOR THE TOWN OF BOYCE, VA., § 5(2), available at <http://dls.virginia.gov/charters/Boyce.pdf>; CHARTER FOR THE TOWN OF CHASE CITY, VA., § 4(5), available at <http://dls.virginia.gov/charters/ChaseCity.pdf>; CHARTER FOR THE TOWN OF CHATHAM, VA., § 4(5), available at <http://dls.virginia.gov/charters/Chatham.pdf>; CHARTER FOR THE TOWN OF IRVINGTON, VA., art. III, § IV, available at <http://dls.virginia.gov/charters/Irvington.pdf>. In previous years, the General Assembly expressly established by general law the power of a town council to discipline its members through former § 15-423, which provides in relevant part: “The council of a town shall judge of the election, qualification, and returns of its members, may fine them for disorderly behavior and with the concurrence of two-thirds, expel a member.” (Former § 15-423 was repealed in 1962. *See* 1962 Va. Acts ch. 623.)

<sup>13</sup> I note that the General Assembly enacted Article III, § 1 of the Charter in 1950, prior to the enactment of VA. CODE ANN. § 24.2-230 (2011) and §§ 24.2-232 through 24.2-238 (2011 & Supp. 2014). *See* 1950 Va. Acts ch. 540; 1975 Va. Acts. ch. 595.

<sup>14</sup> *See, e.g.*, *Country Vintner, Inc. v. Louis Latour, Inc.*, 272 Va. 402, 413, 634 S.E.2d 745, 751 (2006) (quoting *Sexton v. Cornett*, 271 Va. 251, 257, 623 S.E.2d 898, 901 (2006)).

<sup>15</sup> *Id.* (quoting *Sexton v. Cornett*, 271 Va. 251, 257, 623 S.E.2d 898, 901 (2006)).

<sup>16</sup> *Scott v. Lichford*, 164 Va. 419, 423, 180 S.E. 393, 394 (1935) (internal quotation marks omitted); *see* 1996 Op. Va. Att’y Gen. 33, 35.

<sup>17</sup> *See City of Colonial Heights v. Loper*, 208 Va. 580, 585-86, 159 S.E.2d 843, 847 (1968) (quoting *Ransone v. Craft*, 161 Va. 332, 340, 170 S.E. 610, 613 (1933)); *see also* § 15.2-1103 (2012) (providing that the legislature may confer, by municipal charter, powers in addition to those conferred by general statute); *Fallon Florist, Inc. v. City of Roanoke*, 190 Va. 564, 574, S.E.2d 316, 321 (1950); *City of Portsmouth v. Weiss*, 145 Va. 94, 107, 133 S.E. 781, 785 (1926).

<sup>18</sup> Powers v. Cnty. Sch. Board, 148 Va. 661, 669, 139 S.E. 262, 264 (1927); *see also* Scott, 164 Va. at 423-24, 180 S.E. at 395 (quoting S. & W. Ry. Co v. Commonwealth, 104 Va. 314, 321, 51 S.E. 824, 826 (1905)) (internal quotation marks omitted) (“[W]here there are two statutes, the earlier special and the latter general, the terms of the general broad enough to include the matter provided for in the special, the fact that one is special and the other general creates a presumption that the special is to be considered as remaining an exception to the general, and that the general will not be considered as repealing the special unless the provisions of the general are manifestly inconsistent with those of the special.”); 2010 Op. Va. Att’y Gen. 13, 13.

<sup>19</sup> For instance, I note that § 24.2-228(A) provides that a provision relating to vacancies in local government applies “[n]otwithstanding any charter provisions to the contrary.”

<sup>20</sup> *See* 2010 Op. Va. Att’y Gen. at 13, and citations therein.

<sup>21</sup> CHARTER FOR THE TOWN OF HAYMARKET, VA., art. III, § 1(4).

<sup>22</sup> *Id.* at art. III, § 1(2).

<sup>23</sup> *Id.* at art. III, § 1(7).

<sup>24</sup> *Id.* at art. III, § 1(2).

<sup>25</sup> Commonwealth ex rel. Davis v. Malbon, 195 Va. 368, 377, 78 S.E.2d 683, 688-89 (1953) (internal quotation marks omitted).

<sup>26</sup> CHARTER FOR THE TOWN OF HAYMARKET, VA., art. III, § 1(5) (“A majority of the members of the council shall constitute a quorum for the transaction of business.”).

<sup>27</sup> *See id.* at art. III, § 1(4).

<sup>28</sup> Under the facts you have presented, all six council positions are occupied: there is no vacancy because of death, resignation, or any other reason. Nevertheless, if there were a vacancy, the analysis would be the same: if at least two-thirds of the council members - however many members that may be - vote to expel the Mayor, he is expelled. If less than two-thirds vote to expel him, regardless of whether or not there is a tie, he is not expelled. Even if there are fewer than six council members, the Mayor does not get to vote to break a tie on a vote to expel him.

## **OP. NO. 13-114**

### **CONSTITUTION OF VIRGINIA: BILL OF RIGHTS**

### **CONSTITUTION OF VIRGINIA: DIVISION OF POWERS**

### **CONSTITUTION OF VIRGINIA: LEGISLATURE**

### **TAXATION: INCOME TAX**

**A governor may not direct or require any state agency to allow same-sex couples to receive joint marital status for Virginia income tax returns.**

**THE HONORABLE ROBERT G. MARSHALL**

**MEMBER, HOUSE OF DELEGATES**

**JANUARY 10, 2014**

### ISSUE PRESENTED

You inquire whether a Governor, by executive order, can require or direct the Finance Department or the Department of Taxation to allow same-sex couples to receive joint marital status for purposes of filing Virginia income tax returns.

### RESPONSE

It is my opinion that a Governor may not direct or require any agency of state government to allow same-sex couples to receive joint marital status for Virginia income tax returns. Such a directive would represent an attempt to exercise legislative powers in violation of the constitutionally mandated separation of powers and would also violate the express terms of Article I, § 15-A of the Virginia Constitution.

### APPLICABLE LAW AND DISCUSSION

Article V, § 1 of the Constitution of Virginia establishes that “[t]he chief executive power of the Commonwealth shall be vested in a Governor.” The Supreme Court of Virginia has noted that “[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.”<sup>1</sup> No constitutional or statutory provisions explicitly grant to the Governor the authority to issue executive orders. Governors historically have issued executive orders based upon the authority inherent in the constitutional duty of a Governor to “take care that the laws be faithfully executed.”<sup>2</sup> Prior opinions of the Attorney General recognize that the Constitution grants to the Governor a general reservoir of powers as chief executive of the Commonwealth.<sup>3</sup> Thus, the authority of the Governor to issue executive orders is well established in the law and history of the Commonwealth.

The scope of such authority, however, is limited.<sup>4</sup> A Governor may not use an executive order (or any other means) to exercise legislative power, which is vested solely in the General Assembly.<sup>5</sup> Furthermore, a governor may not issue executive orders or take other action that is contrary to express provisions of the Virginia Constitution.<sup>6</sup> Thus, if an executive order amounts to an exercise of legislative power or violates a provision of the Virginia Constitution, the Governor is without power to issue it and the order necessarily is void.

Applying this background to your specific inquiry, it becomes clear that a Governor may not direct or require a state agency to allow a change in filing status to permit same sex couples to receive joint marital status for Virginia income tax returns for two reasons. First, it would represent an impermissible attempt by the Governor to exercise legislative power belonging to the General Assembly. Second, such a directive would violate the express terms of Article I, § 15-A of the Virginia Constitution.

At the outset, it must be recognized that the power of taxation is a legislative power. The Virginia Supreme Court has

long recognized the principle that the power of a government to tax its people and their property is essential to government's very existence. This power to tax, which is inherent in every sovereign state government, is a legislative power that the Constitution vests in the General Assembly.<sup>[7]</sup>

Regarding income taxation, the General Assembly has exercised its legislative power by enacting Chapter 3 of Title 58.1 of the *Code of Virginia*.<sup>8</sup> In Chapter 3, the General Assembly, through the words it has chosen, has made clear that joint returns are available only to traditional married couples. For example, § 58.1-324 of the *Code of Virginia* uses the gender-specific terms "husband" and "wife," making clear an intention to have the provision apply to couples composed of one man (the husband) and one woman (the wife). Furthermore, even when the relevant provisions of Chapter 3 contain the gender neutral "individual and spouse,"<sup>9</sup> such language must be interpreted consistent with the provisions of Article I, § 15-A of the Virginia Constitution, which limits marriage to one man and one woman.

Because the power of taxation is legislative and because the General Assembly has spoken directly on the topic, there is no avenue for a Governor to countermand existing law to require or direct a state agency to allow same-sex couples to receive joint marital status for Virginia income tax returns.<sup>10</sup> Any attempt by a Governor to do so would represent an unconstitutional attempt to exercise legislative power in violation of the separation of powers.<sup>11</sup>

Irrespective of the limitations imposed by the separation of powers provisions, the Virginia Constitution nonetheless otherwise prevents a Governor from requiring or directing a state agency to allow same sex couple to receive joint marital status for Virginia income tax returns. A Governor, whose powers flow from the Virginia Constitution, has no ability to violate the provisions of the same Virginia Constitution.<sup>12</sup> Article I, § 15-A of the Virginia Constitution provides that

only a union between one man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions. This Commonwealth and its political subdivisions shall not create or recognize a legal status for relationships of unmarried individuals that intends to approximate the design, qualities, significance, or effects of marriage. Nor shall this Commonwealth or its political subdivisions create or recognize another union, partnership, or other legal status to which is assigned the rights, benefits, obligations, qualities, or effects of marriage.

Thus, because joint filing is limited to married couples, a Governor cannot, consistent with the Virginia Constitution, expand the class of people who may file

jointly to same sex couples because doing so would have the Commonwealth “approximate the design, qualities, significance, or effects of marriage . . .” for persons who are not recognizable as married under Virginia law. Accordingly, Article I, § 15-A of the Virginia Constitution serves as an additional bar to a Governor requiring or directing a state agency to allow same-sex couples to receive joint marital status for Virginia income tax returns.

### CONCLUSION

Accordingly, it is my opinion that a Governor may not direct or require any agency of state government to allow same-sex couples to receive joint marital status for Virginia income tax returns. Such a directive would represent an attempt to exercise legislative powers in violation of the constitutionally mandated separation of powers and would also violate the express terms of Article I, § 15-A of the Virginia Constitution.

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<sup>1</sup> *Lewis v. Whittle*, 77 Va. 415, 420 (1883).

<sup>2</sup> VA. CONST. art. V, § 7.

<sup>3</sup> See 1983-84 Op. Va. Att’y Gen. 180; 1945-46 Op. Va. Att’y Gen. 144.

<sup>4</sup> See generally 2006 Op. Va. Att’y Gen. 36.

<sup>5</sup> See VA. CONST. art. I, § 5; art. III, § 1; art. IV, § 1. See also 2012 Op. Va. Att’y Gen. 119 n.44 (listing instances in which this principle has been applied).

<sup>6</sup> *Lewis*, 77 Va. at 420.

<sup>7</sup> *Marshall v. N. Va. Transp. Auth.*, 275 Va. 419, 427, 657 S.E.2d 71, 75 (2008) (internal citations omitted). Because taxation is a legislative power, it may only be exercised by the General Assembly. See VA. CONST. art. IV, § 1 (“The legislative power of the Commonwealth shall be vested in a General Assembly . . .”).

<sup>8</sup> VA. CODE ANN. § 58.1-301(A) (2013) provides that “[a]ny term used in this chapter shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required.” As discussed more fully below, the precise terms chosen by the General Assembly and the existence of Article I, § 15-A of the Virginia Constitution make clear that same-sex couples are not authorized to file joint returns in Virginia regardless of the position taken by the federal government. Accordingly, to the extent the federal government allows Virginia same sex couples to file joint federal tax returns, “a different meaning is clearly required . . .” for Virginia income tax purposes. The United States Supreme Court’s decision in *United States v. Windsor*, 133 S. Ct. 2675 (2013) does not alter the analysis. The holding in *Windsor* is limited to the federal government’s definition of “marriage” and “spouse.” The holding applies only to “those lawful marriages” entered into in a state that, through its marriage laws, “sought to protect in personhood and dignity” same-sex couples. *Windsor*, 133 S. Ct. at 2696. Indeed, the Court made clear that § 2 of the federal Defense of Marriage Act, which allows states to refuse to recognize same-sex marriages performed under the laws of other states, was not at issue, and thus it remains valid law. *Windsor*, 133 S. Ct. at 2682.

<sup>9</sup> See, e.g., VA. CODE ANN. § 58.1-321(B) (2013). I note that § 58.1-321 was amended after Article I, § 15-A of the Virginia Constitution became effective. Accordingly, to comply with the Virginia Constitution, the use of the term “spouse” must be understood to refer only to a marriage between one man and one woman.

<sup>10</sup> Although the Department of Taxation does have authority “to develop procedures or guidelines for implementation of the provisions” of certain portions of Chapter 3 of Title 58.1, any procedure or guideline that would allow joint filings by same-sex couples would be subverting the statutory scheme as opposed to implementing it and would therefore be void.

<sup>11</sup> The separation of powers is a bedrock principle of Virginia government. It is so significant that it appears in two separate provisions of the current Virginia Constitution. *See* VA. CONST. art. I, § 5 (“That the legislative, executive, and judicial departments of the Commonwealth should be separate and distinct . . . .”) and VA. CONST. art. III, § 1 (“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 . . . .”). The concept of separation of powers in Virginia government first appears as § 5 of the Virginia Declaration of Rights of 1776. It has continued in every Virginia Constitution since then. *See* VA. CONST. of 1830 art. I, § 5 & art. II; VA. CONST. of 1851 art. I, § 5 & art. II; VA. CONST. of 1864 art. I, § 5 & art. II; VA. CONST. of 1870 art. I, § 7 & art. II; and VA. CONST. of 1902 §§ 5 & 39.

<sup>12</sup> *See* VA. CONST. art. II, § 7; VA. CODE ANN. § 49-1 (2013) (providing that all elected officers are to take an oath or affirmation swearing or affirming to “support the Constitution of the United States, and the Constitution of the Commonwealth of Virginia . . .”).

## OP. NO. 14-001

### ADMINISTRATION OF GOVERNMENT: STATE AND LOCAL GOVERNMENT CONFLICT OF INTERESTS ACT

It is not a violation of the State and Local Government Conflict of Interests Act for members of the Virginia Tobacco Indemnification and Community Revitalization Commission to vote on transactions before the Commission where such transaction involves an entity or organization represented by a consulting or law firm where a member’s sibling is a partner, unless such sibling resides in the same household with the member and the member is dependent on the sibling or the sibling is dependent on the member.

THE HONORABLE TERRY G. KILGORE  
MEMBER, HOUSE OF DELEGATES  
JANUARY 10, 2014

### ISSUE PRESENTED

You ask whether it would be a violation of the State and Local Government Conflict of Interests Act (the “Act”),<sup>1</sup> for members of the Virginia Tobacco Indemnification and Community Revitalization Commission (“Commission”) to vote on transactions before the Commission where such transaction involves an entity or organization represented by a consulting or law firm where a member’s sibling is a partner.

## RESPONSE

It is my opinion that it is not a violation of the Act for members of the Commission to vote on transactions before the Commission where such transaction involves an entity or organization represented by a consulting or law firm where a member's sibling is a partner, unless such sibling resides in the same household with the member and the member is dependent on the sibling or the sibling is dependent on the member.<sup>2</sup>

## APPLICABLE LAW AND DISCUSSION

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

The Act applies to state and local government officers and employees.<sup>7</sup> A member of the Commission is an "officer"<sup>8</sup> of a state "governmental agency,"<sup>9</sup> subject to the Act's prohibitions and restrictions.

Prior opinions have held that the Act restricts the private financial activities of officers of state governmental agencies when there is a close relationship between the officers' private financial activities and their official duties.<sup>10</sup> Section 2.2-3103 provides that no state officer or employee shall:

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

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

Section 2.2-3106(A) provides that “[n]o officer or employee of any governmental agency of state government . . . shall have a personal interest in a contract with the governmental agency of which he is an officer or employee, other than his own contract of employment.” Section 2.2-3112(A)(1) further requires an officer of a state governmental agency to “disqualify himself from participating in the transaction if (i) the transaction has application solely to property or a business . . . in which he has a personal interest . . . or (ii) he is unable to participate pursuant to subdivision 2, 3 or 4.” A personal interest includes “salary, other compensation, fringe benefits, or benefits from the use of property, or any combination thereof, . . . that exceeds, or may reasonably be anticipated to exceed, \$10,000 annually.”<sup>11</sup> A personal interest in a transaction includes a personal interest of an officer in any matter considered by his agency when the officer may realize a reasonably foreseeable direct or indirect benefit as a result of the agency’s action.<sup>12</sup>

You ask whether any benefit a member’s sibling may receive as a partner in a consulting or law firm where the firm represents entities or organizations before the Commission is imputed to the member such that it gives rise to an impermissible conflict of interest in violation of the Act.

The Act defines a personal interest to include “a financial benefit or liability accruing to an officer or employee or to a member of his immediate family.”<sup>13</sup> Section 2.2-3101 defines immediate family as “(i) a spouse and (ii) any person residing in the same household as the officer or employee, who is a dependent of the officer or employee or of whom the officer or employee is a dependent.” Section 2.2-3101 further defines dependent as a “son, daughter, father, mother, brother, sister or other person, whether or not related by blood or marriage, if such person receives from the officer or employee, or provides the officer or employee, more than one-half of his financial support.” In the situation you describe, the member would be precluded from participating in, or voting on matters before the Commission only if the siblings lived together and if one provided the other with more than one-half of his financial support. If the siblings live apart and are not financially dependent upon one another, the Act does not prohibit a vote by the member.<sup>14</sup>

## CONCLUSION

Accordingly, it is my opinion that it is not a violation of the State and Local Government Conflict of Interests Act for members of the Commission to vote on transactions before the Commission where such transaction involves an entity or organization represented by a consulting or law firm where a member’s sibling is a

partner, unless such sibling resides in the same household with the member or the member is dependent on the sibling or the sibling is dependent on the member.

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<sup>1</sup> VA. CODE ANN. §§ 2.2-3100 through 2.2-3131 (2011 & Supp. 2013).

<sup>2</sup> This Opinion is limited to the application of the State and Local Conflict of Interests Act, and does not consider any implications under the General Assembly Conflicts of Interests Act, VA. CODE ANN., §§ 30-100 through 30-129 (2011 & Supp. 2013).

<sup>3</sup> See § 2.2-3100 (Supp. 2013).

<sup>4</sup> See § 2.2-3103 (2011).

<sup>5</sup> See § 2.2-3106(A), (B) (Supp. 2013).

<sup>6</sup> See § 2.2-3112(A)(1) (Supp. 2013).

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

<sup>8</sup> “‘Officer’ means any person appointed or elected to any governmental or advisory agency ... whether or not he receives compensation or other emolument of office.” Section 2.2-3101 (Supp. 2013).

<sup>9</sup> “‘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.*

<sup>10</sup> See 2000 COI Adv. Op. Va. Att’y Gen. No. 00-A06 (concluding that it is not an impermissible conflict of interest for environmental health manager employed by state Health Department to teach course for regional health environment association).

<sup>11</sup> Section 2.2-3101.

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

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

<sup>14</sup> See 1995 COI Adv. Op. Va. Att’y Gen. No. 95-A16; 2007 COI Adv. Op. Va. Att’y Gen. No. 00-A05; 2012 COI Adv. Op. Va. Att’y Gen. No. 12-A07 (applying the definition of “immediate family” for purposes of the Act).

## OP. NO. 14-003

**COUNTIES, CITIES, AND TOWNS: LOCAL GOVERNMENT PERSONNEL, QUALIFICATION FOR OFFICE, BONDS, DUAL OFFICE HOLDING AND CERTAIN LOCAL GOVERNMENT OFFICERS – QUALIFICATION; ELIGIBILITY, ETC., OF LOCAL ELECTED OFFICERS**

Member of a County Board of Supervisors does not vacate his office solely due to a temporary, work-related absence from his district, provided he maintains his domicile in the district and intends to return there upon the termination of his temporary employment.

MARTIN M. MCMAHON, ESQUIRE  
COUNTY ATTORNEY FOR THE COUNTY OF MONTGOMERY  
MAY 23, 2014

### **ISSUE PRESENTED**

You inquire whether a member of a county board of supervisors vacates his position on the board by accepting temporary employment that will require him, while so employed, to live outside the district he represents, but where his intent is to retain his domicile within that district.

### **RESPONSE**

It is my opinion that a member of a county board of supervisors does not vacate his elected office as a county supervisor solely due to an absence from his electoral district to engage in temporary employment, provided that he maintains his domicile within his electoral district and intends to return there upon the termination of the temporary employment.

### **BACKGROUND**

You relate that a member of the Board of Supervisors of Montgomery County is considering seeking an employment position that would require him to live for approximately nine months per year at a work site outside the district he was elected to represent, but still within Montgomery County. He has represented to you that he will continue to own his legal residence within the district, does not intend to change his domicile, and will return to his home within the district once the new employment ends. The initial term will be for three years, subject to annual performance reviews, and it may also be renewed for a second three-year term.

### **APPLICABLE LAW AND DISCUSSION**

Both constitutional and statutory provisions govern the qualifications to hold elective office in Virginia.<sup>1</sup> These provisions require that, to hold elective office, an individual must be qualified to vote for that office.<sup>2</sup> To be recognized as a “qualified voter,” an individual must meet three qualifications: he must (i) be of legal age to vote, (ii) reside both within the Commonwealth and within the precinct in which he will vote, and (iii) be a registered voter.<sup>3</sup> Further, with respect to holding local office specifically, § 15.2-1525 of the *Code of Virginia* requires every county officer, at the time of his election or appointment, to have resided in the locality for 30 days preceding his election.<sup>4</sup> Such county officers include members of a county board of supervisors.<sup>5</sup> Section 15.2-1526 further provides that when an officer subject to this requirement removes himself from the county, city, town or

district for which he was elected during his elective term, “his office shall be deemed vacant.”<sup>6</sup> A “nonresident of a locality is not eligible to hold an office within the locality.”<sup>7</sup>

For purposes of voting, and thus holding elective office, Virginia law provides that “residence” and “resident” require “both domicile and a place of abode.”<sup>8</sup> To establish domicile, a voter or candidate “must live in a particular locality with the intention to remain.”<sup>9</sup> To satisfy the “place of abode” requirement, an individual must have a physical dwelling place within the relevant jurisdiction.<sup>10</sup> When one maintains several abodes, domicile will control what constitutes residence for purposes of voting and holding elective office.<sup>11</sup> As established in the cases discussed below, residence and domicile - terms that are sometimes used interchangeably - are both governed by intent.

In determining residence pursuant to those provisions, the Supreme Court of Virginia has given significant weight to the intent accompanying an officer’s presence in a particular district.<sup>12</sup> The Court has explained that, where an individual “[leaves] his original residence with the intention of returning, such original residence continues in law, notwithstanding the temporary absence of himself and family.”<sup>13</sup> Mere absence from a fixed home, however long continued, cannot work the change. Indeed, the Supreme Court of Virginia has held that a college student who lives in Virginia for several years has not established residency here, despite the length of time spent here, in the absence of evidence that he intends to abandon his prior residence in Florida.<sup>14</sup> It has also held that a citizen who established extensive, wide-ranging, and meaningful ties to a Virginia community over a period of several years was not a Virginia resident because he did not intend to give up his legal domicile in West Virginia.<sup>15</sup>

As to domicile, “[t]here must be the *animus* to change the prior domicil[e] for another.”<sup>16</sup> Moreover, “[w]here a man has two places of living, which is his legal residence is to be determined largely, where the right to vote or hold office is involved, by his intention.”<sup>17</sup> There is a presumption that a domicile once acquired subsists until a change is proved, and the burden of proving the change is on the party alleging it.<sup>18</sup> Accordingly, I conclude that an officer will not be deemed to have vacated his elected office unless he also demonstrates an intention to establish a permanent residence outside of his original district.<sup>19</sup>

Finally, as to “place of abode,” the facts under consideration entail the supervisor being required to live outside his district for only nine months per year and retaining ownership of his home within his district, with the intent to return to it. Under these facts, he has a physical dwelling place<sup>20</sup> within the district and thus satisfies the requirement of having a “place of abode” within the district.

## CONCLUSION

The question of intent is a fact-specific inquiry, and domicile is “determined by considering relevant factors establishing a person’s intent to remain in the jurisdiction.”<sup>21</sup> As a result, whether a particular person fulfills the residency requirements for holding an elective office is a question beyond the scope this Opinion.<sup>22</sup> Nevertheless, it is my opinion that, as a general rule, when a member of a county board of supervisors relocates to another district within the county for a temporary job for nine months a year, with the intent to continue owning his home and maintaining his domicile within the district from which he was elected, and with the intent to return home after completion of his temporary employment, he has not taken up automatically, or as a matter of law, a new residence for purposes of § 15.2-1526.<sup>23</sup> Thus, he has not vacated his elected office.

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<sup>1</sup> See, e.g., VA. CONST. art. II, §§ 1, 5; VA. CODE ANN. § 24.2-500 (2011).

<sup>2</sup> VA. CONST. art. II, § 5.

<sup>3</sup> VA. CODE ANN. § 24.2-101 (Supp. 2013); see also VA. CONST. art. II, § 1.

<sup>4</sup> VA. CODE ANN. § 15.2-1525 (2012).

<sup>5</sup> See § 15.2-1400(A) (2012) (providing that the qualification for office as a member of local governing body is governed by § 15.2-1522 et seq.).

<sup>6</sup> Section 15.2-1526 (2012).

<sup>7</sup> 2003 Op. Va. Att’y Gen. 104, 107.

<sup>8</sup> VA. CONST. art. II, § 1; VA. CODE ANN. § 24.2-101.

<sup>9</sup> Section 24.2-101.

<sup>10</sup> *Id.*; see 1993 Op. Va. Att’y Gen. 33, 40.

<sup>11</sup> 1992 Op. Va. Att’y Gen. 108, 110 (citing 1 A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 352 (1974)).

<sup>12</sup> See, e.g., *Kegley v. Johnson*, 207 Va. 54, 58, 59, 147 S.E.2d 735, 737, 738 (1966) (“The crucial factor, then, in the case before us, is [the prospective voter’s] intention with respect to his stay in Albemarle County. . . . We simply say that [his] presence in [the] County, without the requisite domiciliary intent, was not sufficient to qualify him as a resident for voting purposes.”).

<sup>13</sup> *Dotson v. Commonwealth*, 192 Va. 565, 571, 66 S.E.2d 490, 493 (1951) (discussing whether a member of the board of supervisors of Dickenson County who relocated to Wise County vacated his office). See *Williams v. Commonwealth*, 116 Va. 272, 277, 81 S.E. 61, 63 (1914) (holding that “[a] legal residence, once acquired by birth or habitancy, is not lost by temporary absence for pleasure, health, or business, or while attending to the duties of a public office.”).

<sup>14</sup> *Kegley*, 207 Va. at 54, 147 S.E.2d at 735.

<sup>15</sup> *Cooper’s Adm’r v. Commonwealth*, 121 Va. 338, 93 S.E. 680 (1917). The community ties included including building and owning a home there, becoming an officer and stockholder of several Virginia corporations, serving as president of the local board of trade, transferring his church membership there, sending his children to public schools there as residents, and re-interring his two deceased children there.

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<sup>16</sup> *Id.* at 347, 93 S.E. at 682 (italics in original) (quoting *Lindsay v. Murphy*, 76 Va. 428 (1882)), *accord* *Harrison v. Harrison*, 58 Va. App. 90, 103, 706 S.E.2d 905, 912 (2011). I note that, although not necessarily conclusive, the length of the absence likely is a factor in determining intent.

<sup>17</sup> *Dotson*, 192 Va. at 571, 66 S.E.2d at 493.

<sup>18</sup> *Williams*, 116 Va. at 278, 81 S.E. at 63.

<sup>19</sup> *Dotson*, 192 Va. at 573, 66 S.E.2d at 494 (An individual “does not acquire a domicile where he is if he has no intention of staying there and had no intention of abandoning his former home when he left there.”); *Williams*, 116 Va. at 277-78, 81 S.E. at 63 (“a man’s legal residence is not changed when he leaves it for temporary purposes and transient objects, meaning to return when those purposes are answered and objects attained.”) (citation omitted). See *Dixon*, 83 Va. Cir. at 372 (quoting Ruling of the Tax Comm’r, No. 10-32 at 2 (Apr. 8, 2010) (“In order to change from one legal domicile to another legal domicile, there must be (1) an actual abandonment of the old domicile, coupled with an intent not to return to it, and (2) an acquisition of a new domicile at another place, which must be formed by personal presence and an intent to remain there permanently or indefinitely.”)).

<sup>20</sup> VA. CODE ANN. § 24.2-101.

<sup>21</sup> 1993 Op. Va. Att’y Gen. at 39.

<sup>22</sup> The Attorney General refrains from issuing opinions on matters requiring a determination of fact rather than law. See, e.g., 2006 Op. Va. Att’y Gen. 12 and citations therein. See also 2009 Op. Va. Att’y Gen. 80, 81 and n.17 (“Attorneys General consistently have declined to render official opinions on specific factual matters . . .”).

<sup>23</sup> “Once a person has established domicile, establishing a new domicile requires that he intentionally abandon his old domicile.” *Dixon*, 83 Va. Cir. at 373 (quoting State Board of Elections Policy 2009-005).

## OP. NO. 14-005

### CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT

Section 2-5 of the Petersburg City Charter, which allows for the expulsion of City Council members, and the Petersburg City Council’s adoption of a Disciplinary Procedure pursuant thereto, are both valid exercises of constitutional authority. This conclusion is not affected by § 24.2-233 of the *Code of Virginia*, which provides a separate means for the removal of an elected official.

BRIAN K. TELFAIR, ESQUIRE  
CITY ATTORNEY FOR THE CITY OF PETERSBURG  
JULY 18, 2014

### ISSUE PRESENTED

You ask whether § 2-5 of the Petersburg City Charter (the “City Charter”), which allows for the expulsion of City Council members, and the City Council’s adoption of a Disciplinary Procedure pursuant thereto, are constitutional in light of § 24.2-

233 of the *Code of Virginia*, which provides for a method by which a circuit court may remove city officials.

### RESPONSE

It is my opinion that § 2-5 of the City Charter, and the Disciplinary Procedure adopted by the City Council pursuant thereto, are valid exercises of constitutional authority. The constitutionality of the City Charter and the Disciplinary Procedure are not affected by § 24.2-233 of the *Code of Virginia*.

### APPLICABLE LAW AND DISCUSSION

Article VII, § 2 of the Constitution of Virginia authorizes the General Assembly to “provide by special act for the organization, government, and powers of any county, city, town, or regional government, including such powers of legislation, taxation, and assessment as the General Assembly may determine . . . .” Pursuant to this provision, the legislature may enact municipal charters that confer upon localities “rights and powers different from, and in addition to, those conferred by general statutes.”<sup>1</sup> In addition, the legislature may enact municipal charters that establish “laws for the organization and government of one city which differ from those enacted for another city.”<sup>2</sup>

In accordance with this constitutional authority, the General Assembly granted to the Petersburg City Council, through § 2-5 of the City Charter, the express authority “to adopt such rules and to appoint such officers and clerks as it may deem proper for the regulation of its proceedings, and for the convenient transaction of business, to compel the attendance of absent members, to expel a member for malfeasance, misfeasance or nonfeasance in office.”<sup>3</sup> The City Council has exercised this authority by adopting a City Council Disciplinary Procedure, which allows the Council to take disciplinary action against a member for official misconduct.<sup>4</sup>

Generally, all acts of the General Assembly are presumed constitutional.<sup>5</sup> Because a municipal charter is an act of the General Assembly, “there is a *prima facie* presumption that [it] was enacted in the manner required by the Constitution, and that the rights and powers conferred are within the legislative power to grant.”<sup>6</sup> The Supreme Court of Virginia “will not invalidate a statute unless that statute clearly violates a provision of the United States or Virginia Constitutions.”<sup>7</sup> I find no federal or state constitutional provision that would preclude the General Assembly from granting a local legislative body the power to expel one of its members.<sup>8</sup> I therefore conclude that § 2-5 of the City Charter, which allows for the expulsion of City Council members, is a constitutional exercise of the General Assembly’s legislative power. It follows that the Council’s Disciplinary Policy and Procedure, adopted in pursuance to this express grant of authority, also is constitutional.<sup>9</sup>

This conclusion is not altered by § 24.2-233 of the *Code of Virginia*. This statute provides that, “[u]pon petition, a circuit court may remove from office any elected

officer or officer who has been appointed to fill an elective office, residing within the jurisdiction of the court . . . .”<sup>10</sup> There is no direct conflict between the provisions of this statute and § 2-5 of the City Charter.<sup>11</sup> Although § 24.2-233 provides one means for the removal of an elected local official, there is no language to indicate it is intended to be the sole means. “A principal rule of statutory interpretation is that courts will give statutory language its plain meaning.”<sup>12</sup> In addition, “[r]ules of statutory construction prohibit adding language to or deleting language from a statute.”<sup>13</sup> Accordingly, exclusivity cannot be read into the provisions of § 24.2-233. The City Charter’s grant of disciplinary authority and the removal authority granted to circuit courts by § 24.2-233 therefore must be read as additional procedures available for the discipline of local officials.

### CONCLUSION

Accordingly, it is my opinion that § 2-5 of the City Charter, and the Disciplinary Procedure adopted by the City Council pursuant thereto, are valid exercises of constitutional authority. The constitutionality of the Charter and the Disciplinary Procedure are not affected by § 24.2-233 of the *Code of Virginia*.

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<sup>1</sup> *City of Colonial Heights v. Loper*, 208 Va. 580, 585-86, 159 S.E.2d 843, 847 (1968) (quoting *Ransone v. Craft*, 161 Va. 332, 340, 170 S.E. 610, 613 (1933) (citing to the predecessor provision of VA. CONST. art. VII, § 2, as found in the 1902 Constitution of Virginia)); *see also* VA. CODE ANN. § 15.2-1103 (2012) (providing that the legislature may confer, by municipal charter, powers in addition to those conferred by general statute); *Fallon Florist, Inc. v. City of Roanoke*, 190 Va. 564, 574, S.E.2d 316, 321 (1950); *City of Portsmouth v. Weiss*, 145 Va. 94, 107, 133 S.E. 781, 785 (1926).

<sup>2</sup> *Pierce v. Dennis*, 205 Va. 478, 485, 138 S.E.2d 6, 12 (1964) (citing to the predecessor provision of VA. CONST. art. VII, § 2, as found in the 1902 Constitution of Virginia).

<sup>3</sup> CHARTER FOR THE CITY OF PETERSBURG, VA., § 2-5 (emphasis added), *available at* <http://dls.virginia.gov/charters/Petersburg.pdf>. This Charter was last amended in 2009, with no change to this authority. *See* 2009 Va. Acts cc. 659 & 724.

<sup>4</sup> CITY OF PETERSBURG, VA., Resolution No. 13-R-29 (2013) (“A Resolution Adopting a Policy and Procedure that Governs the Exercise of City Council’s Disciplinary Authority”).

<sup>5</sup> Indeed, “[t]here is no stronger presumption known to the law than that which is made by the courts with respect to the constitutionality of an act of Legislature.” *Whitlock v. Hawkins*, 105 Va. 242, 248, 53 S.E. 401, 403 (1906).

<sup>6</sup> *City of Colonial Heights*, 208 Va. at 586, 159 S.E.2d at 847 (quoting *Ransone*, 161 Va. at 341, 170 S.E. at 613).

<sup>7</sup> *Marshall v. N. Va. Transp. Auth.*, 275 Va. 419, 427, 657 S.E.2d 71, 75 (2008).

<sup>8</sup> I note in this regard that “a legislative body’s discipline of one of its members is a core legislative act.” *Whitener v. McWatters*, 112 F.3d 740, 741 (4th Cir. 1997); *see also* *Pine v. Commonwealth*, 121 Va. 812, 825, 93 S.E. 652, 655-56 (1917); 1980-81 Op. Va. Att’y Gen. 186, 187.

<sup>9</sup> It is well-established in Virginia that a locality may exercise all powers that are necessarily or fairly implied from powers expressly granted by the General Assembly. *See, e.g.,* *Richmond v. Confrere Club of Richmond, Inc.*, 239 Va. 77, 79, 387 S.E.2d 471, 473 (1990); *Bd. of Suprvs. v. Horne*, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975).

<sup>10</sup> This statute applies to local officers, so long as their removal is not provided for by the Constitution of Virginia. *See* VA. CODE ANN. § 24.2-230 (2011).

<sup>11</sup> Statutes should be construed “in a manner that harmonizes and gives effect to each statute.” *Liberty Mut. Ins. Co. v. Fisher*, 263 Va. 78, 84, 557 S.E.2d 209, 212 (2002). I note that, even if § 24.2-233 and § 2-5 of the City Charter directly conflicted, § 2-5 of the City Charter would govern, as this provision is part of a special act. *See Powers v. Cnty. Sch. Board*, 148 Va. 661, 669, 139 S.E. 262, 264 (1927) (stating that “[w]hen there is a conflict in the provisions of a special or local act and the general law on the subject[,] the special act is controlling”).

<sup>12</sup> *Davenport v. Little-Bowser*, 269 Va. 546, 555, 611 S.E.2d 366, 371 (2005) (citing *Jackson v. Fidelity & Deposit Co.*, 269 Va. 303, 313, 608 S.E.2d 901, 904 (2005)).

<sup>13</sup> *Appalachian Power Co. v. State Corp. Comm’n*, 284 Va. 695, 706, 733 S.E.2d 250, 256 (2012) (citing *BBF, Inc. v. Alstom Power, Inc.*, 274 Va. 326, 331, 645 S.E.2d 467, 469 (2007)).

## OP. NO. 14-008

### CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT – COUNTY AND CITY OFFICERS

#### COURTS OF RECORD: CLERKS, CLERKS’ OFFICES AND RECORDS

#### ELECTIONS: FEDERAL, COMMONWEALTH AND LOCAL OFFICERS – REMOVAL OF PUBLIC OFFICERS FROM OFFICE

A Circuit Clerk has no authority to deem unconstitutional a statute imposing on him a ministerial duty. Whether particular conduct of a Clerk declining to apply a statute constitutes malfeasance is a fact-specific determination. Conversely, however, a Clerk who in good faith performs a ministerial duty in the absence of clear judicial authority directing him not to so has not engaged in malfeasance.

THE HONORABLE GORDON F. ERBY  
CLERK OF COURT, LUNENBURG CIRCUIT COURT  
MAY 30, 2014

### ISSUES PRESENTED

You inquire regarding the authority of Clerks of Circuit Court (hereinafter simply “Clerks”) and other local elected officials to determine the constitutionality of laws of Commonwealth. You also seek guidance related to a Clerk’s potential liability for malfeasance if he declines to perform a ministerial duty that he believes to be contrary to the federal or state constitution.

### RESPONSE

This response addresses only Clerks, and not any other elected officials.<sup>1</sup> It is my opinion that while a Clerk is governed by the federal and state constitutions, he has no authority to deem unconstitutional a statute imposing on him a ministerial duty. Such determinations are made only by the judicial branch, and thereafter interpreted by the judicial branch and other officials charged with doing so.<sup>2</sup> The duties of a

Clerk are ministerial, and decisions relating to constitutionality are discretionary, not ministerial. Whether particular conduct of a Clerk *declining* to apply a statute constitutes malfeasance is a fact-specific determination beyond the scope of an official Opinion of this Office. Conversely, it is my further opinion that, as a general principle, a Clerk who in good faith *performs* his ministerial duties in the absence of clear judicial authority directing him not to do so has not engaged in malfeasance.

## APPLICABLE LAW AND DISCUSSION

### I. Determinations of Constitutionality

Clerks are constitutional officers whose powers and duties are prescribed by statute.<sup>3</sup> Numerous prior opinions of this Office note the broad discretion Clerks have with respect to only the *manner* in which they fulfill their statutory duties, but they do not have the ability to decide whether or not to perform such duties.<sup>4</sup> Performance of a required ministerial duty is mandatory and not discretionary. As a general rule, Clerks have no inherent powers. The scope of their authority must be determined by reference to applicable statutes,<sup>5</sup> and no provision of the *Code of Virginia* affords a clerk legal authority to determine whether a particular law is constitutional.

The Supreme Court of Virginia “has consistently characterized the duties of a Clerk as ‘ministerial’ in nature.”<sup>6</sup> A ministerial act is non-discretionary.<sup>7</sup> It is “one which a person performs in a given state of facts and prescribed manner in obedience to the mandate of legal authority *without regard to, or the exercise, of his own judgment upon the propriety of the act being done.*”<sup>8</sup> For example, in addressing issues arising from a Clerk’s ministerial duty of recordation, this Office routinely has noted that a Clerk has no authority to weigh the legal sufficiency of a document beyond what is necessary to perform the duty.<sup>9</sup> I also note that the correct performance of ministerial duties is enforceable through a writ of mandamus.<sup>10</sup>

If there is a question about whether any statutory duty of a Clerk is constitutional, it is to be raised by parties in interest in a proper judicial proceeding.<sup>11</sup> Since *Marbury v. Madison*,<sup>12</sup> “it has been the indisputable and clear function of the courts, federal and state, to pass on the constitutionality of legislative acts . . . .”<sup>13</sup> Indeed, it is well-established that the power

“to interpret law -- to declare what a law *is* or *has been* -- is judicial power. The power to declare what is the law of the state, is delegated to the courts. The power to declare what the law is, of necessity involves the power to declare what acts of the legislature *are*, and what acts of the legislature *are not laws.*”<sup>[14]</sup>

*Marbury* involved a federal court ruling on the federal constitutionality of a federal statute. The federal judiciary has also ruled on whether particular Virginia laws violate the federal constitution,<sup>15</sup> The Supreme Court of Virginia has ruled on whether Virginia laws violate the Constitution of Virginia,<sup>16</sup> and also on whether they violate the federal constitution.<sup>17</sup>

It is well-settled that duly enacted laws of the Commonwealth are presumed to be constitutional,<sup>18</sup> and courts are required to resolve any reasonable doubt concerning the constitutionality of a law in favor of its validity.<sup>19</sup> However, it also should be noted that where a statute is based on a suspect classification, the government bears the burden of proving its validity.<sup>20</sup> Although an unconstitutional law is unenforceable,<sup>21</sup> a statute is not to be declared unconstitutional unless a court is driven to that conclusion.<sup>22</sup> Moreover, the Constitution of Virginia has a unique provision, commonly called the “suspension clause,” which provides, “that all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.”<sup>23</sup>

Thus, a Clerk has no power to invalidate a statute. I therefore must conclude that a Clerk has no authority by which to make independent determinations respecting the constitutionality of statutes, nor may he decline to perform a ministerial duty because of his own personal opinion about constitutional infirmity.<sup>24</sup>

## II. Malfeasance

A prior opinion of this Office explains that malfeasance is a common law crime, indictable as a misdemeanor, and it is an act wrongful in itself, performed under the authority of office.<sup>25</sup> The Supreme Court of Virginia has defined it as “the doing of an act for which there is no authority or warrant of law.”<sup>26</sup> It can be the basis for removal from office.<sup>27</sup> There are only a few instances where the *Code of Virginia* specifies what conduct will constitute misfeasance or malfeasance.<sup>28</sup> Without a statutory definition, they remain common law terms.

The question of whether it is malfeasance for a Clerk to decline to perform a ministerial duty because of his personal doubts about constitutionality is fact-specific. For that reason, this Office cannot express an opinion on the question.

Nevertheless, for the foregoing reasons, it is my opinion that a Clerk who applies standing laws of the Commonwealth in good faith, in the absence of a final decree from a court of competent jurisdiction directing him to do otherwise, has *not* engaged in malfeasance. If a party wishes to challenge the constitutionality of a law being applied by a Clerk, the proper remedy would be mandamus, injunction, prohibition, or declaratory judgment - all civil remedies - not the quasi-criminal remedy of prosecution for malfeasance.

## CONCLUSION

Accordingly, I conclude that while Clerks are subject to the federal and state constitutions, a Clerk performs ministerial duties, and the interpretation of the federal and state constitutions is a discretionary duty for the judicial branch and thus outside his authority. This Office can express no opinion regarding whether *declining* to apply a statute under the circumstances described herein constitutes malfeasance. Nonetheless, it is my opinion that a Clerk who in good faith *enforces* an applicable statute, in the absence of a judicial decree that clearly indicates he should do otherwise, has *not* engaged in malfeasance. Please note that these are only general rules. Again, whether particular conduct constitutes malfeasance is a determination of fact that is beyond the scope of an official opinion of this Office.<sup>29</sup>

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<sup>1</sup> Your opinion request makes reference to “constitutional officers; whether they be clerks, sheriffs, commissioners, treasurers, commonwealth attorneys, board [sic] of supervisors, mayors, councilmembers, or other elected officials.” As the Clerk of Lunenburg Circuit Court, you are authorized pursuant to § 2.2-505(A) of the *Code of Virginia* to request official advisory opinions of this Office; however, pursuant to § 2.2-505(B), the inquiry must be “directly related to the discharge of [your] duties.” This response therefore applies only to Clerks of Circuit Courts. *See, e.g.*, 2009 Op. Va. Att’y Gen. 80, 81 and n.17.

<sup>2</sup> For example, the Attorney General of Virginia may and should use his independent judgment when there is a question of the constitutionality of a state law. *See Gilmore v. Landslide*, 252 Va. 388, 478 S.E.2d 307 (1996) (Attorney General James Gilmore).

<sup>3</sup> VA. CONST. art. VII, § 4.

<sup>4</sup> *See, e.g.*, 2013 Op. Va. Att’y Gen. 151 n.13, and opinions cited therein (“The clerk, as a constitutional officer, may choose the means by which he fulfills his duties unless the General Assembly has limited his discretion.”). *See id.*, at 153 (“The Clerk of Court, as a constitutional officer, must abide by the law and his oath of office, which requires him to ‘faithfully and impartially discharge all the duties incumbent upon’ him.”) (quoting VA. CONST. art. II, § 7). *See also* VA. CODE ANN. § 15.2-1634 (2012) (providing expressly that the clerk “shall exercise all powers and all the duties imposed upon such officers by general law).

<sup>5</sup> 2009 Op. Va. Att’y Gen. 38, 40 (citing, *inter alia*, *Mendez v. Commonwealth*, 220 Va. 97, 255 S.E.2d 533 (1979); *Harvey v. Chesapeake & Potomac Tel. Co.*, 198 Va. 213, 93 S.E.2d 309 (1956)); *accord* 2003 Op. Va. Att’y Gen. 60; 2001 Op. Va. Att’y Gen. 121.

<sup>6</sup> *Small v. Fed. Nat’l Mortgage Ass’n*, 286 Va. 119, 127, 747 S.E.2d 817, 821 (2013) (citing cases).

<sup>7</sup> *Id.* (citing BLACK’S LAW DICTIONARY 28 (9th ed. 2009)).

<sup>8</sup> *Id.* (emphasis added) (quoting *Moreau v. Fuller*, 276 Va. 127, 135, 661 S.E.2d 841, 845-46 (2008)).

<sup>9</sup> *See, e.g.*, 1973-74 Op. Va. Att’y Gen. 65A (concluding that “[w]hether a deed which is admitted to record gives constructive notice is a judicial question, and a clerk is not justified in rejecting a deed which appears to meet the requirements of [the applicable statute] on the basis that the acknowledgement . . . may be held to be invalid by a court”); 2002 Op. Va. Att’y Gen. 270, 271 (“clerk has no duty to inquire beyond the statutory requirements for the recordation of an instrument” and “clerk is limited in his ability to refuse to record an instrument that meets the statutory requirements for recordation”); 1987-88 Op. Va. Att’y 208, 210 and opinions cited therein.

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<sup>10</sup> See *Richland Med. Ass'n v. Commonwealth, ex rel. State Health Comm'r*, 230 Va. 384, 386, 337 S.E.2d 737, 739 (1985) (“Mandamus is an extraordinary remedy employed to compel a public official to perform a purely ministerial duty imposed on him by law.”).

<sup>11</sup> See *Brown v. Saunders*, 159 Va. 28, 35-36, 166 S.E. 105, 107 (addressing whether apportionment bill conformed with constitutional mandates).

<sup>12</sup> 5 U.S. (1 Cranch) 137 (1803).

<sup>13</sup> *Wise v. Bigger*, 79 Va. 269, 273 (1884) (citing *Marbury*, 5 U.S. at 170-80).

<sup>14</sup> *Id.*, at 274 (quoting *Wolfe v. McCaull*, 76 Va. 876 (1882)). As Chief Justice Marshall observed in *Marbury*, “the Constitution vests the whole judicial power of the United States in one Supreme Court, and such inferior courts as Congress shall, from time to time, ordain and establish.” 5 U.S. (1 Cranch) at 166. “It is emphatically the province and duty of the Judicial Department [*i.e.*, the federal courts] to say what the law is.” *Id.*, at 177.

<sup>15</sup> See *Loving v. Virginia*, 388 U.S. 1 (1967).

<sup>16</sup> *Marshall v. N. Va. Transp. Auth.*, 275 Va. 419, 657 S.E.2d 71 (2008).

<sup>17</sup> *NAACP v. Harrison*, 202 Va. 142, 116 S.E.2d 55 (1960).

<sup>18</sup> *Tanner v. Virginia Beach*, 277 Va. 432, 438, 674 S.E.2d 848, 852 (2009).

<sup>19</sup> *Roanoke v. Elliot*, 123 Va. 393, 406, 96 S.E. 819, 824 (1918).

<sup>20</sup> *Fisher v. Univ. of Texas*, 570 U.S. 1135 (2013), slip op. at 8 (Kennedy, J.).

<sup>21</sup> See *Loving*, 388 U.S. at 1.

<sup>22</sup> *Roanoke v. James W. Michael’s Bakery Corp.*, 180 Va. 132, 142, 21 S.E.2d 788, 792 (1942) (citing *Richmond Linen Supply Co. v. Lynchburg*, 160 Va. 644, 647, 169 S.E. 554 (1942), *affirmed by* 291 U.S. 641 (1934)).

<sup>23</sup> VA. CONST. art. I, §7.

<sup>24</sup> *Cf.* 2007 Op. Va. Att’y Gen. 30 n.8 (citing cases supporting the proposition that administrative agencies have no power to determine the constitutional validity of statutes).

<sup>25</sup> 1987-88 Op. Va. Att’y Gen. 69, 71.

<sup>26</sup> *Warren v. Commonwealth*, 136 Va. 573, 118 S.E. 125, 129 (1923).

<sup>27</sup> See VA. CODE ANN. § 24.2-233 (2011) (providing that, “[u]pon petition, a circuit court may remove from office any elected officer . . . [f]or neglect of duty, misuse of office, or incompetence in the performance of duties when that neglect of duty, misuse of office, or incompetence in the performance of duties has a material adverse effect upon the conduct of the office . . .”).

<sup>28</sup> See, e.g., VA. CODE ANN. §§ 2.2-1115 (2011) (certain purchasing violations constitute malfeasance), 2.2-3122 (2011) (willful violation of State and Local Government Conflict of Interests Act is malfeasance); VA. CODE ANN. § 19.2-55 (2008) (person who issues a search warrant without affidavit guilty of malfeasance); VA. CODE ANN. § 22.1-91 (2011) (certain school division officers guilty of malfeasance in office for expenditures exceeding the funds available for school purposes for that fiscal year).

<sup>29</sup> See 1969-70 Op. Va. Att’y Gen. 211A, 212 (concluding that factual situation involving action of a sheriff would have to be judicially weighed to determine whether malfeasance had occurred); 1987-88 Op. Va. Att’y Gen. 69, 72 (explaining, in context of inquiry implicating potential criminal liability for malfeasance or misfeasance for violation of a statute by a public officer, that the application of elements

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of a criminal offense to a specific set of facts is a function properly reserved to the Commonwealth's attorney, the grand jury, and the trier of fact).

**OP. NO. 14-009**

**CONSTITUTION OF VIRGINIA: EXECUTIVE – EXECUTIVE AND ADMINISTRATIVE POWERS**

**CONSTITUTION OF VIRGINIA: BILL OF RIGHTS – LAWS SHOULD NOT BE SUSPENDED**

**CONSTITUTION OF VIRGINIA: BILL OF RIGHTS - SEPARATION OF LEGISLATIVE, EXECUTIVE, AND JUDICIAL DEPARTMENTS**

**CONSTITUTION OF VIRGINIA: DIVISION OF POWERS – DEPARTMENTS TO BE DISTINCT**

The governor must enforce duly enacted laws, unless the power to delay or suspend enforcement is granted by statute or by the law's enactment clause.

THE HONORABLE L. SCOTT LINGAMFELTER  
MEMBER, HOUSE OF DELEGATES

THE HONORABLE C. TODD GILBERT  
MEMBER, HOUSE OF DELEGATES  
MAY 30, 2014

**ISSUES PRESENTED**

You ask whether the Governor of Virginia has authority to fail to implement or to follow a valid law that has been passed by the General Assembly and signed into law by the Governor in the absence of the General Assembly granting that authority either by statute or by the law's enactment clause. You also ask whether the President of the United States has authority not to implement the Affordable Care Act.

**RESPONSE**

It is my opinion that the Governor must enforce valid, duly enacted laws unless the power to delay or suspend enforcement is granted by statute<sup>1</sup> or by the law's enactment clause.<sup>2</sup> Based on longstanding precedent of this Office, I also conclude that a question related to the scope of power that can be exercised by the President of the United States with regard to enforcing a particular federal law is not an appropriate subject for an official Opinion of this Office.

**APPLICABLE LAW AND DISCUSSION**

*I. General Duty of Governor to Enforce Laws*

Your first inquiry implicates several provisions of the Constitution of Virginia. First, Article IV, § 1 vests the legislative power of the Commonwealth in the General Assembly.<sup>3</sup> Article V, § 7 provides, in pertinent part, that “[t]he Governor shall take care that the laws be faithfully executed.”<sup>4</sup> This provision is commonly

known as the “take care” clause.<sup>5</sup> Our Constitution further expressly requires the separation of powers: Article I, § 5 provides that “the legislative, executive, and judicial departments of the Commonwealth should be separate and distinct . . . [.]” and Article III, § 1 provides that “[t]he 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 . . . .”<sup>6</sup> Finally, Article I, § 7 expressly provides “[t]hat all power of suspending laws, or the execution of laws, by any authority, without consent of the representatives of the people, is injurious to their rights, and ought not to be exercised.”<sup>7</sup>

A recent Opinion of this Office discusses the history and interplay of these constitutional provisions.<sup>8</sup> Although the Opinion dealt specifically with the application of these provisions to the Governor’s power, through formal action, to suspend the enforcement of regulations having the force of law,<sup>9</sup> the reasoning of the Opinion applies equally to the failure of the Governor to enforce, implement, or follow duly enacted statutes. Indeed, as the Opinion explains, “[p]rohibiting the executive from suspending duly enacted laws has long been part of Virginia’s constitutional history.”<sup>10</sup>

Ignoring or failing to implement a duly adopted regulation or statute has the same practical effect as actively issuing a directive suspending the enforcement of such law. To conclude otherwise, in a fashion analogous to permitting the Governor to issue an order suspending or ignoring a regulation, “would render the ‘take care’ clause of the Virginia Constitution a mere nullity.”<sup>11</sup> Further, in concluding that the Governor may not unilaterally suspend a validly promulgated regulation, the previous Opinion noted that such action “is as much a violation of the separation of powers as if the Governor sought to suspend the operation of a Virginia statute,”<sup>12</sup> the action about which you inquire.

## *II. Duty of President to Enforce Laws*

Your second inquiry is whether the President of the United States may fail to implement or follow a specific law - the Affordable Care Act - that has been passed by Congress and that he has signed into law. Although this Office does from time to time interpret federal law, that is done in order to address the interplay between specific provisions of federal law and the laws of the Commonwealth. Such opinions, when rendered, help to inform state or local decisions. Questions related to the President’s inherent, implied, or express authority are governed by a complex interplay of the United States Constitution and various federal laws, including federal legislative history, federal common law, and possibly opinions of the United States Attorney General and the Office of Legal Counsel. Finally, it is important to note a practical consideration: the President is not subject to or guided or governed by Opinions of this Office, and thus any Opinion our office might render on this

subject would be merely academic. It would not have any practical impact on either the President's conduct or state or local decisions. In these circumstances, the question of the President's authority not to implement a particular law should be resolved by appropriate federal authorities, not by this Office. For those reasons, I respectfully decline to offer an Opinion of the Office on the matter.

### CONCLUSION

Accordingly, it is my opinion that the Governor must enforce duly enacted valid laws, unless the power to delay or suspend enforcement is granted by statute or by the law's enactment clause. It is further my opinion that a question related to the President of the United States declining to implement a particular federal law is not an appropriate subject for an official Opinion of this Office.

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<sup>1</sup>One example of a statute granting modification and suspension authority is VA. CODE ANN. § 2.2-4014 (2011), which allows the relevant standing committees of the General Assembly, or the Joint Commission on Administrative Rules, which is created by VA. CODE ANN. § 30-73.1 (2011), to object to regulations or, with the concurrence of the Governor, to modify or suspend regulations.

<sup>2</sup>Herein, the phrase "duly enacted" means passed by the General Assembly and signed by the Governor, and it also means, in the case of a bill vetoed by the Governor, where the General Assembly has voted to override the veto pursuant to VA. CONST. art. V, § 6(b)(ii). This Opinion assumes that the laws at issue do not have any constitutional infirmity. If a constitutional infirmity in a particular law does exist, a separate legal analysis would be necessary. Such an analysis is beyond the scope of this Opinion.

<sup>3</sup>VA. CONST. art. IV, § 1.

<sup>4</sup>VA. CONST. art. V, § 7.

<sup>5</sup>Virginia's "take care" clause first appears explicitly in the Virginia Constitution of 1830. VA. CONST. of 1830 art. IV, § 4. It has appeared in every subsequent version of the Virginia Constitution. *See* VA. CONST. of 1851 art. V, § 5; VA. CONST. of 1864 art. V, § 5; VA. CONST. of 1870 art. IV, § 5; and VA. CONST. of 1902 § 73.

<sup>6</sup>VA. CONST. art. I, § 5 and art. III, § 1. The separation of powers is a bedrock principle of Virginia government. The concept of separation of powers in Virginia government first appears as § 5 of the Virginia Declaration of Rights of 1776. It has continued in every Virginia Constitution since then. *See* VA. CONST. of 1830 art. I, § 5 & art. II; VA. CONST. of 1851 art. I, § 5 & art. II; VA. CONST. of 1864 art. I, § 5 & art. II; VA. CONST. of 1870 art. I, § 7 & art. II; and VA. CONST. of 1902 §§ 5 & 39.

<sup>7</sup>VA. CONST. art. I, § 7. The explicit prohibition on suspending laws first appeared as § 7 of the Virginia Declaration of Rights of 1776. It has appeared in every subsequent version of the Virginia Constitution. *See* VA. CONST. of 1830 art. I, § 7; VA. CONST. of 1851 art. I, § 7; VA. CONST. of 1864 art. I, § 7; VA. CONST. of 1870 art. I, § 9; and VA. CONST. of 1902 § 7.

<sup>8</sup>*See* 2014 Op. Va. Att'y Gen. No. 13-109, *available via link at*

<http://www.ag.virginia.gov/Opinions%20and%20Legal%20Resources/Opinions/2014opns/Jan14opndx.html>.

<sup>9</sup> The explicit question addressed in the prior Opinion was “whether the Governor has the power to issue a policy directive to suspend a regulation that was properly adopted pursuant to a statutory mandate.” *Id.* at 1.

<sup>10</sup> *Id.* at 3.

<sup>11</sup> *Id.* at 4.

<sup>12</sup> *Id.* at 5. The prior Opinion notes that there may be instances “where a statute . . . allows for [suspension] under certain circumstances, and thus, such suspension would not necessarily violate the separation of powers[.]” *id.* n.28; your request, however, expressly is limited to situations in which there is no statutory allowance.

## OP. NO. 14-012

### MINES AND MINING: GEOTHERMAL ENERGY

#### TAXATION: LOCAL TAXES

Rights to geothermal resources belong to the owner of the surface property unless specifically conveyed, and are not encompassed within mineral or water rights.

Applicable statutory or regulatory standards for geothermal resources refer only to temperature and volume but not to depth of the resource below the surface or type of use, whether residential or commercial. However, heat pumps are not regulated by Virginia laws on geothermal resources, so long as they do not exceed threshold standards for temperature and volume.

In the absence of any legislation by the General Assembly establishing how geothermal resources are to be taxed, they are to be assessed either as leaseholds taxable as real estate to the lessees if leased or, if not leased, as a factor affecting the assessed fair market value of the real estate they occupy, regardless of whether or not energy is being extracted from them.

THE HONORABLE TERRY G. KILGORE  
MEMBER, HOUSE OF DELEGATES  
DECEMBER 19, 2014

### ISSUES PRESENTED

You raise several questions regarding how Virginia law treats geothermal resources. Your questions cover three general subjects:

1. Whether geothermal property rights are related to surface, mineral, or water rights;

2. Whether regulation of geothermal resources is dependent on their depth below the surface or on whether they are used for commercial or residential purposes and whether heat pumps are regulated as geothermal resources; and
3. Whether geothermal property rights are taxable by local government as real property or as personal property.

### **RESPONSE**

It is my opinion that the rights to geothermal resources belong to the owner of the surface property unless specifically conveyed. They are not encompassed within mineral or water rights. Thus, a mineral or a water reservation does not reserve a geothermal resource, and a lease of oil, gas or some other mineral is not a lease of geothermal resources. The rights of the owner of a geothermal resource as related to the rights of owners of other property interests depend on the particular language of the instruments and all other relevant circumstances, as is the case generally in property law.

It is my further opinion that applicable statutory or regulatory standards for geothermal resources refer only to temperature and volume but not to depth of the resource below the surface or type of use, whether residential or commercial. It is my further opinion that heat pumps are not regulated by Virginia laws on geothermal resources, so long as they do not exceed threshold standards for temperature and volume.

Finally, in the absence of any legislation by the General Assembly establishing how geothermal resources are to be taxed, they are to be assessed either as leaseholds taxable as real estate to the lessees if leased or, if not leased, to be included as a factor affecting the assessed fair market value of the real estate they occupy, regardless of whether or not energy is being extracted from them.

### **APPLICABLE LAW AND DISCUSSION**

Your inquiry generally is governed by the Virginia Geothermal Resource Conservation Act (the “Act”).<sup>1</sup> Thus, as an initial matter, I note that the Act defines “geothermal resource” as “the natural heat of the earth and the energy in whatever form, present in, associated with, created by, or which may be extracted from, that natural heat, as determined by the rules and regulations of the Department [of Mines, Minerals, and Energy, hereinafter “DMME].”<sup>2</sup> Accordingly, geothermal resources also are subject to regulation by DMME, which has been directed by the General Assembly to “[d]evelop a comprehensive geothermal permitting system for the Commonwealth, which shall provide for the exploration and development of geothermal resources”<sup>3</sup> and to “[p]romulgate such rules and regulations as may be

necessary to provide for geothermal drilling and the exploration and development of geothermal resources in the Commonwealth . . . based on a system of correlative rights.”<sup>4</sup>

1. Relationship of geothermal property rights to surface, mineral, or water rights.

You first ask whether, under Virginia law, geothermal property rights are linked to surface, mineral, or water rights. The Act expressly provides that “[o]wnership rights to geothermal resources shall be in the owner of the surface property underlain by the geothermal resources unless such rights have been otherwise explicitly reserved or conveyed.”<sup>5</sup> The Act further establishes that “[g]eothermal resources are found and hereby declared to be sui generis, being neither a mineral resource nor a water resource. Mineral estates shall not be construed to include geothermal resources unless explicit in the terms of the deed or other instrument of conveyance.”<sup>6</sup>

It is well established that “[w]hen the language of a statute is unambiguous, we are bound by the plain meaning of that language.”<sup>7</sup> Accordingly, based on the plain language of these provisions, I must conclude that, under Virginia law, geothermal property rights are linked to surface rights, but not mineral or water rights, unless specifically conveyed. Further, the Act makes clear that “mineral reservations” will not be construed under Virginia law to include reservations of geothermal resources “unless explicit in the terms of the deed or other instrument of conveyance.”<sup>8</sup> Similarly, leases of “oil, gas and other minerals” do not constitute leases of geothermal resources unless the terms of the deed or other instrument explicitly so provide.<sup>9</sup> Rather, the Act establishes that, under Virginia law, geothermal resources constitute a distinct estate appurtenant to the land,<sup>10</sup> rights to which the surface owner is able to convey as he desires.<sup>11</sup>

The Virginia Supreme Court has held that a subsequent grant of a distinct property interest can create an impermissible conflict with an existing lease of mineral rights.<sup>12</sup> The logic of that holding means that a subsequent grant of geothermal rights could be limited by an existing lease or reservation of mineral or water rights; but that will depend on the language of the first instrument. Where there is only one operative instrument (e.g., conveying geothermal only), the nature and extent of the rights depends on the particular language of that instrument.

Thus, if a dispute arises between an owner of geothermal rights and an owner of some other estate or interest in land such as a lease for a mineral estate, there is no Virginia statute giving priority to any of the competing interests. As is normal for other property disputes, these issues depend on the nature of the respective interests conveyed<sup>13</sup> as defined by terms of the relevant instruments,<sup>14</sup> the timing of the conveyances, and all other relevant circumstances. “The fundamental rule of construction in Virginia is that the purpose or intent of a written instrument is to be

determined from the language used in the light of the circumstances under which it was written.”<sup>15</sup> I also note that Attorneys General consistently have declined to render opinions on specific factual matters.<sup>16</sup>

2. Whether regulation of geothermal resources depends on their depth below the surface or on whether they are used for residential or commercial purposes; whether heat pumps are regulated as geothermal resources.

Neither the Act nor the regulations of DMME draws an explicit distinction between near-surface geothermal resources and deeper geothermal resources, nor is any distinction drawn between use of geothermal resources for residential purposes or for commercial purposes. Based on DMME definitions, however, the regulations do exclude heat pump installations, so long as the heat pumps do not exceed the thresholds for temperature and volume.

The definition of “geothermal resource” under the regulations limits the term to “the natural heat of the earth at temperatures 70°F or above with volumetric rates of 100 gallons per minute or greater.”<sup>17</sup> No reference is made either to how deep or how close to the surface a geothermal resource is or to whether the resource is used for residential or commercial purposes.

As to heat pumps, the definition “does not include ground heat or groundwater resources at lower temperatures and rates that may be used in association with heat pump installations.”<sup>18</sup> Thus, a heat pump - whether residential or commercial - is not covered by the regulatory scheme of the Act unless it exceeds the thresholds for both temperature (70°F) and volume (100 gallons per minute). If it does exceed these thresholds, it is subject to the Act.

3. How may geothermal property rights be assessed and taxed by local government?

The final subject of your inquiry is how geothermal property rights are to be assessed and taxed by local government. Under present law, the only applicable local tax is either real property or personal property tax.<sup>19</sup>

Under the Constitution of Virginia, all property is to be taxed unless exempted by a constitutional provision.<sup>20</sup> Real estate and tangible personal property are to be assessed at their fair market value.<sup>21</sup> The General Assembly has the power to define and classify taxable subjects.<sup>22</sup> As the Supreme Court of the United States has recognized, “[u]sually real estate is taxed as a unit; but as different elements of the land are capable of being severed and separately owned, [statutes] may authorize a separate assessment against the owners of the severed parts.”<sup>23</sup> Interests in real estate, coal and other mineral lands, and tangible personal property are subject to local taxation, and the taxes are to be assessed as the General Assembly may

prescribe.<sup>24</sup> The General Assembly has enacted specific statutory schemes for taxing lands, separately owned improvements, air space, standing timber, and mineral lands.<sup>25</sup> In contrast, there is no specific statutory scheme for taxing geothermal resources.

By statute, “‘Land,’ ‘lands,’ or ‘real estate’ includes lands, tenements and hereditaments, and all rights and appurtenances thereto and interests therein, other than a chattel interest.”<sup>26</sup> A leasehold interest is also to be taxed as realty,<sup>27</sup> although it is taxed to the lessee, not the property owner.<sup>28</sup> It is also noted that under common law, a mineral interest that is in its natural state in the ground is real estate, even if subject to a lease.<sup>29</sup>

Thus, it is my opinion that, under present law, geothermal resources that are in their natural state remain realty, even if they are subject to a lease or some other conveyance by the property owner to a lessee or a grantee.

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What remains to be determined is if geothermal energy can be “severed” from land in the same sense that physical resources such as coal and timber can be severed, and, if so, how it is to be taxed by localities.

Common law precedent for other land resources establishes that if a physical resource that is real property while in its natural state is severed from land in the sense of physically removing it, it becomes personal property. For example, coal that has been mined and timber that has been cut are treated as personal property.<sup>30</sup> However, there is a critical difference for geothermal resources. Coal and timber remain tangible in fact once severed from the land, while geothermal energy that is captured by the extraction of energy from geothermal heat is intangible in fact. The primary definition of the term “tangible” is, “having or possessing physical form.”<sup>31</sup> “Tangible personal property” has been defined as “property that has physical form and characteristics.”<sup>32</sup> Energy that has been extracted from a geothermal resource does not have physical form or characteristics, and thus it is not tangible personal property. Further, the current statutory scheme for taxation of personal property, whether tangible or intangible, makes no reference to extracted geothermal energy.<sup>33</sup> In plain language, there can be a truck full of coal or timber, but there cannot be a truck full of extracted geothermal energy.

Because geothermal resources have been declared by statute to be “sui generis, being neither a mineral resource nor a water resource,”<sup>34</sup> and because of the substantive difference between physically removing a tangible resource and extracting energy, which is an intangible resource, it is my opinion that extracting energy from geothermal heat does not constitute “severing” it from the land. It therefore follows that extracting heat from a geothermal resource is not governed by

the common law principle that severing a resource from land converts it from real property to personal property.

But even if energy that is extracted from geothermal heat were deemed to be converted to personal property, it would not be taxable personal property. Energy is intangible personal property, and Virginia statutes allow local taxation only for tangible personal property:

The aggregate of all tangible personal property owned by any person, firm, association, unincorporated company, or corporation which is leased by such owner to any agency or political subdivision of the federal, state, or local governments shall be subject to local taxation.<sup>[35]</sup>

Therefore, because geothermal energy cannot be deemed tangible personal property, it is not subject to local taxation as personal property.<sup>36</sup> If a geothermal resource is being utilized through extraction of some of its energy, that is a factor that may reasonably be considered in assessing the fair market value of the surface property, the same as for a geothermal resource that remains in its natural state. Under present law, however, there is no authority for separate local taxation of a geothermal resource from which energy is being extracted.

### CONCLUSION

For the reasons stated above, it is my opinion that the rights to geothermal resources belong to the owner of the surface property unless specifically conveyed. They are not encompassed within mineral or water rights. Thus, a mineral or a water reservation does not reserve a geothermal resource, and a lease of oil, gas or some other mineral is not a lease of geothermal resources. The rights of the owner of a geothermal resource as related to the rights of owners of other property interests depend on the particular language of the conveyance instruments and all other relevant circumstances, as is the case generally in property law.

It is my further opinion that applicable statutory or regulatory standards for geothermal resources refer only to temperature and volume but not to depth of the resource below the surface or type of use, whether residential or commercial, and that heat pumps are not regulated by Virginia laws on geothermal resources, so long as they do not exceed threshold standards for temperature and volume.

Finally, in the absence of any legislation by the General Assembly establishing how geothermal resources are to be taxed, they are to be assessed either as leaseholds taxable as real estate to the lessees if leased or, if not leased, as a factor affecting the assessed fair market value of the real estate they occupy, regardless of whether or not energy is being extracted from them.

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<sup>1</sup> VA. CODE ANN. §§ 45.1-179.1 through 45.1-179.11 (2013).

<sup>2</sup> Section 45.1-179.2. Pursuant to this authority, DMME further defines “geothermal resource” as “the natural heat of the earth at temperatures 70°F or above with volumetric rates of 100 gallons per minute or greater and the energy, in whatever form, present in, associated with, or created by, or that may be extracted from, that natural heat.” 4 VA. ADMIN. CODE § 25-170-10. DMME’s regulations also define “geothermal area” as “the general land area that is underlaid or reasonably appears to be underlaid by geothermal resources in a single reservoir, pool, or other source or interrelated sources, as such area or areas may be from time to time designated by the department.”

<sup>3</sup> VA. CODE ANN. § 45.1-179.7.

<sup>4</sup> *Id.*

<sup>5</sup> Section 45.1-179.4. This section further provides that “Nothing in this section shall divest the people or the Commonwealth of any rights, title, or interest they may have in geothermal resources.”

<sup>6</sup> Section 45.1-179.5.

<sup>7</sup> *Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 283 Va. 420, 425, 722S.E.2d 626, 629 (2012) (quoting *Kozmina v. Commonwealth*, 281 Va. 347, 349, 706 S.E.2d 860, 862 (2011)) (further citation and internal quotation marks omitted).

<sup>8</sup> *See* § 45.1-179.4.

<sup>9</sup> *See id.* I note, however, that pursuant to the Geothermal Steam Act of 1970, in instances where the federal government has reserved a mineral estate, it considers geothermal rights part of the mineral estate. *See* 30 U.S.C.S. § 1020 (“Geothermal resources in lands the surface of which has passed from Federal ownership but in which the minerals have been reserved to the United States shall not be developed or produced except under geothermal leases made pursuant to this Act.”).

<sup>10</sup> “Land includes everything belonging or attached to it. It includes the surface, and whatever is contained within or beneath the surface . . . [I]n these various subjects[,] separate and distinct freeholds may be created and owned by different persons by separate and independent titles. One may own the surface, another the coal, and another still some other mineral, all within the same parcel of land. Each may have a fee or less estate in his respective part.” *Va. Coal & Iron Co. v. Kelly*, 93 Va. 332, 336, 24 S.E. 1020, 1023 (1896).

<sup>11</sup> “‘The right of an owner to carve out of his property as many estates, or interests (perpendicular, or horizontal, perpetual, or limited), as it may be able to sustain cannot be open to doubt.’ It is incident to the rights of the owner of the fee, . . . that such owner may do what he will with his own, unless his intended disposition be contrary to public policy, or to some positive rule of law.” *Wilson Bros. v. Branham*, 131 Va. 373-74, 109 S.E. 189, 192 (1921).

<sup>12</sup> *Hagan Co. v. Norton Coal Co.*, 137 Va. 140, 119 S.E. 153 (1923).

<sup>13</sup> In the absence of any positive law to the contrary, the surface owner’s interest in his parcel’s geothermal resources can be conveyed as a freehold estate, a leasehold estate, or a license. *See Bostic v. Bostic*, 199 Va. 348, 99 S.E.2d 591 (1957). Your inquiry does not specify what “geothermal rights” are being conveyed.

<sup>14</sup> *See, e.g., McCarthy Holdings LLC v. Burgher*, 282 Va. 267, 716 S.E.2d 461 (2011) (scope of grantee’s rights under easement determined by the terms of the instrument); *Levisa Coal Co. v. Consolidation Coal Co.*, 276 Va. 44, 58-59, 662 S.E.2d 44, 52 (2008) (examining terms of deed for rights of coal lessee).

<sup>15</sup> *Phipps v. Leftwich*, 216 Va. 706, 710, 222 S.E.2d 536, 539 (1976) (citing *Taylor v. Holloway*, 206 Va. 257, 260, 142 S.E.2d 521, 523 (1965)).

<sup>16</sup> 2009 Op. Va. Att’y Gen. 80, 81 and n.17.

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<sup>17</sup> 4 VA. ADMIN. CODE § 25-170-10.

<sup>18</sup> *Id.*

<sup>19</sup> The Act, through § 45.1-179.3(b), makes geothermal resources above a volumetric minimum subject to severance taxes under Chapter 15.1 (“Geothermal Energy”), but that Chapter does not create any severance taxes.

<sup>20</sup> VA. CONST. art X, § 1 (“All property, except as hereinafter provided, shall be taxed.”).

<sup>21</sup> VA. CONST. art X, § 2.

<sup>22</sup> VA. CONST. art X, § 1.

<sup>23</sup> *Downman v. Texas*, 231 U.S. 353, 357 (1913).

<sup>24</sup> VA. CONST. art X, § 4; VA. CODE ANN. § 58.1-3000 (2013).

<sup>25</sup> See §§ 58.1-3280 (2013) (lands), 58.1-3282 (2013) (separately-owned improvements), 58.1-3283 (2013) (airspace), 58.1-3284 (2013) (standing timber), 58.1-3286 (Supp. 2014) (mineral lands, including coal, gas, and oil). Note that, by statute, geothermal resources are *sui generis* and are neither mineral resources nor water resources (§ 45.1-179.5), and thus they are not taxable as “mineral lands.”

<sup>26</sup> VA. CODE ANN. § 1-219 (2014). See also §§ 58.1-3503, 58.1-3504, 58.1-3505, and 58.1-3506 (identifying numerous separate categories of tangible personal property, none of which encompasses geothermal energy).

<sup>27</sup> “For purposes of the assessment of real estate for taxation, the term ‘taxable real estate’ shall include a leasehold interest in every case in which the land or improvements, or both, as the case may be, are exempt from assessment for taxation to the owner.” Section 58.1-3200.

<sup>28</sup> “All leasehold interests in real property which are exempt from assessment for taxation from the owner shall be assessed for local taxation to the lessee.” Section 58.1-3203.

<sup>29</sup> “The prevailing if not wholly unbroken current of authority supports the general proposition that a grantee of coal in place is the owner, not of an incorporeal right to mine and remove, but of a corporeal freehold estate in the coal.” *Clayborn v. Camilla Red Ash Coal, Inc.*, 128 Va. 383, 388, 105 S.E. 117, 118 (1920).

<sup>30</sup> *Id.*, 128 Va. 383, 392, 105 S.E. 117, 120 (1920) (noting that “Coal and timber become personalty as soon as they are severed.”).

<sup>31</sup> BLACK’S LAW DICTIONARY 1683 (10th ed.) (2014).

<sup>32</sup> *Id.* at 1412. See also *Roanoke v. Michael’s Bakery Corp.*, 180 Va. 132, 21 S.E.2d 788 (1942) (holding that the term “tangible personal property” does not include capital used in a business).

<sup>33</sup> See *Code of Virginia*, Title 58.1, Chapters 11 (Intangible Personal Property Tax), 17 (Miscellaneous Taxes), 30 (General Provisions [for Local Taxation]), 32 (Real Property Tax), 35 (Tangible Personal Property Tax), and 37.1 (Local Coal Severance Taxes).

<sup>34</sup> VA. CODE ANN. § 45.1-179.5.

<sup>35</sup> VA. CODE ANN. § 58.1-3501.

<sup>36</sup> For a geothermal resource from which energy is being extracted, any machines and equipment that are used to extract the energy are subject to local taxation, either as real property (see §§ 58.1-3200 to 58.1-3205), as tangible personal property (see §§ 58.1-3500 to 58.1-3506), or as machinery and tools (see §§ 58.1-3507 to 58.1-3508.5), depending on which taxation category is appropriate for the particular facts at hand.

OP. NO. 14-013

**HIGHWAYS, BRIDGES & FERRIES: HIGHWAY SYSTEMS – PRIMARY STATE HWY. SYSTEM**

Section 33.1-42 of the *Code of Virginia* permits the Town of New Market, with the consent of the Commissioner of Highways, to maintain such roads and streets that are incorporated as primary roads in the State Highway System, and the statute authorizes the Commissioner, in his discretion, to reimburse the Town for such maintenance, up to the amount the Commissioner is authorized to expend for such maintenance.

JASON J. HAM, ESQUIRE

TOWN ATTORNEY FOR THE TOWN OF NEW MARKET

JULY 10, 2014

**ISSUE PRESENTED**

You inquire whether § 33.1-42 of the *Code of Virginia* permits the Town of New Market (“Town”), with the consent of the Commissioner of Highways, to maintain its own streets that are incorporated in the State Highway System and whether it allows the Town to be reimbursed up to the amount the Commissioner is authorized to expend on such street maintenance.

**RESPONSE**

It is my opinion that § 33.1-42, by its express terms, allows the Town of New Market, with the consent of the Commissioner of Highways, to maintain those roads in the Town that are incorporated in the State Highway System, but not those that are part of the secondary system of state highways. It is further my opinion that the statute further allows the Town to be reimbursed up to the amount the Commissioner is authorized to expend for such street maintenance.

**BACKGROUND**

You relate that the Town is located at the crossroads of U.S. Routes 11 and 211 and Interstate 81 in Shenandoah County, Virginia. The population of the Town is approximately 2,150 as of the 2010 Census. Because of its location at the junction of these highways, the Town, for a town of its size, has an unusually high volume of vehicular traffic on both primary and secondary routes. You further relate that the Town is not eligible to maintain its own secondary street system under § 33.1-224 because its population is less than 3,500.<sup>1</sup> In light of the traffic volume and a desire to exercise autonomy, the Town would like to maintain its own streets and be reimbursed by the Commissioner of Highways up to the amount he is authorized to expend on such street maintenance pursuant to § 33.1-42.

**APPLICABLE LAW AND DISCUSSION**

“When construing a statute, our primary objective is ‘to ascertain and give effect to legislative intent,’ as expressed by the language used in the statute.”<sup>2</sup> Thus, we

interpret statutes according to their plain meaning,<sup>3</sup> for “when the legislature has used words of a clear and definite meaning, the courts cannot place on them a construction that amounts to holding that the legislature did not intend what it actually has expressed.”<sup>4</sup>

Under certain circumstances, § 33.1-42 permits the roads and streets of incorporated towns of fewer than 3,500 inhabitants to be incorporated into the State Highway System.<sup>5</sup> For those roads and streets that have been incorporated, § 33.1-42 expressly provides that “[t]he Commissioner of Highways may in his discretion permit such town or city to maintain any such road or street, or portion thereof . . . .” Accordingly, provided the Commissioner consents, a town may maintain roads and streets within its jurisdiction that have been incorporated into the State Highway System.

In addition, § 33.1-42 expressly confers upon the Commissioner the discretion to “reimburse [the] town up to such amount as he is authorized to expend on the maintenance of such road or street, or portion thereof.”<sup>6</sup> Again, the clear language of the statute establishes that a town may be reimbursed up to the authorized amount upon assuming responsibility for the maintenance of roadways within the State Highway System. Nonetheless, such reimbursement is subject to the sound discretion of the Commissioner.

Therefore, provided the Commissioner is agreeable with the Town’s request to maintain its roads or streets and exercises his discretion in the Town’s favor, § 33.1-42 permits the Town to maintain its roads or streets, or portions thereof, that are incorporated in the State Highway System, and to receive the reimbursement provided for under the statute. The Commissioner is not required to consent; thus, any request to maintain such roads or streets or subsequent request for reimbursement may be denied under this provision.<sup>7</sup>

I must note further that the express language of § 33.1-42 limits the availability of this arrangement to those portions of roads and streets that have been incorporated into the “State Highway System.”<sup>8</sup> The Code expressly excludes from this system the roads and streets in the secondary system of state highways.<sup>9</sup> Therefore, to the extent a street or road in a town is part of the secondary system of state highways, or any other system, rather than the primary “State Highway System” the provisions of § 33.1-42 do not apply,<sup>10</sup> and the Town may not seek to maintain such a road or street pursuant to the statute.<sup>11</sup>

### CONCLUSION

Accordingly, it is my opinion that § 33.1-42 of the *Code of Virginia* does permit the Town of New Market, with the consent of the Commissioner of Highways, to maintain such roads and streets that are incorporated as primary roads in the State Highway System, and the statute authorizes the Commissioner, in his discretion, to

reimburse the Town for such maintenance, up to the amount the Commissioner is authorized to expend for such maintenance.

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<sup>1</sup> VA. CODE ANN. § 33.1-224 (2011) provides that

Whenever any incorporated town has a population of more than 3,500 inhabitants, all the roads, streets, causeways, bridges, landings and wharves in such town theretofore incorporated within the secondary system of state highways shall be eliminated from such system and the control and jurisdiction over them shall be vested in the local authorities.

<sup>2</sup> *Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 283 Va. 420, 425, 722 S.E.2d 626, 629 (2012) (quoting *Commonwealth v. Amerson*, 281 Va. 414, 418, 706 S.E.2d 879, 882 (2011)) (further citation and internal quotation marks omitted).

<sup>3</sup> *See Davenport v. Little-Bowser*, 269 Va. 546, 555, 611 S.E.2d 366, 371 (2005) (citing *Jackson v. Fidelity & Deposit Co.*, 269 Va. 303, 313, 608 S.E.2d 901, 904 (2005)).

<sup>4</sup> *Hubbard v. Henrico Ltd. P'shp.*, 255 Va. 335, 339, 497 S.E.2d 335, 337 (1998).

<sup>5</sup> The statute specifically provides that

The Commonwealth Transportation Board may, by and with the consent of the Governor and the governing body of any incorporated town or city having a population of 3,500 inhabitants or less, incorporate in the State Highway System such streets and roads or portions thereof in such incorporated town or city as may in its judgment be best for the handling of traffic through such town or city from or to any road in the State Highway System.

<sup>6</sup> VA. CODE ANN. § 33.1-42 (2011).

<sup>7</sup> *See Masters v. Hart*, 189 Va. 969, 979, 55 S.E.2d 205, 2210 (1949) (“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’ shall be given its ordinary meaning – permission, importing discretion.”).

<sup>8</sup> The roads and streets constituting the “State Highway System” are also referred to as “The Primary System of State Highways.” *See* § 33.1-25 (2011).

<sup>9</sup> Section 33.1-25. Section 33.1-67 provides that the secondary system of state highways “shall consist of all of the public roads . . . in the several counties of the Commonwealth not included in the State Highway System, including such roads and community roads leading to and from public school buildings, streets, causeways, bridges, landings and wharves in incorporated towns having 3,500 inhabitants or less . . . as constitute connecting links between roads in the secondary system in the several counties and between roads in the secondary system and roads in the primary system of the state highways, not, however, to exceed two miles in any one town.” Section 33.1-72.1 permits, under specific circumstances, certain streets, not already part of the secondary state system, to be taken into the secondary system of state highways. In addition, the CTB is authorized to transfer, as it deems proper, roads from the primary to the secondary state system, § 33.1-35 (2011), and vice versa, § 33.1-34 (2011).

<sup>10</sup> The maxim ‘*expressio unius est exclusio alterius*’ “provides that mention of a specific item in a statute implies that omitted items were not intended to be included within the scope of the statute.” *GEICO v. Hall*, 260 Va. 349, 355, 533 S.E.2d 615, 617 (2000) (quoting *Turner v. Wexler*, 244 Va. 124, 127, 418

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S.E.2d 886, 887 (1992)). Thus, when the legislature has created an express grant of authority, that authority exists only to the extent specifically granted. *See, e.g.*, 2010 Op. Va. Att’y Gen. 10, 11 & n.2.

<sup>11</sup> Irrespective of §§ 33.1-42 and 33.1-224, to the extent any particular road within the Town does not “constitute[] a part of any system of state highways,” the Town has broad authority to maintain such a road. *See* VA. CODE ANN. §§ 15.2-2000 (2012) & 15.2-2001 (2012) (“Every locality may lay out, open, extend, widen, narrow, establish or change the grade of, close, construct, pave, curb, gutter, plant and maintain shade trees on, improve, maintain, repair, clean and light: streets, limited access highways, express highways, roads, alleys, bridges, viaducts, subways and underpasses.”).

## **OP. NO. 14-015**

### **CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING MORALS AND DECENCY – FAMILY OFFENSES; CRIMES AGAINST CHILDREN, ETC.**

A parent or caretaker who leaves a child alone in the same room with a sexually violent offender, yet who remains within the residence, has not violated § 18.2-371 by leaving the child “alone in the same dwelling” with an offender within the meaning of § 16.1-228(6).

THE HONORABLE A. DONALD MCEACHIN  
MEMBER, SENATE OF VIRGINIA  
MAY 23, 2014

### **ISSUE PRESENTED**

You ask whether a parent or caretaker who leaves a child alone in the same room with a sexually violent offender, yet remains within the residence, would be in violation of § 18.2-371, which incorporates by reference the provisions of § 16.1-228(6).

### **RESPONSE**

It is my opinion that a parent or caretaker who leaves a child alone in the same room with a sexually violent offender, yet remains within the residence, has not violated § 18.2-371 by leaving the child “alone in the same dwelling” with an offender within the meaning of § 16.1-228(6).

### **BACKGROUND**

In your request, you present a hypothetical set of facts in which a parent or caretaker leaves a child alone in the same room of a residence with a person known by the parent to be required to register as a sexually violent offender, while the parent or caretaker remains elsewhere within the residence. You inquire whether such actions would violate § 18.2-371, which incorporates by reference the provisions of § 16.1-228(6) with respect to the definition of an “abused or neglected child.”

## APPLICABLE LAW AND DISCUSSION

Section 18.2-371 provides, in relevant part, that

Any person 18 years of age or older, including the parent of any child, who . . . willfully contributes to, encourages, or causes any act, omission, or condition which renders a child delinquent, in need of services, in need of supervision, or abused or neglected as defined in § 16.1-228 . . . shall be guilty of a Class 1 misdemeanor.

According to § 16.1-228(6), an “abused or neglected” child includes a child

[w]hose parents or other person responsible for his care creates a substantial risk of physical or mental injury by knowingly leaving the child *alone in the same dwelling*, including an apartment as defined in § 55-79.2, with a person to whom the child is not related by blood or marriage and who the parent or other person responsible for his care knows has been convicted of an offense against a minor for which registration is required as a violent sexual offender pursuant to § 9.1-902 [emphasis added].

I note first that, “[w]hen construing a statute, our primary objective is ‘to ascertain and give effect to legislative intent,’ as expressed by the language used in the statute.”<sup>1</sup> Moreover, “the plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction, and a statute should never be construed in a way that leads to absurd results.”<sup>2</sup> Further, “[w]e ‘assume that the legislature chose, with care, the words it used when it enacted the relevant statute.’”<sup>3</sup> Finally, undefined terms in a statute must be given their ordinary meaning, given the context in which they are used.<sup>4</sup>

The *Code of Virginia* does not define the term “dwelling” for purposes of § 16.1-228(6); however, a “dwelling” commonly is defined as a “habitation,” “place of residence,” or “abode.”<sup>5</sup> This term is distinct from the narrower term “room,” which is defined as “[a]n area separated by walls or partitions from other similar parts of the structure or building in which it is located.”<sup>6</sup> Had the General Assembly intended to enlarge the scope of § 16.1-228(6) by adding the term “room,” it could have done so.<sup>7</sup> Accordingly, the reach of § 16.1-228(6) does not include a child who is left alone in the same room as a sexually violent offender, provided the child’s parent or caretaker remains within the residence.

Moreover, it is well-established that “[p]enal statutes must be ‘strictly construed against the State,’ and . . . ‘cannot be extended by implication or construction, or be made to embrace cases which are not within their letter and spirit.’”<sup>8</sup> Based on the definitions above, a strict construction of § 16.1-228(6) requires that the subsection

be limited to instances in which a parent or caretaker leaves the dwelling itself, rather than a room within the dwelling.

### CONCLUSION

Accordingly, it is my opinion that a parent or caretaker who leaves a child alone in the same room with a sexually violent offender, yet who remains within the residence, has not violated § 18.2-371 by leaving the child “alone in the same dwelling” with an offender within the meaning of § 16.1-228(6).

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<sup>1</sup> *Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 283 Va. 420, 425, 722 S.E.2d 626, 629 (2012) (quoting *Commonwealth v. Amerson*, 281 Va. 414, 418, 706 S.E.2d 879, 882 (2011)) (further citation and internal quotation marks omitted).

<sup>2</sup> *Meeks v. Commonwealth*, 274 Va. 798, 802, 651 S.E.2d 637, 639 (2007) (internal quotation marks and citations omitted).

<sup>3</sup> *Alger v. Commonwealth*, 267 Va. 255, 261, 590 S.E.2d 563, 556 (2004) (quoting *Barr v. Town & Country Props., Inc.*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990)).

<sup>4</sup> *See Moyer v. Commonwealth*, 33 Va. App. 8, 35, 531 S.E.2d 580, 593 (2000) (citing *McKeon v. Commonwealth*, 211 Va. 24, 27, 175 S.E.2d 282, 284 (1970)).

<sup>5</sup> THE WEBSTER ENCYCLOPEDIA DICTIONARY OF THE ENGLISH LANGUAGE 271 (Virginia S. Thatcher & Alexander McQueen eds., 1967); *see also* THE AMERICAN HERITAGE DICTIONARY: SECOND COLLEGE EDITION 431 (Pamela B. DeVinne et al. eds., 1985) (defining a “dwelling” as “a place to live in” or “abode”).

<sup>6</sup> THE AMERICAN HERITAGE DICTIONARY: SECOND COLLEGE EDITION, *supra* note 6, at 1070; *see also* THE WEBSTER ENCYCLOPEDIA DICTIONARY OF THE ENGLISH LANGUAGE, *supra* note 6, at 730 (defining a “room” as “an apartment in a house” or “any division separated from the rest by a partition”).

In addition, Virginia’s common law of burglary draws a clear distinction between the terms “dwelling” and “room.” *See Lacey v. Commonwealth*, 54 Va. App. 32, 40, 675 S.E.2d 846, 850 (2009); *Hitt v. Commonwealth*, 43 Va. App. 473, 483, 598 S.E.2d 783, 788 (2004).

<sup>7</sup> I note that this Opinion does not address a scenario in which a parent or caretaker leaves his child alone in a room that *independently* might constitute a separate “dwelling” (such as a rented room), as your inquiry does not present such a scenario. *See Hitt*, 43 Va. App. at 481-82, 598 S.E.2d at 787 (indicating that rooms within a larger residence may constitute independent “dwelling houses” if they serve as the discrete habitation of individuals who reside therein); *Clarke v. Commonwealth*, 66 Va. (Gratt) 908, 917, 919 (1874) (noting that a rented room may constitute an individual “dwelling house” by construction of law); *see also* VA. CODE ANN. § 36-96.1:1 (2011) (defining a “dwelling,” for purposes of Virginia’s Fair Housing Law, as “any building, structure, or portion thereof, that is occupied as, or designated or intended for occupancy as, a residence by one or more families” (emphasis added)).

<sup>8</sup> *Armstrong v. Commonwealth*, 263 Va. 573, 581, 562 S.E.2d 139, 144 (2002) (quoting *Dep’t of Motor Vehicles v. Athey*, 261 Va. 385, 388, 542 S.E.2d 764, 766 (2001)) (further citation omitted).

OP. NO. 14-016

PRISONS AND OTHER METHODS OF CORRECTION: LOCAL CORRECTIONAL FACILITIES

COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS -  
DISPOSITION

It is my opinion that a prisoner charged as a juvenile but sentenced under § 16.1-284 is eligible for the good conduct credit established in § 53.1-116 if the offense for which he is being sentenced would be classified as a misdemeanor if committed by an adult. However, if the offense for which he is being sentenced would be classified as a felony if committed by an adult, the good conduct credit established in § 53.1-116 does not apply.

THE HONORABLE ROBERT L. BUSHNELL  
JUDGE, JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT,  
CITY OF MARTINSVILLE AND COUNTIES OF HENRY AND PATRICK  
JULY 10, 2014

### ISSUE PRESENTED

You inquire whether the good conduct credit established in § 53.1-116 of the *Code of Virginia* applies to a prisoner who commits an offense while a juvenile, is charged pursuant to a juvenile petition, and is adjudicated delinquent in Juvenile and Domestic Relations District Court (“juvenile court”), but who is over the age of eighteen at the time of disposition and therefore is sentenced to a term of imprisonment in a local jail pursuant to § 16.1-284 of the *Code of Virginia*.

### RESPONSE

It is my opinion that a prisoner charged as a juvenile but sentenced under § 16.1-284 is eligible for the good conduct credit established in § 53.1-116 if the offense for which he is being sentenced would be classified as a misdemeanor if committed by an adult. However, if the offense for which he is being sentenced would be classified as a felony if committed by an adult, the good conduct credit established in § 53.1-116 does not apply. It further is my opinion that, in the event the prisoner has received a sentence arising from multiple offenses, one or more of which would be a misdemeanor if committed by an adult, and one or more of which would be a felony if committed by an adult, the good conduct credit applies to the misdemeanor sentence(s), but not to the felony sentence(s). As to good conduct credit for violating a court order or the terms of probation or parole, the underlying offense governs in the same way.

### APPLICABLE LAW AND DISCUSSION

Pursuant to § 16.1-284, when a juvenile court “sentences an adult who has committed, before attaining the age of eighteen, an offense which would be a crime if committed by an adult,” the court “may impose the penalties which are authorized

to be imposed on adults for such violation.”<sup>1</sup> The court, however, may not “exceed the punishment for a Class 1 misdemeanor for a single offense or multiple offenses.”<sup>2</sup> Accordingly, when a criminal defendant is charged in juvenile court for an offense that would have been a crime if committed by an adult,<sup>3</sup> and is adjudicated delinquent by the court,<sup>4</sup> but already has attained the age of eighteen by the time of the dispositional hearing, the juvenile court is limited in terms of the sentence it may impose. Regardless of the number or nature of the charged offenses, the court may impose a total sentence of up to twelve months imprisonment, a fine of not more than \$2500, or both.<sup>5</sup>

The provisions of § 16.1-284 also apply when the juvenile court is sentencing an offender for violation of a court order or a violation of probation or parole, but, at the time of disposition, that offender is “eighteen years of age or older.”<sup>6</sup> That is, regardless of the nature of the underlying adjudication of delinquency, once the offender reaches the age of eighteen, the juvenile court may impose a jail term of up to twelve months imprisonment.<sup>7</sup>

Your question concerns whether a defendant who is sentenced to a term of imprisonment pursuant to § 16.1-284 is eligible for good conduct credit under § 53.1-116. Good conduct credits “are a statutorily authorized method by which correctional officials may shorten the confinement of eligible prisoners without court approval.”<sup>8</sup> Pursuant to § 53.1-116,

Unless he is serving a mandatory minimum sentence of confinement, each prisoner sentenced to 12 months or less for a misdemeanor or any combination of misdemeanors shall earn good conduct credit at the rate of one day for each one day served, including all days served while confined in jail prior to conviction and sentencing, in which the prisoner has not violated the written rules and regulations of the jail.<sup>[9]</sup>

The statute at issue here specifically permits a sentence reduction for “each prisoner” being held in a local jail who is serving a sentence of “12 months or less for a misdemeanor or any combination of misdemeanors.”<sup>10</sup> According to the plain language of the statute,<sup>11</sup> in order to qualify for good conduct credit under § 53.1-116, then, the detained individual must be: (1) a “prisoner” being held in a local jail, and (2) serving a misdemeanor sentence of twelve months or less. The second requirement of the statute - serving a misdemeanor sentence - is the governing principle for answering your inquiry.

Section 53.1-116 draws no distinction between prisoners who were convicted in general district court, those who were convicted in circuit court, and those who were convicted in juvenile and domestic relations district court, nor does it differentiate between prisoners based on their age at the time of incarceration or at the time of the commission of the offense. Further, no distinction is made regarding whether

that individual was charged by petition, warrant, complaint, or indictment. Rather, the statute plainly states, “*each prisoner.*”<sup>12</sup> Because the wording of § 53.1-116 unambiguously encompasses any prisoner who is confined at a local jail,<sup>13</sup> I conclude that an inmate who was a juvenile at the time of the commission of the offense but is sentenced to a jail term under § 16.1-284 qualifies as a “prisoner” within the meaning of § 53.1-116.<sup>14</sup>

Moreover, the General Assembly clearly knows how to express its intent when it comes to permitting sentence-reducing credits. For example, the legislature specifically has provided that a juvenile who is convicted of a felony as an adult and, in addition to imposition of an adult sentence, is committed to the Department of Juvenile Justice as a serious offender, is eligible to earn sentence credits for the portion of his sentence that is served with the Department of Juvenile Justice;<sup>15</sup> while, by contrast, a juvenile who is indeterminately committed to the Department of Corrections as a youthful offender is not eligible for good conduct credits and other sentence-reducing measures.<sup>16</sup> In addition, when the legislature has intended for good conduct credit to be unavailable to a prisoner serving a particular type of sentence, it expressly has said so.<sup>17</sup> Here, the General Assembly did not include a provision in § 16.1-284 indicating that good conduct credits would be unavailable to prisoners sentenced under that statutory provision. I therefore conclude that an adult sentenced to a term of imprisonment under § 16.1-284 will qualify as a “prisoner” within the meaning of this statute as long as the other express terms of the legislative mandate are fulfilled.<sup>18</sup>

Turning to the second qualification, § 53.1-116 provides that good conduct credit is available only for those prisoners who are serving a misdemeanor sentence of twelve months or less.<sup>19</sup> Consequently, under the express terms of the statute, if the prisoner is serving a felony sentence, the misdemeanor good conduct credit is not available.<sup>20</sup>

Here, § 16.1-284 provides that, when a juvenile court sentences an offender who was a juvenile at the time of the commission of the offense but has since attained the age of eighteen, that sentence shall not “exceed the punishment for a Class 1 misdemeanor for a single offense or multiple offenses.”<sup>21</sup> This statutory provision does not automatically transform the offense charged in the juvenile petition into a misdemeanor. It affects the sentence only, not the nature of the charge. Where the General Assembly specifically has intended for a particular offense to be deemed a misdemeanor or a felony, it has provided statutory language to that effect.<sup>22</sup> Section 16.1-284 does not provide that the offender will be, upon sentencing, “guilty of a Class 1 misdemeanor;” rather, it simply sets a statutory maximum punishment for the charged offense if the juvenile offender is an adult at the time of sentencing.

As a result, when a prisoner is sentenced under § 16.1-284, the good conduct credit established by § 53.1-116 applies if that sentence arose from an adjudication of

delinquency for a crime that would have been a misdemeanor if committed by an adult. Accordingly, when deciding whether good conduct credit should be available for a prisoner sentenced under § 16.1-284, the sheriff or jail superintendent responsible for determining the length of a jail inmate's term of confinement must ascertain whether the prisoner's sentence resulted from a misdemeanor or a felony charge. If the prisoner's sentence is predicated on a mixture of misdemeanor and felony adjudications, good conduct credit should be available only for the misdemeanor portion of that sentence. If the prisoner's sentence under § 16.1-284 is predicated on a finding, under § 16.1-291(E), that the prisoner is in violation of his probation, the sheriff or jail superintendent should look to the nature of the underlying charge to ascertain whether the inmate is serving time for a felony probation violation or a misdemeanor probation violation, and award good conduct credit only if the underlying charge is in the nature of a misdemeanor.<sup>23</sup>

### CONCLUSION

Accordingly, it is my opinion that, a prisoner charged as a juvenile but sentenced under § 16.1-284 is eligible for the good conduct credit established in § 53.1-116 if the offense for which he is being sentenced would be classified as a misdemeanor if committed by an adult. If the offense for which he is being sentenced would be classified as a felony if committed by an adult, the good conduct credit established in § 53.1-116 would not apply. If the prisoner has received a sentence arising from multiple offenses, one or more of which would be a misdemeanor if committed by an adult, and one or more of which would be felony if committed by an adult, the good conduct credit would apply to the misdemeanor sentence(s), but not the felony sentence(s). And if the prisoner is sentenced for violating a court order or the terms or probation or parole, the nature of the underlying conviction (felony or misdemeanor) governs eligibility for good conduct credit in the same way.

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<sup>1</sup> VA. CODE ANN. § 16.1-284 (2010).

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

<sup>3</sup> A defendant would not necessarily be charged by petition in the juvenile and domestic relations district court simply because he was a juvenile at the time of the commission of the offense. Specifically, if, at the time of the new offense, that juvenile previously had been "tried and convicted in a circuit court as an adult," the matter would proceed in all respects as though the defendant were an adult at the time of the commission of the offense. Section 16.1-271 (Supp. 2014). Similarly, if the defendant is charged with committing an offense when he was a juvenile, but the prosecution of that offense was not initiated until after the defendant attained the age of twenty-one, the juvenile court would not have jurisdiction, and the matter would proceed as though the defendant were an adult at the time of the commission of the offense. Section 16.1-242 (2010).

<sup>4</sup> If the defendant is transferred or certified for trial as an adult, the provisions of § 16.1-284 do not apply automatically. See § 16.1-284 (providing for sentencing "[w]hen *the juvenile court* sentences an adult")

(emphasis added)); *see also* § 16.1-269.1 (Supp. 2014) (providing for the transfer or certification of a juvenile for trial in circuit court). When a defendant who was a juvenile at the time of the charged offense is tried in the circuit court, the circuit court utilizes a separate statutory provision to fashion an appropriate sentence for the offender. *See* § 16.1-272 (2010). Nonetheless, if the juvenile ultimately is convicted of a misdemeanor in circuit court, the circuit court “shall deal with the juvenile in the manner prescribed by law for the disposition of a delinquency case in the juvenile court.” Section 16.1-272(A)(3) (emphasis added). Thus, if a juvenile is transferred to or certified for trial in circuit court, but is convicted of a misdemeanor rather than a felony, and if that defendant already has attained the age of eighteen by the date of sentencing, the circuit court, too, would be confined by the provisions of § 16.1-284 and could impose an aggregate sentence of up to twelve months imprisonment and/or a fine of up to \$2,500. *See* § 16.1-284; *see also* VA. CODE ANN. § 18.2-11(a) (2014).

<sup>5</sup> Section 16.1-284; *see also* § 18.2-11(a) (establishing punishment for a Class 1 misdemeanor).

<sup>6</sup> Section 16.1-291(E) (2010).

<sup>7</sup> *See id.*; *see also* 2005 Op. Va. Att’y Gen. 71 (opining that a probation violation arising from a juvenile adjudication properly would be heard in juvenile court even though the defendant was now over the age of twenty-one, reasoning that a probation violation is simply a continuation of the earlier criminal proceedings).

<sup>8</sup> 1992 Op. Va. Att’y Gen. 72; *see also* 2004 Op. Va. Att’y Gen. 173, 173 (“Section 53.1-116(A) embodies the legislative intent that prisoners sentenced to 12 months or less in jail for misdemeanors shall earn good conduct credits to reduce the length of their imprisonment.”).

<sup>9</sup> VA. CODE ANN. § 53.1-116(A) (2013).

<sup>10</sup> Section 53.1-116(A).

<sup>11</sup> “A principal rule of statutory interpretation is that courts will give statutory language its plain meaning.” *Davenport v. Little-Bowser*, 269 Va. 546, 555, 611 S.E.2d 366, 371 (2005) (citing *Jackson v. Fidelity & Deposit Co.*, 269 Va. 303, 313, 608 S.E.2d 901, 904 (2005)).

<sup>12</sup> *Id.* (emphasis added).

<sup>13</sup> “When the language of a statute is unambiguous, we are bound by the plain meaning of that language.” *Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 283 Va. 420, 425, 722S.E.2d 626, 629 (2012) (quoting *Kozmina v. Commonwealth*, 281 Va. 347, 349, 706 S.E.2d 860, 862 (2011)) (further citation and internal quotation marks omitted).

<sup>14</sup> A previous Opinion of this Office lends support to this interpretation: in applying § 53.1-116 to prisoners serving their sentences on the weekends, we concluded that such prisoners are entitled to good conduct credit, because “the language of the statute applies equally to *all* jail prisoners.” 1982-83 Op. Va. Att’y Gen. 293 (emphasis added).

<sup>15</sup> Section 53.1-202.2(B) (2013).

<sup>16</sup> Section 53.1-67 (2013).

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<sup>17</sup> See *id.*; see also § 53.1-203 (Supp. 2014) (providing that a prisoner serving a sentence for escape will not receive any form of sentence-reducing credit for that sentence); see also 1992 Op. Va. Att’y Gen. 72 (“[W]hen the General Assembly has intended conviction under a penal statute to prohibit parole or good conduct credits, it expressly has said so.”).

<sup>18</sup> See *Osman v. Osman*, 285 Va. 384, 389, 737 S.E.2d 876, 878-79 (2013) (“When the language of a statute is unambiguous, we are bound by the plain meaning of that language.” (quoting *Conyers v. Martial Arts World of Richmond, Inc.*, 273 Va. 96, 104, 639 S.E.2d 174, 178 (2007))); see also 1982-83 Op. Va. Att’y Gen. 320, 320-21 (discussing the predecessor statute to current § 16.1-284 and opining that, “[w]hen a juvenile . . . attains the age of 18 years, he may be confined in jail in the same manner as other adult prisoners”).

<sup>19</sup> Section 53.1-116(A).

<sup>20</sup> See *id.* (“[A]ny prisoner committed to jail upon a felony offense . . . shall not earn good conduct credit . . . in excess of that permissible under Article 4 (§ 53.1-202.2 et seq.) of Chapter 6 of this title.”). Moreover, that sentence-reducing measures for felony charges are contemplated elsewhere in the Code further evinces that an adjudication of delinquency for a crime that would have been a felony if committed by an adult does not fall within the ambit of this statute. Prisoners accrue earned sentence credits for felony offences pursuant to the provisions of Title 53.1, Chapter 6, Article 4 of the *Code of Virginia*. See §§ 53.1-202.2 through 53.1-202.4 (2013).

<sup>21</sup> Section 16.1-284.

<sup>22</sup> Title 18.2 of the *Code of Virginia* is replete with statutes designating certain offenses as felonies or misdemeanors by utilizing the language “shall be guilty of.” See, e.g., §§ 18.2-19 (2014) (accessory after the fact in a felony offense “shall be guilty of a Class 1 misdemeanor”); 18.2-22 (2014) (conspiracy to commit a capital offense “shall be guilty of a Class 3 felony,” and conspiracy to commit a non-capital offense “shall be guilty of a Class 5 felony”).

<sup>23</sup> Cf. 2004 Op. Va. Att’y Gen. at 173 (opining that, when deciding whether good conduct credit is available to an inmate who is serving a sentence for contempt, the sheriff must first “ascertain whether the individual is being detained pursuant to a civil or a criminal contempt finding and award only those prisoners serving criminal contempt sentences the good conduct credits prescribed in § 53.1-116(A)”).

## OP. NO. 14-017

### TAXATION: TANGIBLE PERSONAL PROPERTY, MACHINERY AND TOOLS AND MERCHANTS' CAPITAL – SITUS FOR TAXATION

A county and a town concurrently may assess tangible personal property taxes on business property located within the boundaries of both governmental entities.

THE HONORABLE RICHARD H. BLACK  
MEMBER, SENATE OF VIRGINIA  
JULY 16, 2014

### ISSUE PRESENTED

You ask whether the dual taxation of business tangible personal property by a county and a town is authorized by law.<sup>1</sup>

### RESPONSE

It is my opinion that a county and a town concurrently may assess tangible personal property taxes on business property located within the boundaries of both governmental entities.

### APPLICABLE LAW AND DISCUSSION

Article X, § 4 of the Constitution of Virginia provides that tangible personal property is subject to local taxation only, and “shall be assessed for local taxation in such manner and at such times as the General Assembly may prescribe by general law.”<sup>2</sup> The General Assembly, in § 58.1-3511 of the *Code of Virginia*, has provided that “[t]he situs for the assessment and taxation of tangible personal property . . . shall in all cases be the county, district, town or city in which such property may be physically located on the tax day.”<sup>3</sup> Accordingly, counties and towns in Virginia implicitly are separately authorized to assess tangible personal property taxes in accord with the situs provisions of § 58.1-3511.

Because a town is not completely independent of its host county,<sup>4</sup> tangible personal property can be physically located in both a town and the surrounding county at the same time. Although a town possesses its own independent taxing authority,<sup>5</sup> property there remains subject to the taxing authority of the county in which it is located. It is settled in Virginia that both a county and a town may assess taxes on the same property located within both localities. As the Supreme Court of Virginia has held, “an incorporated town continues to be an integral part of the county, subject to the jurisdiction of . . . county authorities and to taxation for general county purposes.”<sup>6</sup> The Court further has found that the constitutional requirement of uniformity of taxation “forbids [the] exemption from county taxes of property located in a town.”<sup>7</sup>

Prior opinions of this Office likewise have affirmed that “[p]roperty located in an incorporated town within a county is subject to taxation by both the county and town,”<sup>8</sup> and “[a] county and an incorporated town therein may each levy a tangible personal property tax on the same personal property located within the town.”<sup>9</sup> Accordingly, based on the weight of this authority, I conclude that both a county and a town may assess tangible personal property taxes on business property located within both localities.

You question whether the use of the disjunctive “or” in § 58.1-3511 serves to preclude such concurrent taxation. Section 58.1-3511 provides that “[t]he situs for the assessment and taxation of tangible personal property . . . shall in all cases be

the county, district, town *or* city in which such property may be physically located on the tax day.”<sup>10</sup> “Generally, phrases separated by a comma and the disjunctive ‘or’ are independent.”<sup>11</sup> Nevertheless, “[w]henver it is necessary to effectuate the obvious intention of the legislature, disjunctive words may be construed as conjunctive, and *vice versa*.”<sup>12</sup> As noted above, our Supreme Court has held that residents of a town remain subject to taxation for general county purposes, and that the constitutional requirement of uniformity of property taxation requires county taxes to be assessed against property located in a town. This precedent predates the addition of “town” to the situs provision of § 58.1-3511.<sup>13</sup> “The General Assembly is presumed to be aware of the decisions of [the Supreme Court of Virginia] when enacting legislation.”<sup>14</sup> Accordingly, when the legislature included “town” in the list of entities authorized to impose a tax on tangible personal property, it did so knowing that the town constitutionally would not be permitted to be exempted from county taxation of the same property. Accordingly, § 58.1-3511 cannot be read in the disjunctive, but it must be read so as to allow the imposition of tangible personal property taxes by both a county and a town.<sup>15</sup>

### CONCLUSION

Accordingly, it is my opinion that a county and town concurrently may assess tangible personal property taxes on business tangible personal property located within their mutual boundaries.

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<sup>1</sup> Because I answer this question in the affirmative, there is no need to address your second question regarding which local government otherwise would be authorized to assess the applicable tax.

<sup>2</sup> See also VA. CODE ANN. § 58.1-3000(A) (2013) (providing generally that all taxable tangible personal property is made subject to local taxation).

<sup>3</sup> I note that § 58.1-3511 also contains particularized provisions regarding the situs for the taxation of motor vehicles, travel trailers, boats, and airplanes. These specific provisions are omitted, as they are not directly relevant to your inquiry.

<sup>4</sup> Unlike cities, towns in Virginia do not exist independently of the counties in which they are located. See *Cnty. of Brunswick v. Peebles & Purdy Co.*, 138 Va. 348, 358, 122 S.E. 424, 427 (1924) (“A city is entitled, under the provisions of article VI of the Constitution, to a separate government, and when incorporated is no part of the county for governmental purposes. But this is not true of a town. Its people and property are still subject to county government for county purposes.”).

<sup>5</sup> See VA. CODE ANN. § 15.2-1104 (2012) (providing a town general authority to assess taxes on “property, persons, and other subjects of taxation, which are not prohibited by law”).

<sup>6</sup> *Nexsen v. Bd. of Supvrs.*, 142 Va. 313, 318, 128 S.E. 570, 571 (1925).

<sup>7</sup> See 1970-71 Op. Va. Att’y Gen. 386, 386 (paraphrasing a key holding of *Campbell v. Bryant*, 104 Va. 509, 515-16, 52 S.E. 638, 640 (1905)). With respect to the constitutional requirement of uniformity of taxation, Article X, § 1 of the Virginia Constitution provides generally that all taxes “shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax.”

<sup>8</sup> 2009 Op. Va. Att’y Gen. 164, 166; *see* 1970-71 Op. Va. Att’y Gen. at 386; 1969-70 Op. Va. Att’y Gen. 276, 276. Although two of these opinions were issued prior to the 1972 amendment adding “town” to § 58.1-3511, the 1972 amendment is not inconsistent with the underlying logic of the opinions. It merely corrected a legislative omission by which the earlier version of the statute could have been interpreted to mean that towns have no taxing authority over personal property.

<sup>9</sup> 1969-70 Op. Va. Att’y Gen. at 276; *see also* 1970-71 Op. Va. Att’y Gen. at 386 (concluding that residents of the Town of Middletown are subject to personal property taxes assessed by the Town as well as by Frederick County).

<sup>10</sup> Emphasis added.

<sup>11</sup> *Lampkins v. Commonwealth*, 44 Va. App. 709, 717, 607 S.E.2d 722, 726 (2005) (citing *Smoot v. Commonwealth*, 37 Va. App. 495, 501, 559 S.E.2d 409, 412 (2002)).

<sup>12</sup> *Indus. Dev. Auth. v. La France Cleaners & Laundry Corp.*, 216 Va. 277, 280, 217 S.E.2d 879, 882 (1975) (alteration in original) (quoting *S. E. Pub. Serv. Corp. v. Commonwealth*, 165 Va. 116, 122, 181 S.E. 448, 450 (1935)).

<sup>13</sup> *See* 1972 Va. Acts ch. 185 (inserting the word “town” into the list of taxing entities of the disjunctive phrase found in the predecessor statute to § 58.1-3511). The applicable cases were decided in 1905 and 1924, *see supra* notes 6 and 7.

<sup>14</sup> *Waterman v. Halverson*, 261 Va. 203, 207, 540 S.E.2d 867, 869 (2001).

<sup>15</sup> In addition, as a comparison, I note that when the General Assembly has intended to limit the authority of counties and towns simultaneously to assess taxes not subject to the uniformity requirement, it expressly has done so. For example, any county license tax assessed pursuant to § 58.1-3703 does not apply within the limits of a town located within such county if the town imposes a license tax on the same privilege. *See* § 58.1-3711 (2013).

## OP. NO. 14-018

### TAXATION: TANGIBLE PERSONAL PROPERTY, MACHINERY AND TOOLS AND MERCHANTS’ CAPITAL

The terms “original cost” as used in § 58.1-3503(A)(17) and “original total capitalized cost” as used in § 58.1-3507(B) mean the original cost paid by the original purchaser of the property from the manufacturer or dealer.

THE HONORABLE T. SCOTT HARRIS  
HANOVER COUNTY COMMISSIONER OF THE REVENUE  
JUNE 26, 2014

### ISSUE PRESENTED

You ask, for purposes of the valuation of property for the taxation of tangible personal property and the taxation of machinery and tools, whether the terms “original cost” as

used in § 58.1-3503(A)(17) and “original total capitalized cost” as used in § 58.1-3507(B) of the *Code of Virginia* mean the cost paid by the original purchaser of the property from the manufacturer, or the current owner’s purchase price.

### **RESPONSE**

It is my opinion that the terms “original cost” as used in § 58.1-3503(A)(17) and “original total capitalized cost” as used in § 58.1-3507(B) mean the original cost paid by the original purchaser of the property from the manufacturer or dealer and not the price paid by the current owner.

### **BACKGROUND**

You advise that, for decades, the Hanover County Commissioner of Revenue has assessed a tax on machinery and tools located within the County by valuing the property at a percentage (10%) of the original cost paid by the original purchaser of the asset being taxed. A local manufacturer purchased machinery and tools, indisputably subject to this tax, in a bankruptcy sale in 2012. The question has arisen whether the “original total capitalized cost” of these assets, used to determine their fair market value for tax purposes, means the purchase price paid by the current owner, which in this case is the amount that the local manufacturer paid when it purchased the assets in a bankruptcy sale, or the price of the tools paid by the original purchaser of the property.

### **APPLICABLE LAW AND DISCUSSION**

The Constitution of Virginia requires that “all taxes shall be uniform upon the same class of subjects”<sup>1</sup> and all assessments of tangible personal property “shall be at their fair market value, to be ascertained as prescribed by law.”<sup>2</sup> Tangible personal property is segregated for and made subject to local taxation only, “and shall be assessed for local taxation in such manner and at such times as the General Assembly may prescribe by general law.”<sup>3</sup>

In determining the value of tangible personal property, the General Assembly has provided that such property, when used in a trade or business, unless otherwise specified, “shall be valued by means of a percentage or percentages of *original* cost.”<sup>4</sup> Machinery and tools are further segregated as a separate class of tangible personal property,<sup>5</sup> and the General Assembly has prescribed that such property “shall be valued by means of depreciated cost or a percentage or percentages of *original* total capitalized cost excluding capitalized interest.”<sup>6</sup>

Although the General Assembly has provided no definition for the terms “original cost” and “original total capitalized cost,” the statutes establishing the method of valuation clearly refer simply to the “original” cost of the property. They do not use any language referencing the purchase price of the taxpayer.

As a 2009 Opinion that similarly addresses the meaning of “original cost” in § 58.1-3503(A)(17) states, “words in a statute are to be construed according to their

ordinary meaning, given the context in which they are used.”<sup>7</sup> That Opinion concluded that the term “original cost” means “the acquisition cost of property from manufacturer or dealer, i.e., original cost paid by original purchaser of such property from manufacturer or dealer.”<sup>8</sup> Because the General Assembly has not amended this language since this Opinion was issued,<sup>9</sup> I affirm its conclusion that “original cost” means the “the cost paid by the original, or first, purchaser of such personal property[.]”<sup>10</sup> and not the purchase price paid by a subsequent owner paying the tax.

I similarly must conclude that the plain meaning of “original total capitalized cost” refers to the cost of the product when new. Reading the numerous subsections of § 58.1-3503(A) as a whole further clarifies the proper interpretation of the terms “original cost” and “original total capitalized cost.” There is a notable distinction between the term “original cost,” used in subsections 4, 5, 10, 11, 12, 13, 15, and 17, and the term “original cost *to the taxpayer*,” used in subsection 16.<sup>11</sup> Had the General Assembly intended the term “original cost” or “original total capitalized cost” standing alone to mean the cost to the taxpayer/current owner of the assets, there would be no need to make such distinction elsewhere in the Code.<sup>12</sup>

Because “the practical construction given to a statute by public officials charged with its enforcement is entitled to great weight by the courts and in doubtful cases will be regarded as decisive[.]”<sup>13</sup> it is significant that these conclusions are further supported by rulings of the Commissioner of the Department of Taxation. In a situation analogous to the circumstances leading to your inquiry, in which a company purchased assets at a bankruptcy sale and claimed their purchase price at the bankruptcy sale was the “original cost,” the Tax Commissioner determined that a city’s interpretation of original cost as the cost paid by the owner who first purchased the property was consistent with statutory requirements.<sup>14</sup> In a subsequent opinion, the Tax Commissioner defined the term “original total capitalized cost” as “the purchase price of the owner that first purchased the machinery and tools, not the Taxpayer’s cost.”<sup>15</sup>

### CONCLUSION

Accordingly, it is my opinion that the terms “original cost” as used in § 58.1-3503(A)(17) and “original total capitalized cost” as used in § 58.1-3507(B) mean the original cost paid by the original purchaser of the property from the manufacturer or dealer.<sup>16</sup>

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<sup>1</sup> VA. CONST. art. X, § 1.

<sup>2</sup> VA. CONST. art. X, § 2.

<sup>3</sup> VA. CONST. art. X, § 4.

<sup>4</sup> VA. CODE ANN. § 58.1-3503(A)(17) (2013) (emphasis added).

<sup>5</sup> Section 58.2-3507(A) (2013).

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<sup>6</sup> Section 58.1-3507(B) (emphasis added).

<sup>7</sup> *Id.* (quoting *City of Va. Beach v. Bd. of Supvrs.*, 246 Va. 233, 236, 435 S.E.2d 382, 384 (1993)).

<sup>8</sup> 2009 Op. Va. Att’y Gen. 177, 178.

<sup>9</sup> “The legislature is presumed to have had knowledge of the Attorney General’s interpretation of the statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General’s view.” *Beck v. Shelton*, 267 Va. 482, 492, 593 S.E.2d 195, 200 (2004) (quoting *Browning-Ferris, Inc. v. Commonwealth*, 225 Va. 157, 161-62, 300 S.E.2d 603, 605-06 (1983)).

<sup>10</sup> 2009 Op. Va. Att’y Gen. at 178.

<sup>11</sup> Section 58.1-3503(A) (emphasis added).

<sup>12</sup> When the legislature omits language from one statute that it has included in another, courts may not construe the former statute to include that language, as doing so would ignore “an unambiguous manifestation of a contrary intention” of the legislature. *See Halifax Corp. v. Wachovia Bank*, 268 Va. 641, 654, 604 S.E.2d 403, 408 (2004).

<sup>13</sup> *Commonwealth v. Appalachian Electric Power Co.*, 193 Va. 37, 45-46, 68 S.E.2d 122, 127 (1951).

<sup>14</sup> *See Va. Tax Comm’r Priv. Ltr. Rul.*, Pub. Doc. 12-27 (Mar. 16, 2012), *available at* <http://www.policylibrary.tax.virginia.gov/OTP/policy.nsf>.

<sup>15</sup> *See Va. Tax Comm’r Priv. Ltr. Rul.*, Pub. Doc. 13-20 (Feb. 15, 2013), *available at* <http://www.policylibrary.tax.virginia.gov/OTP/policy.nsf>.

<sup>16</sup> I am mindful that this construction can lead the fair market value of property for purposes of the machinery and tools tax or the personal property tax to be significantly more than what the current owner/taxpayer paid for the property, as is evidenced by the bankruptcy sale at issue in your request. The fair market value of an asset generally might exceed the purchase price paid for that asset at bankruptcy or similar foreclosure sale. *See City of Martinsville v. Commonwealth Blvd. Assocs., LLC*, 268 Va. 697, 604 S.E.2d 69 (2004). This does not, however, necessarily lead to taxation based upon more than fair market value in violation of Article X, § 2 of the Constitution of Virginia. As the Supreme Court of Virginia has stated,

The fair market value of property, as that term is here used means the price which it will bring when it is offered for sale by one who desires, but is not obliged, to sell it, and is bought by one who is under no necessity of having it.

*American Viscose Corp. v. Roanoke*, 205 Va. 192, 194, 135 S.E.2d 795, 797 (1964) (citing § 169 of the 1902 Constitution of Virginia, the predecessor to Art. X, § 2 of the 1971 Constitution). Thus, this construction of §§ 58.1-3503(A) and 58.1-3507(B) is in accord with the constitutional requirements of uniformity and fair market value.

OP. NO. 14-019

EDUCATION: SCHOOL BOARDS; SELECTION, QUALIFICATION & SALARIES OF MEMBERS

Section 22.1-30 of the *Code* applies to school board appointments made by a school board selection commission.

Section 22.1-30 of the *Code* does not preclude a school board member who was appointed prior to the election of the member's spouse to a county board of supervisors from continuing to serve on the school board after his election.

THE HONORABLE RYAN T. MCDUGLE  
MEMBER, SENATE OF VIRGINIA  
JUNE 26, 2014

### ISSUES PRESENTED

You inquire regarding the application of § 22.1-30 of the *Code of Virginia*, which prohibits the appointment of certain relatives of a member of a board of supervisors to a school board during the term of the supervisor. Your initial question is whether the prohibition applies to an appointment made by a school board selection commission. You also ask whether an incumbent appointee may continue to serve on the school board where her husband is elected at a later time to the board of supervisors.

### RESPONSE

It is my opinion that, although § 22.1-30 does apply to school board appointments made by a school board selection commission, it prohibits only an appointment that is made while the relative is serving on the board of supervisors. It is therefore further my opinion that § 22.1-30 does not preclude a school board member who was appointed prior to the election of the member's spouse to the county's board of supervisors from continuing to serve on the school board after his election.

### BACKGROUND

You advise that Richmond County uses a school board selection commission to appoint the members of the Richmond County School Board. You relate that a member of the school board was appointed by the commission to serve a term from July 1, 2012 to July 1, 2016. After her appointment, in November 2013, her husband was elected to the Richmond County Board of Supervisors for a term beginning January 1, 2014, and ending December 31, 2017.

### APPLICABLE LAW AND DISCUSSION

In Virginia, county school board members can be elected by popular vote, appointed by the county's governing body, or chosen by a school board selection commission.<sup>1</sup> The members of such a commission are chosen by the Circuit Court.<sup>2</sup> Richmond County employs the school board selection commission method,

whereby “[e]ach school board member shall be appointed by the school board selection commission.”<sup>3</sup>

The initial part of your inquiry is whether § 22.1-30(A) of the *Code of Virginia*, which provides that “no member of a governing body of a county. . . and no father, mother, brother, sister, spouse, son, [or] daughter . . . of a member of the county governing body may, during his term of office, be appointed as a member of the school board for such county . . .,” applies to school board appointments made by a selection commission.

It is well settled that, “[w]hen construing a statute, our primary objective is ‘to ascertain and give effect to legislative intent,’ as expressed by the language used in the statute.”<sup>4</sup> Statutes related to the same subject are to be read *in pari materia*,<sup>5</sup> and, unless there is some indication that the legislature intended otherwise, the same meaning will be attributed to the same terms used in related statutes.<sup>6</sup> Moreover, we assume the legislature chose, with care, the words it used in its enactments.<sup>7</sup>

By its terms, § 22.1-30 applies to appointees to school boards, and not to school board members who are elected.<sup>8</sup> The language of the statute makes no distinction between school board members who are appointed by local governing bodies and those appointed by a selection commission; rather, it merely uses the term “appointed.” Because the General Assembly knows how to express its intention and did not limit the application of § 22.1-30 to only those school boards whose members are appointed by the local governing body, I must conclude that the restrictions of § 22.1-30 also apply to appointments made by a selection commission.<sup>9</sup>

The next part of your inquiry is whether the subsequent election of an incumbent school board member’s husband to the board of supervisors requires her to resign. The prohibition against appointments of certain relatives under § 22.1-30 is limited to appointments that are made “during [the member of the governing body’s] term of office[.]” In the situation you describe, the school board member was appointed prior to the election of her husband to the board of supervisors. Therefore, at the time of the appointment there was no prohibition as to her appointment, because the appointment was not made during her husband’s “term of office.”<sup>10</sup>

The statute speaks only to relationships existing at the time of appointment. It does not require an appointed school board member to resign if a covered relationship comes into existence at a later time -- such as by the later election of a spouse to the board of supervisors.

I conclude, therefore, that § 22.1-30 does not require a school board member to resign from the school board position based on a spouse’s subsequent election to the county board of supervisors, and the member may continue to serve the remainder

of her term. I note, however, that the school board member will not be eligible for reappointment if her spouse is still in “his term of office” at that time.

### CONCLUSION

Accordingly, it is my opinion that § 22.1-30 applies to persons appointed to a school board by a school board selection commission. It is further my opinion that, because the school board member about whom you inquire was appointed before her husband was elected to the board of supervisors, she may continue to serve on the school board, and she is not required to resign. However, if her husband is still a member of the board of supervisors when her term expires, she may not be reappointed at that time.

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<sup>1</sup> See, respectively, VA. CODE ANN. §§ 22.1-57.3(A) (2011); 22.1-44 (2011); 22.1-35 (2011) & 22.1-36 (2011).

<sup>2</sup> Section 22.1-35.

<sup>3</sup> Section 22.1-36 (emphasis added).

<sup>4</sup> *Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 283 Va. 420, 425, 722 S.E.2d 626, 629 (2012) (quoting *Commonwealth v. Amerson*, 281 Va. 414, 418, 706 S.E.2d 879, 882 (2011)) (further citation and internal quotation marks omitted).

<sup>5</sup> See, e.g., *Prillaman v. Commonwealth*, 199 Va. 401, 405-6, 100 S.E.2d 4, 7-8 (1957). “*In pari materia*” is the Latin phrase meaning “on the same subject; relating to the same matter.” BLACK’S LAW DICTIONARY 862 (9th ed. 2009).

<sup>6</sup> See *Lamb v. Parsons*, 195 Va. 353, 357, 78 S.E.2d 707, 709 (1953) (stating that it is “presumed that the legislature was cognizant of the fact that in 46-387(4), in that same Chapter 6, it had defined the ‘conviction’ and intended the same word to be given the same meaning when used in 46-416.1.”). Cf. 1983-84 Op. Va. Att’y Gen. 271, 271 (“The same meaning should be given to the nearly identical phrase used later in the same sentence.”).

<sup>7</sup> *Barr v. Town & County Props., Inc.*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990); *Jackson v. Fid. & Deposit Co.*, 269 Va. 303, 313, 608 S.E.2d 901, 906 (2005).

<sup>8</sup> See 2011 Op. Va. Att’y Gen. 124.

<sup>9</sup> In addition, in setting the salary limits for school board members, § 22.1-32(B) clearly and simply treats the Richmond County school board as an “appointed school board.”

<sup>10</sup> This interpretation is supported by the statute’s legislative history. Section 22.1-30 was amended in 1993 as follows:

No state, county, city or town officer, no deputy of any such officer, no member of the governing body of a county, city or town and, ~~in counties having a population of more than 100,000 persons~~, no father, mother, brother, sister, spouse, son, daughter, son-in-law, daughter-in-law, sister-in-law or brother-in-law of a member of the county governing body may, during his term of office, be appointed ~~or serve~~ as a member of the school board for such county, city or town or as tie breaker for such school board . . . .

1993 Va. Acts ch. 352.

As a previous Opinion of this Office notes, “the deletion of the words ‘or serve’ is significant[.]” 2011 Op. Va. Att’y Gen. at 125. That Opinion reasoned that, [h]ad that language been left in the Code, the listed persons would have been prohibited from *servin*g on the school board,” *id.* (emphasis added).

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Accordingly, the statute's present language prohibits only the *appointment* of certain family members to the school board during their relative's term as a member of the local governing body -- it does not preclude simultaneous service under the circumstances you present.

**OP. NO. 14-021**

**CRIMES AND OFFENSES GENERALLY: CRIMES AGAINST THE PERSON – CRIMINAL SEXUAL ASSAULT**

**HEALTH: REGULATION OF MEDICAL CARE FACILITIES AND SERVICES – HOSPITAL AND NURSING HOME LICENSURE AND INSPECTION**

**WELFARE (SOCIAL SERVICES): CHILD ABUSE AND NEGLECT**

A Virginia Department of Health licensing inspector who is a nurse and who, during the course of a hospital inspection, learns from the review of a medical record that a fourteen-year-old girl received services related to her pregnancy is not required to make a report of child abuse and neglect pursuant to Virginia Code § 63.2-1509 unless there is reason to suspect that a parent or other person responsible for the child's care committed, or allowed to be committed, the unlawful sexual act upon the child. Further, the VDH licensing inspector is not required to make a report to law enforcement of the crime of carnal knowledge of a child between the ages of thirteen and fifteen (§ 18.2-63).

THE HONORABLE MARISSA J. LEVINE, MD, MPH, FAAFP  
STATE HEALTH COMMISSIONER  
SEPTEMBER 12, 2014

**ISSUES PRESENTED**

You ask whether a hospital licensing inspector who is a nurse is required to make a report of suspected child abuse or neglect under Virginia Code § 63.2-1509 upon reviewing the medical record of a fourteen-year-old girl who was pregnant and received services, such as prenatal or abortion services, at the hospital. You further ask whether a hospital licensing inspector is required to make a report to law enforcement given that it is a crime to have carnal knowledge of a child between the ages of thirteen and fifteen under Virginia Code § 18.2-63.

**RESPONSE**

It is my opinion that a Virginia Department of Health (“VDH”) licensing inspector who is a nurse and who, during the course of a hospital inspection, learns from the review of a medical record that a fourteen-year-old girl received services related to her pregnancy is not required to make a report of child abuse and neglect pursuant to Virginia Code § 63.2-1509 unless there is reason to suspect that a parent or other person responsible for the child's care committed, or allowed to be committed, the

unlawful sexual act upon the child. It is also my opinion that the VDH licensing inspector is not required to make a report to law enforcement of the crime of carnal knowledge of a child between the ages of thirteen and fifteen.

### **BACKGROUND**

You relate that VDH performs inspections of hospitals that it licenses pursuant to Virginia Code § 32.1-126 and that such inspections typically include a review of medical records of patients treated at the hospital that is the subject of the inspection. You also state that many of the VDH licensing inspectors are nurses licensed by the Board of Nursing and are considered to be acting within their professional nursing capacity when performing inspections of hospitals. As such, you relate that they are considered to be mandated reporters of suspected child abuse and neglect under Virginia Code § 63.2-1509.

### **APPLICABLE LAW AND DISCUSSION**

Virginia Code § 63.2-1500 sets forth the general policy of the Commonwealth regarding the reporting of suspected child abuse and neglect. Specifically, § 63.2-1500 states:

The General Assembly declares that it is the policy of this Commonwealth to require reports of suspected child abuse and neglect for the purpose of identifying children who are being abused or neglected, of assuring that protective services will be made available to an abused or neglected child in order to protect such a child and his siblings and to prevent further abuse or neglect, and of preserving the family life of the parents and children, where possible, by enhancing parental capacity for adequate child care.<sup>[1]</sup>

This policy underscores the importance of the duty placed upon certain professionals to report suspected child abuse and neglect in accordance with Virginia law.

Virginia Code § 63.2-1509 requires “certain persons, who in their professional or official capacity, have reason to suspect that a child is an abused or neglected child” to report the matter immediately to the local department of social services or to the toll-free child abuse and neglect hotline of the Department of Social Services.<sup>2</sup> Nurses employed in the nursing profession are mandated reporters under the statute.<sup>3</sup> Because the nurses employed as VDH licensing inspectors are considered to be acting within their professional nursing capacities when performing hospital inspections, they must comply with § 63.2-1509 and make a report to DSS if they suspect that a child is an “abused or neglected child.”

An “abused or neglected child” is defined as “any child less than 18 years of age ... [w]hose parents or other person responsible for his care commits or allows to be

committed any act of sexual exploitation or any sexual act upon a child in violation of the law . . . .”<sup>4</sup> Virginia Code § 18.2-63 provides that “if any person carnally knows, without the use of force, a child thirteen years of age or older but under fifteen years of age, such person shall be guilty of a Class 4 felony.”<sup>5</sup> Clearly, with respect to a fourteen-year-old who is pregnant, a sexual act upon a child was committed in violation of § 18.2-63. This fact alone, without additional information or evidence, is not sufficient to create a reason to suspect that the child is an “abused or neglected child” within the meaning of § 63.2-100. Under the statutory definition of an “abused or neglected child,” there must also be some evidence or information that the unlawful sexual act was committed or allowed to be committed by the child’s parents or other person responsible for the child’s care.<sup>6</sup> Thus, whether or not a VDH licensing inspector who is a nurse has a duty to report under § 63.2-1509 would depend on what information the inspector obtained during the course of the inspection.

In an official Opinion to Delegate Robert G. Marshall issued in 2003 (the “Marshall Opinion”), this Office determined that medical personnel have a duty under § 63.2-1509 (mandatory reporting of child abuse) to report statutory rape when a child victim reveals such incidence to them in conversation.<sup>7</sup> In contrast, you state that VDH licensing inspectors obtain information solely from their reviews of medical records and do not have any interaction or engagement with the patients treated by the facility that is the subject of the inspection. If the only information in the medical record reviewed by a VDH licensing inspector is that a hospital treated a pregnant fourteen-year-old, without any information as to how the child became pregnant, and there is no other basis upon which the licensing inspector could have reason to suspect that the child’s parents or other person responsible for the care of the child committed or allowed to be committed the sexual act, then there is no duty to report under § 63.2-1509. On the other hand, if the medical record showed, for example, that the child’s father committed the sexual act, then the VDH nurse licensing inspector is required to make a report in accordance with § 63.2-1509. The mere knowledge that a child between thirteen and fifteen is or was pregnant is, without more evidence, insufficient to trigger the reporting responsibility of § 63.2-1509.

A 2001 official opinion of this Office issued to Staunton Commonwealth’s Attorney Raymond Robertson (the “Robertson Opinion”) concluded that teachers who learn that a sexual act was committed upon a child that would constitute a violation of § 18.2-63 had a duty to report under then-Virginia Code § 63.1-248.3 (recodified in 2002 to § 63.2-1509), regardless of whether the teacher had reason to suspect that the child’s parents, or other person responsible for the care of the child, committed or allowed to be committed, the sexual act.<sup>8</sup> This opinion relied on then-Virginia Code § 63.1-248.2 ( now recodified at § 63.2-1508), which states: “Nothing in this section shall relieve any person specified in § 63.1-248.3 from making reports

required in that section, regardless of the identity of the person suspected to have caused such abuse or neglect.” This language was enacted by the General Assembly in 1990, presumably in response to a 1989 Opinion of this Office determining that the responsibility of the local department of social services in child abuse and neglect matters is limited to the investigation of alleged acts committed by a parent or other person responsible for the care of a child.<sup>9</sup>

The Robertson Opinion concluded that the General Assembly’s 1990 amendment of § 63.1-248.2 (now § 63.2-1508), after the issuance of the 1989 Opinion indicated a legislative intent that the definition of “abused or neglected child” not be limited to acts committed by a parent or other person responsible for his care.<sup>10</sup> The Marshall Opinion followed this same line of reasoning and concluded that medical personnel who learn that a sexual act was committed upon a child that would constitute a violation of § 18.2-61 or § 18.2-63 have a duty to report under § 63.2-1509, regardless of whether the medical personnel had reason to suspect that the child’s parent, or other person responsible for his care, committed or allowed to be committed, the sexual act.<sup>11</sup> Both Opinions, however, are inconsistent with long-standing rules of statutory construction and interpretation.

Section 63.2-1508 specifies what constitutes a valid report of child abuse or neglect that requires the local department of social services to conduct an investigation.<sup>12</sup> One required element is that the alleged abuser is the alleged victim child’s parent or other caretaker. This is consistent with the definition of “abused or neglected child” contained in § 63.2-100.<sup>13</sup> Section 63.2-1508 ends by stating that nothing in the section shall relieve a person obligated to report suspected child abuse or neglect from making a report required by § 63.2-1509, regardless of the identity of the abuser.

“The general rule is that statutes may be considered as *in pari materia* when they relate to . . . the same subject . . . . Statutes that have the same general or common purpose or are parts of the same general plan are also ordinarily considered as *in pari materia*.”<sup>14</sup> In *Prillaman v. Commonwealth*, the Supreme Court of Virginia stated that:

“Under the rule of statutory construction of statutes *in pari materia*, statutes are not to be considered as isolated fragments of law, but as a whole, or as parts of a great connected, homogeneous system, or a single and complete statutory arrangement. Such statutes are considered as if they constituted but one act, so that sections of one act may be considered as though they were parts of the other act, as far as this can reasonably be done. Indeed, 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.”<sup>[15]</sup>

Section 63.2-1508 states that its terms do not relieve a person obligated to report child abuse or neglect from making a report *as required by* § 63.2-1509 regardless of the identity of the alleged abuser.<sup>16</sup> Section 63.2-1509 only requires reports when there is a reason to suspect that a child is an “abused or neglected child.”<sup>17</sup> By statutory definition, “an abused or neglected child” is one who has been subject to a sexual act in violation of the law that was committed or allowed to be committed *by the child’s parent or other person responsible for his care*.<sup>18</sup> To construe § 63.2-1508 as expanding the reporting requirements of § 63.2-1509, thereby expanding the definition of “an abused or neglected child,” results in an inharmonious interpretation in which both statutes could not stand.<sup>19</sup> Such an interpretation is even more absurd given that § 63.2-1508 only requires the local department of social services to investigate reports where the alleged abuser is a parent or other person responsible for the child’s care.<sup>20</sup> To the extent that the referenced official opinions issued in 2001 and 2003 (the Robertson Opinion and the Marshall Opinion) require reporting of suspected child abuse or neglect regardless of whether the alleged abuser is a parent or other person responsible for the child’s care, they contradict longstanding rules of statutory construction and are hereby overruled.

You next ask whether a VDH licensing inspector who reviews the medical record of a pregnant fourteen-year-old is required to make a report to law enforcement in the absence of a duty to report under § 63.2-1509. There is no law that requires a VDH licensing inspector to report a crime discovered during the inspection of a hospital.

### CONCLUSION

Accordingly, it is my opinion that a VDH licensing inspector who is a nurse and who, during the course of a hospital inspection, learns from the review of a medical record that a fourteen-year-old girl received services related to her pregnancy is not required to make a report of child abuse and neglect pursuant to Virginia Code § 63.2-1509 unless there is reason to suspect that a parent or other person responsible for the child’s care committed, or allowed to be committed, the unlawful sexual act

upon the child. It is also my opinion that the VDH licensing inspector is not required to make a report to law enforcement of the crime of carnal knowledge of a child between the ages of thirteen and fifteen.

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<sup>1</sup> 2002 Va. Acts ch. 747, at 1108, 1197 (quoting § 63.2-1500, not set out in Virginia Code).

<sup>2</sup> VA. CODE ANN. § 63.2-1509 (Supp. 2014).

<sup>3</sup> *Id.*

<sup>4</sup> Section 63.2-100 (Supp. 2014).

<sup>5</sup> VA. CODE ANN. § 18.2-63 (2014).

<sup>6</sup> *See* § 63.2-100(4). *See also* Moore v. Brown, 2014 Va. App. LEXIS 181 (Va. Ct. App. May 20, 2014) (finding that § 63.2-100(4) requires that the suspect be either a parent of the abused child or some other person responsible for his care). In *Moore*, the Virginia Court of Appeals also interpreted “other person responsible for his care” to mean an adult who by law, social custom, express or implied acquiescence, collective consensus, agreement, or any other legally recognizable basis has an obligation to look after the well-being of a child left in his care. Simply being an adult residing in the same home as a child does not make one responsible for every child in the home.” *Moore*, 2014 Va. App. LEXIS 181, at \*8.

<sup>7</sup> 2003 Op. Va. Att’y Gen. 185, 187.

<sup>8</sup> 2001 Op. Va. Att’y Gen. 94.

<sup>9</sup> 1989 Op. Va. Att’y Gen. 354, 356

<sup>10</sup> 2001 Op. Va. Att’y Gen. at 96.

<sup>11</sup> 2003 Op. Va. Att’y Gen. at 188.

<sup>12</sup> Section 63.2-1508 (2012).

<sup>13</sup> Section 63.2-100.

<sup>14</sup> *Prillaman v. Commonwealth*, 199 Va. 401, 405, 100 S.E.2d 4, 7 (1957) (quoting 50 Am. Jur., Statutes, § 349, at 345-47).

<sup>15</sup> *Id.*

<sup>16</sup> Section 63.2-1508 (emphasis added).

<sup>17</sup> Section 63.2-1509.

<sup>18</sup> Section 63.2-100 (emphasis added).

<sup>19</sup> *See also* 1977-78 Op. Va. Att’y Gen. 351, 353 (concluding that where two statutes are in apparent conflict, they should be construed, if reasonably possible, in such manner that both may stand together).

<sup>20</sup> Section 63.2-1508.

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

Implied consent to a blood test is triggered by a valid arrest. If a common law arrest is not feasible because a defendant is in a medical facility, the arrest may be made by the issuance of a summons pursuant to § 19.2-73(B), because that summons is deemed an arrest document. If a summons is issued, it must be based on probable cause, and it must be issued before obtaining the blood draw. The suspect should be advised of the requirements of the implied consent law, after which the blood test should be administered. The arresting officer should remain with the suspect until after the blood is drawn and then release him on the previously issued summons. If the suspect objects to the blood test, he should be charged with a violation of § 18.2-268.3 (refusal to take a blood or breath test).

COLONEL W.S. FLAHERTY  
SUPERINTENDENT, DEPARTMENT OF STATE POLICE  
DECEMBER 19, 2014

**ISSUES PRESENTED**

You inquire about the proper procedural steps a law enforcement officer must follow to obtain a blood sample pursuant to the implied consent law where the suspect has been transported to a medical facility for treatment. You specifically seek guidance as to what constitutes a valid arrest in such situations and as to the proper timing of issuance of a summons.

**RESPONSE**

It is my opinion that implied consent to a blood test is triggered by a valid arrest. If a common law arrest is not feasible because a defendant is in a medical facility, the arrest may be made by the issuance of a summons pursuant to § 19.2-73(B), because that summons is deemed an arrest document. If a summons is issued, it must be based on probable cause, and it must be issued before obtaining the blood draw. The suspect should be advised of the requirements of the implied consent law, after which the blood test may be administered. The arresting officer should remain with the suspect until after the blood is drawn and then release him on the previously issued summons. If the suspect objects to the blood test, he should be charged with a violation of § 18.2-268.3 (refusal to take a blood or breath test).

**APPLICABLE LAW AND DISCUSSION**

In Virginia, a valid arrest is a prerequisite for invoking the implied consent law and to the admission into evidence of any blood or breath test results. Virginia's implied consent statute provides in pertinent part:

Any person . . . who operates a motor vehicle upon a highway . . . in the Commonwealth shall be deemed thereby, as a condition of such operation, to have consented to have samples of his blood . . . taken for a chemical test to determine the alcohol, drug, or both alcohol and drug content of his blood, if he is *arrested* for [driving while intoxicated] . . . within three hours of the alleged offense.<sup>[1]</sup>

Because the driver's timely arrest triggers the statutory consent provision, the arrest must be completed before the driver may be required to take the test.<sup>2</sup> Blood samples obtained in accordance with law are admissible at trial.<sup>3</sup>

Certain conditions must exist at common law for an officer to effectuate an arrest. Merely stating to a suspect that he is "under arrest" is not sufficient to constitute an arrest.<sup>4</sup> Rather, "[a]n arrest requires either physical force . . . or, where that is absent, submission to the assertion of authority."<sup>5</sup> The General Assembly, however, has recognized the difficulty or unfeasibility of arresting a person through the exertion of physical force and submission to authority where the person is hospitalized. In situations where a suspected intoxicated driver has been transported to a medical facility, § 19.2-73(B) allows for issuance of a summons without detaining the defendant through physical force, provided probable cause exists:

If any person under suspicion for driving while intoxicated has been taken to a medical facility for treatment or evaluation of his medical condition, the officer at the medical facility may issue, on the premises of the medical facility, a summons for a violation of [driving while intoxicated] and for refusal of tests . . . without having to detain that person, provided that the officer has probable cause to place him under arrest. *The issuance of such summons shall be deemed an arrest* for purposes of Article 2 (18.2-266 et seq.) of Chapter 7 of Title 18.2.<sup>[6]</sup>

A summons serves, under § 19.2-73(B), as the arrest document.<sup>7</sup> Accordingly, when a summons is issued pursuant to § 19.2-73(B) for a person suspected of driving while intoxicated, the person will be deemed to have been arrested for purposes of applying the implied consent law. It is the *arrest*, not the *custody*, of the suspect that triggers the implied consent law. If the suspect does not submit to the blood draw after being served with the summons, he may be charged with refusal.<sup>8</sup>

Thus, a person suspected of driving while intoxicated who has been transported to a medical facility may be issued a summons under § 19.2-73(B), provided probable cause exists. Once that summons has been issued, there has been a valid arrest, and the blood test may then be administered. In order to have admissible evidence that the blood test was administered in accordance with law, it would be prudent for the officer to remain with the defendant until the blood draw has been made.

## CONCLUSION

Accordingly, it is my opinion that implied consent to a blood test is triggered by a valid arrest. If a common law arrest is not feasible because a defendant is in a medical facility, the arrest may be made by the issuance of a summons pursuant to § 19.2-73(B), because that summons is deemed an arrest document. If a summons is issued, it must be based on probable cause, and it must be issued before obtaining the blood draw. The suspect should be advised of the requirements of the implied consent law, after which the blood test should be administered. The arresting officer should remain with the suspect until after the blood is drawn and then release him on the previously issued summons. If the suspect objects to the blood test, he should be charged with a violation of § 18.2-268.3 (refusal to take a blood or breath test).

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<sup>1</sup> VA. CODE ANN. § 18.2-268.2(A) (2014) (emphasis added).

<sup>2</sup> *Bristol v. Commonwealth*, 272 Va. 568, 574-75, 636 S.E.2d 460, 464 (2006). In this case, a conviction of driving while intoxicated was reversed because no summons was issued until several days after the blood test had been administered. Also, while the defendant was had been told that he was under arrest prior to administering the blood test, he was not in fact arrested at that time, and the officer left the medical facility after the blood test without detaining the defendant.

<sup>3</sup> *See* § 18.2-268.7(C) (2014).

<sup>4</sup> *Bristol*, 272 Va. at 573, 636 S.E.2d at 463.

<sup>5</sup> *California v. Hodari D.*, 499 U.S. 621, 626-27 (1991) (emphasis original), *accord* *Hall v. Commonwealth*, 280 Va. 566, 701 S.E.2d 68 (2010); *but see* *Young v. Commonwealth*, 57 Va. App. 731, 706 S.E.2d 53 (2011) (rejecting the notion that arrest turns on insignificant formalities reminiscent of the medieval livery of seisin).

<sup>6</sup> Section 19.2-73(B) (Supp. 2014) (emphasis added).

<sup>7</sup> *Sprouse v. Commonwealth*, 53 Va. App. 488, 673 S.E.2d 481 (2009).

<sup>8</sup> Section 18.2-268.3 (2014).

### OP. NO. 14-025

#### COUNTIES, CITIES AND TOWNS: POLICE AND PUBLIC ORDER

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

Section 15.2-1705 disqualifies a prospective law enforcement officer from service if that individual has been convicted of, or has pled guilty or no contest to, one of the offenses specified in the statute, even if the charge is later dismissed or expunged. Nevertheless, upon request of a state or local law enforcement agency, the

Department of Criminal Justice Services may waive this disqualification for good cause shown.

An individual who was adjudicated delinquent as a juvenile for an offense enumerated in § 15.2-1705 is not automatically disqualified from service as a law enforcement officer, state and local law enforcement agencies are authorized to consider certain aspects of juvenile adjudications as a basis for denying employment.

THE HONORABLE RICHARD H. STUART  
MEMBER, SENATE OF VIRGINIA  
JULY 10, 2014

### **ISSUES PRESENTED**

You inquire whether § 15.2-1705 of the *Code of Virginia*, as amended in 2013, prohibits an individual from qualifying as a law enforcement officer when that individual pled guilty or no contest to a disqualifying crime, but the charge was later dismissed or expunged. You also ask whether an individual who, as a juvenile, was adjudicated delinquent based on conduct that would be a disqualifying crime if committed by an adult is precluded from serving as a law enforcement officer.

### **RESPONSE**

It is my opinion that § 15.2-1705 disqualifies a prospective law enforcement officer from service if that individual has been convicted of, or has pled guilty or no contest to, one of the offenses specified in the statute, even if the charge is later dismissed or expunged. Nevertheless, upon request of a state or local law enforcement agency, the Department of Criminal Justice Services may waive this disqualification for good cause shown. It is further my opinion that, although an individual who was adjudicated delinquent as a juvenile for an enumerated offense is not automatically disqualified from service as a law enforcement officer pursuant to the statute, state and local law enforcement agencies are authorized to consider certain aspects of juvenile adjudications as a basis for denying employment.

### **APPLICABLE LAW AND DISCUSSION**

Section 15.2-1705 of the *Code of Virginia*, as amended in 2013, establishes the minimum qualifications for an individual who wishes to serve as a law enforcement officer. It provides, in pertinent part, that

all such officers who enter upon the duties of such office on or after July 1, 2013, shall not have been convicted of or pled guilty or no contest to (a) any misdemeanor involving moral turpitude, including but not limited to petit larceny under § 18.2-96, or any offense involving moral turpitude that would be a misdemeanor if committed in the Commonwealth, (b) any misdemeanor sex offense in the Commonwealth, another state, or the United States, including but not limited to sexual battery under § 18.2-67.4 or

consensual sexual intercourse with a minor 15 or older under clause (ii) of § 18.2-371, or (c) domestic assault under § 18.2-57.2 or any offense that would be domestic assault under the laws of another state or the United States.<sup>[1]</sup>

In construing a statute, we “give effect to the legislature’s intent as evidenced by the plain meaning of statutory language, ‘unless a literal interpretation would result in manifest absurdity.’”<sup>2</sup> We must “construe the law as it is written,” for it is “unnecessary to resort to the rules of statutory construction when a statute is free from ambiguity and the intent is plain.”<sup>3</sup> Moreover, “[w]e ‘assume that the legislature chose, with care, the words it used when it enacted the relevant statute[.]’”<sup>4</sup> and courts are not free to add to or ignore language contained in statutes.<sup>5</sup>

With respect to your first inquiry, the plain language of § 15.2-1705 expressly provides that a prospective law enforcement officer will be disqualified from service if he has “been convicted of or pled guilty or no contest to” any of the delineated offenses.<sup>6</sup> The statute is stated in the disjunctive: it applies when a prospective law enforcement officer has been “convicted of” a listed offense, and it also applies when that individual has “pled guilty or no contest to” a disqualifying offense.<sup>7</sup> Section 15.2-1705 contains no language exempting such persons whose charges against them later were dismissed or expunged.<sup>8</sup>

The language of § 15.2-1705 is clear and unambiguous. Had the General Assembly wished to limit application of § 15.2-1705 to proceedings resulting in a finalized criminal conviction, it would have so provided. Because I cannot conclude “that the General Assembly did not mean what it actually expressed”<sup>9</sup> in § 15.2-1705, “the plain meaning and intent of the enactment will be given it.”<sup>10</sup> Accordingly, if a prospective law enforcement officer has been convicted of, or has pled guilty or no contest to a listed offense, the statute applies and serves to disqualify him from service, regardless of whether the underlying charge is ultimately dismissed.

However, it is important for me to note that the disqualification is not absolute. It may be waived. §15.2-1705(B) states, in relevant part, that upon request of a state or local law enforcement agency, “the Department of Criminal Justice Services is . . . authorized to waive the requirements for qualification. . . for good cause shown.”

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Turning to your second question, I note that “[t]he rule in Virginia has been clear for some time that proceedings in juvenile court are civil, and not criminal, in nature.”<sup>11</sup> Thus, Virginia law provides that “a finding of guilty on a petition charging delinquency . . . shall not operate to impose any of the disabilities ordinarily imposed by conviction for a crime.”<sup>12</sup> Consequently, absent an express

indication of legislative intent, an adjudication of delinquency is not considered a “conviction” for purposes of other provisions of the *Code of Virginia*.<sup>13</sup>

Nothing in the language of § 15.2-1705 indicates that it is intended to encompass juvenile adjudications of delinquency. “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.”<sup>14</sup> Moreover, the General Assembly clearly knows how to exercise “its ability to draft a statute that specifically delineates when a juvenile status adjudication may be considered.”<sup>15</sup> Therefore, because the General Assembly declined to do so in § 15.2-1705, I conclude that juvenile adjudications of delinquency will not disqualify an individual from service as a law enforcement officer under § 15.2-1705.<sup>16</sup>

Nevertheless, although juvenile adjudications of delinquency will not operate as a specific disqualifying event under § 15.2-1705, prospective employers are not barred from considering the existence of any such adjudications when deciding whether to extend an offer of employment to a prospective law enforcement officer. Rather, state and local law enforcement agencies are permitted to consider certain characteristics of juvenile adjudications in denying employment:

Nothing in this section shall prevent the State Police or a police department or sheriff’s office that is a part of or administered by the Commonwealth or any political subdivision thereof from denying employment to a person who has been adjudicated delinquent where such denial is based on the nature and gravity of the offense, the time since adjudication, the time since completion of any sentence, and the nature of the job sought.<sup>17)</sup>

### CONCLUSION

Accordingly, it is my opinion that § 15.2-1705 disqualifies a prospective law enforcement officer from service if that individual has been convicted of, or has pled guilty or no contest to, one of the offenses specified in the statute, even if the charge is later dismissed or expunged. Nevertheless, upon request of a state or local law enforcement agency, the Department of Criminal Justice Services may waive this disqualification for good cause shown. It is further my opinion that, although an individual who was adjudicated delinquent as a juvenile for an enumerated offense is not automatically disqualified from service as a law enforcement officer pursuant to the statute, state and local law enforcement agencies are authorized to consider certain aspects of juvenile adjudications as a basis for denying employment.

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<sup>1</sup> VA. CODE ANN. § 15.2-1705(A) (Supp. 2014). Prior to the 2013 amendment, the statute listed conviction, etc. of a felony as a disqualifying condition. That portion of the statute remains in effect.

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The 2013 amendments merely served to add conviction of certain misdemeanor offenses as additional, or expanded, disqualifying conditions. *See* 2013 Va. Acts chs. 307, 468.

<sup>2</sup> David v. David, 287 Va. 231, 237, 754 S.E.2d 285, 289 (2014) (quoting Hollingsworth v. Norfolk S. Ry. Co., 279 Va. 360, 366, 689 S.E.2d 651, 654 (2010)).

<sup>3</sup> Hampton Roads Sanitation Dist. Comm'n v. City of Chesapeake, 218 Va. 696, 702, 240 S.E.2d 819, 823 (1978).

<sup>4</sup> Alger v. Commonwealth, 267 Va. 255, 261, 590 S.E.2d 563, 556 (2004) (quoting Barr v. Town & Country Props., Inc., 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990)).

<sup>5</sup> Signal Corp. v. Keane Sys., 265 Va. 38, 46, 574 S.E.2d 253, 257 (2003).

<sup>6</sup> Section 15.2-1705(A).

<sup>7</sup> I note that, under Virginia law, “a voluntary and intelligent plea of guilty by an accused is, in reality, a self-supplied conviction authorizing imposition of the punishment fixed by law.” *Peyton v. King*, 210 Va. 194, 196, 169 S.E.2d 569, 571 (1969). Similarly, “by entering a plea of *nolo contendere*, the defendant ‘implies a confession . . . of the truth of the charge . . . [and] agrees that the court may consider him guilty’ for the purpose of imposing judgment and sentence.” *Commonwealth v. Jackson*, 255 Va. 552, 555, 449 S.E.2d 276, 278 (1988) (quoting *Honaker v. Howe*, 60 Va. 50, 53 (1869)) (omissions and alteration in original).

<sup>8</sup> I also note that, under certain circumstances, the *Code of Virginia* authorizes trial courts to defer disposition and ultimately dismiss criminal charges following a determination that there is sufficient evidence to support a finding of guilt, but without entering an actual adjudication of guilt. *See, e.g.*, VA. CODE ANN. §§ 18.2-57.3 (2014) (first offender domestic assault); 18.2-61(C) (2014) (rape, when defendant is married to the victim and all parties consent to deferral); 18.2-67.1(C) (2014) (same, forcible sodomy); 18.2-67.2(C) (2014) (same, object sexual penetration); 18.2-251 (2014) (first offender drug offense); VA. CODE ANN. §§ 19.2-303.2 (2008) (first offender misdemeanor property offenses); 19.2-151 (2008) (authorizing dismissal for certain misdemeanors following accord and satisfaction). Also, until the trial court enters an order specifically finding the defendant guilty, the court “has the inherent authority to take the matter under advisement or to continue the case for disposition at a later date.” *Hernandez v. Commonwealth*, 281 Va. 222, 226, 707 S.E.2d 273, 275 (2011).

<sup>9</sup> *Hicks v. Mellis*, 275 Va. 213, 218, 657 S.E.2d 142, 144 (2008).

<sup>10</sup> *Brown v. Lukhard*, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985) (citing Sch. Bd. of Chesterfield Cnty. v. Sch. Bd. of the City of Richmond, 219 Va. 244, 250, 247 S.E.2d 380, 384 (1978)).

<sup>11</sup> *Conkling v. Commonwealth*, 45 Va. App. 518, 612 S.E.2d 235 (2005) (internal quotations omitted).

<sup>12</sup> VA. CODE ANN. § 16.1-308 (Supp. 2014).

<sup>13</sup> *See Conkling*, 45 Va. App. at 523-24, 612 S.E.2d at 238 (“That an adjudication is treated as a conviction in specific circumstances implies that it is not so treated as a general rule.”).

<sup>14</sup> *Commonwealth ex. rel. Va. Dept’t of Corrs. v. Brown*, 259 Va. 697, 704-05, 529 S.E.2d 96, 100 (2000).

<sup>15</sup> *Conkling*, 45 Va. App. at 522, 612 S.E.2d at 238. For statutes indicating a distinction between convictions and juvenile adjudications of delinquency, *see* VA. CODE ANN. § 17.1-805(B) (Supp. 2014) (noting that, for the sentencing guidelines, “previous convictions shall include prior adult convictions and juvenile convictions”); §§ 18.2-270(E) (2014) (distinguishing between an “adult conviction” and “finding of guilty in the case of a juvenile”); 18.2-308.2(A) (2014) (distinguishing between individuals “convicted of a felony” and those “adjudicated delinquent as a juvenile”); §§ 19.2-295.1 (Supp. 2014) (listing “adult convictions” as well as “juvenile convictions and adjudications of delinquency”); 19.2-327.11 (Supp. 2014) (listing both “convictions” and “adjudications of delinquency” in the context of a

petition for a writ of actual innocence); VA. CODE ANN. §§ 63.2-1719 (2012) (listing “adult convictions” as well as “juvenile convictions or adjudications of delinquency”); and 63.2-1724 (Supp. 2014) (same).

<sup>16</sup> This conclusion is consistent with that of numerous prior opinions of this Office, which similarly have noted that juvenile adjudications of delinquency typically are not considered convictions under the Code. *See, e.g.*, Ops. Va. Att’y Gen. 2002 at 124 (“[J]uveniles are charged with ‘delinquent acts’ rather than ‘crimes’” and, “thus, are not subject to adult penalties.”); 2001 at 85 (“[A] juvenile is not charged with a criminal act and a finding of delinquency is not a **conviction** of a crime.”); 2001 at 82 (same); 1987-88 at 260 (juvenile adjudications may not be used to enhance a larceny offense to a felony); 1986-87 at 155 (noting intent of General Assembly to distinguish delinquent acts of juveniles from criminal acts of adults); 1978-79 at 83 (juvenile finding of “not innocent” on marijuana charge does not bar probation as a first time offender for a later adult offense); 1977-78 at 94 (“[A] a **juvenile** is not ‘convicted’ if he is tried in a **juvenile** court.”) 1977-78 at 203 (“[A] finding of delinquency by a juvenile court is not a ‘conviction’ of a crime under § 19.2-301.1A of the Code.”); 1975-76 at 199 (juvenile adjudication is not considered a “conviction” for purposes of voter registration); 1975-76 at 198 (use of the term “felony” or “misdemeanor” is “inappropriate in juvenile proceedings” because “[a] juvenile is not charged with a crime or convicted of a criminal offense”); 1974-75 at 227 (juveniles are not “convicted” of felonies in juvenile court and, therefore, are not “subject to any of the attendant civil disabilities that are attached to a felony conviction”).

<sup>17</sup> Section 16.1-308.

## OP. NO. 14-026

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

A service district may not legally be created to encompass an entire locality where the funds to be raised thereby would replace an existing source of general fund revenues to maintain a regional jail, and where the special service district is not being created to provide additional, more complete, or more timely services.

THE HONORABLE JAMES EDMUNDS  
MEMBER, HOUSE OF DELEGATES  
MAY 1, 2014

### ISSUE PRESENTED

You ask whether Prince Edward County may create a service district pursuant to Chapter 24 of Title 15.2 of the *Code of Virginia* to collect an additional *ad valorem* property tax to help pay for the expenses of a regional jail.

### RESPONSE

A service district may not legally be created to encompass an entire locality where the funds to be raised thereby would replace an existing source of general fund revenues to maintain a regional jail, and where the special service district is not being created to provide additional, more complete, or more timely services.<sup>[1]</sup>

## BACKGROUND

You report that the Piedmont Regional Jail Board was established in 1986 by the counties of Amelia, Buckingham, Cumberland, Lunenburg, Nottoway, and Prince Edward.<sup>2</sup> Each locality pays a portion of the net operating costs of the regional jail.<sup>3</sup>

In recent years, jail revenues have decreased significantly because of several factors, including a decrease in federal prisoners (a source of net revenue) and a decrease in the state's share of the cost of jail operations. Although efforts have been made to reduce operating costs, including staff reductions, these measures have not sufficiently offset the reduced revenues. In addition, required improvements to medical services for inmates are creating additional costs. As a result, Prince Edward County has had to increase its local funding for the regional jail by approximately \$1,400,000 over the last two years.

You indicate that, in order to continue to provide the needed funding, Prince Edward County may have to adopt a sizeable tax increase for the upcoming budget. The Board of Supervisors has sought guidance regarding the ability to create a special service district to help generate revenue to meet the county's share of funding requirements. The special service district would encompass the entire county and impose an additional tax levy for the regional jail in order to reduce or eliminate the proposed general tax increase. The information related to you is that citizens will better understand the overall tax increase if the tax revenues raised for regional jail costs are characterized as a separate tax, rather than as part of the general tax. You relate that the special service district taxes would not be used for debt service on bonds for any capital improvements at the regional jail.

## APPLICABLE LAW AND DISCUSSION

In determining the authority of local governments, Virginia follows the Dillon Rule of strict construction, which provides that local governing bodies have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.<sup>4</sup> Further, once a power is conferred, that authority exists only to the extent granted.<sup>5</sup> Finally, any doubt as to the existence of a legislative power must be resolved against the locality.<sup>6</sup>

Pursuant to § 15.2-2400, local governments have the express power to establish service districts "to provide additional, more complete or more timely services of government than are desired in the locality. . . as a whole."<sup>7</sup> Once a service district is created, § 15.2-2403 permits an annual tax to be imposed

upon any [real] property in such district subject to local taxation to pay, either in whole or in part, the expenses and charges for providing the governmental services authorized by subdivisions 1, 2 and 11 and for constructing, maintaining, and operating such

facilities and equipment as may be necessary and desirable in connection therewith[.]<sup>[8]</sup>

Thus, a locality clearly is authorized to create a service district to raise revenue for certain purposes. Such purposes, however, must be those “authorized by subdivisions 1, 2 and 11” of § 15.2-2403, as set forth above.

Subdivisions 2 and 11 of §15.2-2403 pertain exclusively to transportation services and preservation of open-space land, respectively, and therefore do not provide a locality any authority to create a service district for regional jail purposes.<sup>9</sup> Subdivision 1 of § 15.2-2403 enumerates several services that may be delivered through creation of a service district, including specific services related to utilities, recreation, pest control, roads, and other public works.<sup>10</sup> While maintenance of jail facilities is not expressly cited, the scope of services authorized by § 15.2-2403(1) is not limited to the cited examples, as it authorizes service district funding generally for “services, events or activities that will enhance the public use and enjoyment of and the public safety, public convenience, and public well-being within a service district.”<sup>11</sup> Nevertheless, the very nature of the service district revenue model dictates that the service to be funded must be one that can be provided on a targeted basis to benefit primarily taxpayers in a district of the locality. A regional jail is not such a service; it is instead a general government service that benefits a region of the Commonwealth. Section 15.2-2403(1) expressly provides that “an annual tax shall not be levied for or used to pay for schools, police, or general government services not authorized by this section.” This language makes clear that a service district is not intended to be a separate funding source for governmental services that benefit the entire locality, nor intended to be a replacement funding source for existing general services. A service district is intended to provide area-specific funding to pay for additional services for a discrete area or region of the locality.

Even given a service permitted to be funded by service district taxes, the service district law<sup>12</sup> is intended to fund possible enhanced governmental services to a specific geographic portion of a locality, with the enhanced services to be paid for by an additional *ad valorem* tax to be imposed on citizens or businesses within the affected area. The facts provided indicate that the county seeks to raise revenue by creation of a service district only to maintain the level of services provided by the existing regional jail. Section 15.2-2403(1) empowers a locality to create a service district to maintain and operate facilities only as necessary or desirable to provide “additional, more complete, or more timely” services than presently provided to the district. Without a goal or aim to add to or otherwise improve the delivery of jail services on a district basis, the county may not create a service district to fund its share of regular, recurring regional jail costs.

Finally, I also note that a public hearing is required for any increase in the general tax rate.<sup>13</sup> The intent of this statute would be defeated if such a public hearing could

be avoided by the device of creating a service district to provide funding for county-wide services.<sup>14</sup> Statutes should be construed *in pari materia* so as to give effect to both.<sup>15</sup>

### CONCLUSION

Accordingly, it is my opinion that Prince Edward County may not create a county-wide service district to provide needed funding to continue operating an existing regional jail.

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<sup>1</sup> The conclusions expressed herein are based on information this office received in an e-mail from your office dated April 8, 2014, supplemented by an e-mail dated April 11, 2014.

<sup>2</sup> VA. CODE ANN. § 53.1-82 (2013) expressly authorizes localities to enter into contracts providing for cooperative jailing and directs the participating localities to establish a representative board “to advise the locality in which the jail facility is located on matters affecting operation of the facility.”

<sup>3</sup> See § 53.1-87 (2013).

<sup>4</sup> *Sinclair v. New Singular Wireless PCS, LLC*, 284 Va. 567, 576, 720 S.E. 2d 543 (2012) (citing *Marble Techs., Inc. v. City of Hampton*, 279 Va. 409, 690 S.E.2d 84, 88 (2010) and *Bd. of Zoning Appeals v. Bd. of Supvrs.*, 276 Va. 550, 553-54, 666 S.E.2d 315, 317 (2008)). The antecedents of Dillon’s Rule trace back to 11th century England. As Professor Howard notes in his *Commentaries on the Constitution of Virginia*,

Much of what local government has come to be in modern America has its roots in events centuries ago. For example, when William the Conqueror imposed upon England a degree of centralized authority unequalled on the Continent, power was seen as flowing from the Crown, and units of local government had only so much authority as the King might grant them - a concept not unrelated to the modern notion that local governments are essentially creatures of the state.

A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA, Vol. II, at 783-784.

<sup>5</sup> See, e.g., 2019 Op. Va. Att’y Gen. 5, 6.

<sup>6</sup> *Bd. of Supvrs. v. Reed’s Landing Corp.*, 250 Va. 397, 400, 463 S.E.2d 668, 670 (1995).

<sup>7</sup> VA. CODE ANN. § 15.2-2400 (2012).

<sup>8</sup> Section 15.2-2403(6) (2012).

<sup>9</sup> See §15.2-2403(2) and 15.2-2403(11).

<sup>10</sup> See §15.2-2403(1).

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

<sup>12</sup> See 15.2-2400 through 15.2-2413 (2012 & Supp. 2013).

<sup>13</sup> See 58.1-3007 (2013).

<sup>14</sup> A public hearing is required by *Sec. 15.2-2402* to create a service district, but not for any subsequent increase in the tax rate of the service district.

<sup>15</sup> *Prillaman v. Commonwealth*, 199 Va. 401, 405-06, 100 S.E.2d 4, 7-8 (1957).

OP. NO. 14-032

CONSTITUTION OF VIRGINIA: FRANCHISE AND OFFICERS - ELECTORAL BOARDS;  
REGISTRARS AND OFFICERS OF ELECTION

ELECTIONS: GENERAL PROVISIONS AND ADMINISTRATION - LOCAL ELECTORAL  
BOARDS

When a vacancy on a local electoral board occurs, the party of the candidate who prevailed in the most recent gubernatorial election is entitled to recommend the electoral board appointment to fill the vacancy.

MR. DONALD L. PALMER  
SECRETARY, STATE BOARD OF ELECTIONS  
JUNE 26, 2014

### **ISSUE PRESENTED**

You ask which political party is entitled to an electoral board appointment to fill a midterm vacancy, when the original appointee for that term represented the political party of the prior Governor, who was of a different political party than the current Governor.

### **RESPONSE**

It is my opinion that an appointment to fill the vacancy of an unexpired electoral board term must reflect political party representation based on the votes for the office of Governor at the last preceding election at the time the appointment for the vacancy is made. Accordingly, the party of the candidate who prevailed in the most recent gubernatorial election is entitled to recommend the electoral board appointment to fill the vacancy.

### **APPLICABLE LAW AND DISCUSSION**

Local electoral boards are constitutionally created bodies.<sup>1</sup> Article II, § 8 of the Constitution of Virginia specifically provides that

There shall be in each county and city an electoral board composed of three members, selected as provided by law. In the appointment of the electoral boards, representation, as far as practicable, shall be given to each of the two political parties which, at the general election next preceding their appointment, cast the highest and the next highest number of votes. The present members of such boards shall continue in office until the expiration of their respective terms; thereafter their successors shall be appointed for the term of three years. Any vacancy

occurring in any board shall be filled by the same authority for the unexpired term.

Section 24.2-106 of the *Code of Virginia* implements this constitutional provision and provides specific procedures by which the constitutional requirement of partisan balance on local electoral boards is to be achieved. In relevant part, it provides that

Two electoral board members shall be of the political party that cast the highest number of votes for Governor at [the most recent gubernatorial] election. . . . The political party entitled to the appointment shall make and file recommendations with the judges for the appointment not later than January 15 of the year of an appointment to a full term or, in the case of an appointment to fill a vacancy, within 30 days of the date of death or notice of resignation of the member being replaced . . . . The judges shall promptly make such appointment (i) after receipt of the political party's recommendation or (ii) after January 15 for a full term or after the 30-day period expires for a vacancy appointment, whichever of the events described in clause (i) or (ii) first occurs.

The statute thus requires that, of a three-member local electoral board, two members shall be of the political party that cast the highest number of votes for Governor in the last preceding gubernatorial election. This requirement of majority representation based on the most recent gubernatorial election does not differentiate between full-term appointments and interim appointments to fill unexpired terms of vacancies. Indeed, § 24.2-106 specifically addresses interim appointments to fill vacancies by specifying a different time schedule for filling them. The statute simply requires that two members be of the party of the prevailing gubernatorial candidate at the time of appointment, regardless of whether the appointments are for full terms or to fill vacancies. It does not require early termination of any board member in order to achieve the proper partisan balance. To the contrary, it states that “[n]o three-year term shall be shortened to comply with the political party representation requirements of this section.”<sup>2</sup> But it does require that new appointments - whether for full terms or to fill vacancies - bring the board into the proper partisan balance, based on the most recent gubernatorial election.

This interpretation is supported by guidance issued by the State Board of Elections (“SBE”), the state agency tasked with administering the election laws of the Commonwealth.<sup>3</sup> In its General Registrar and Electoral Board Handbook (“GRE Book”), the SBE explains as follows:

By statute, the terms of incumbent members are not interrupted to meet [the political party representation] requirement when the newly elected Governor is of a different party than the previous Governor. Rather, the representation on the electoral board

changes as the terms of incumbent members expire and new appointments are made when regularly scheduled, *or when it is necessary to make an interim appointment for an unexpired term due to the death or resignation of a member. The first appointment (however occurring) for a seat previously held by a member representing the previous Governor's party must be given to the new Governor's party.*<sup>[4]</sup>

This interpretation of § 24.2-106 has appeared in the GRE Book since the 2004 version of the handbook was adopted by the SBE. The Supreme Court of Virginia has a longstanding practice of according great weight to agency interpretation of a statute under these circumstances:

We have frequently said that the practical construction given to a statute by public officials charged with its enforcement is entitled to great weight by the courts and in doubtful cases will be regarded as decisive. The Legislature is presumed to be cognizant of such construction and when long continued, in the absence of legislation evincing a dissent, the courts will adopt that interpretation.<sup>[5]</sup>

Although the General Assembly has amended § 24.2-106 since 2004,<sup>6</sup> the amendments have not affected the language upon which the SBE's interpretation is based. Accordingly, I conclude that the General Assembly has acquiesced in that interpretation -- an interpretation that, as discussed above, reflects the language used in the statute.

### CONCLUSION

Accordingly, it is my opinion that an appointment to fill the vacancy of an unexpired electoral board term must reflect political party representation based on the votes for the office of Governor at the last preceding election at the time the appointment for the vacancy is made. Consequently, the party of the candidate who prevailed in the most recent gubernatorial election is entitled to recommend the electoral board appointment to fill the vacancy.

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<sup>1</sup> VA. CONST. art. II, § 8.

<sup>2</sup> VA. CODE ANN. § 24.2-106 (Supp. 2013).

<sup>3</sup> See § 24.2-103 (Supp. 2013). "The fundamental objective of the State Board of Elections is to provide overall supervision and coordination of election activities throughout the Commonwealth, and to obtain uniformity in local election practices and proceedings and legality and purity in all elections." 2005 Op. Va. Att'y Gen. 97, 101-02.

<sup>4</sup> STATE BOARD OF ELECTIONS, GENERAL REGISTRAR AND ELECTORAL BOARD HANDBOOK § 2.1.1, "Terms of Office" at 4 (rev. July 2013) (emphasis added), *available at*

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[http://townhall.virginia.gov/L/GetFile.cfm?File=C:\TownHall\docroot\GuidanceDocs\132\GDoc\\_SBE\\_527\\_5\\_v1.pdf](http://townhall.virginia.gov/L/GetFile.cfm?File=C:\TownHall\docroot\GuidanceDocs\132\GDoc_SBE_527_5_v1.pdf). Previous Opinions of this Office defer to an agency's interpretations of the laws it is charged with administering, including the SBE. *See, e.g.*, 2001 Op. Va. Att'y Gen 125; 1996 Op. Va. Att'y Gen. 124. *See also* 2002 Op. Va. Att'y Gen. 186; 1999 Op. Va. Att'y Gen. 3; and opinions cited in each.

<sup>5</sup> Commonwealth v. Appalachian Electric Power Co., 193 Va. 37, 45-46, 68 S.E.2d 122, 127 (1951).

<sup>6</sup> *See* 2005 Va. Acts ch. 380 (adding requirement that at least one board member attend annual SBE training); 2011 Va. Acts 764 (adding restrictions on who may serve on electoral board based on certain relationships to elected officials); 2013 Va. Acts ch. 409 (adding provision permitting temporary appointments, on a meeting-to-meeting basis, in cases of temporary absence or disability resulting in loss of quorum).

## OP. NO. 14-033

### COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS DISTRICT COURTS

A juvenile and domestic relations court ("JDR court") may enforce, through indirect contempt proceedings, a provision of an emergency protective order (EPO) granting the petitioner the possession of a companion animal when a magistrate has issued the EPO. Such contempt proceedings may be initiated by a JDR court through the issuance of a show cause summons. A JDR court has discretion in imposing punishment for a violation of a companion animal provision in an EPO, but the punishment may not exceed a jail sentence in excess of six months or a fine in excess of \$500 without affording the defendant the right to trial by jury.

THE HONORABLE ANITA D. FILSON  
JUDGE, LEXINGTON/ROCKBRIDGE JUV. & DOM. RELATIONS DISTRICT COURT  
NOVEMBER 21, 2014

### ISSUES PRESENTED

You inquire whether a juvenile and domestic relations court ("JDR court") may enforce, through contempt proceedings, a provision of an emergency protective order ("EPO") granting the petitioner the possession of a companion animal when the EPO was issued by a magistrate. If the court may enforce such a provision, you further ask the appropriate mechanism for initiating the proceedings. Finally, you ask the maximum punishment that may be imposed for violating an EPO provision relating to a companion animal.

### RESPONSE

It is my opinion that a JDR court may enforce, through indirect contempt proceedings, a provision of an EPO granting the petitioner the possession of a companion animal when a magistrate has issued the EPO. Further, it is my opinion that the contempt proceedings may be initiated by a JDR court through the issuance of a show cause summons. Finally, it is my opinion that a JDR court has discretion

in imposing punishment for a violation of a companion animal provision in an EPO, but the punishment may not exceed a jail sentence in excess of six months or a fine in excess of \$500 without affording the defendant the right to trial by jury.

### APPLICABLE LAW AND DISCUSSION

As an initial matter, I note the following principles of statutory construction that guide response to your inquiry. First, “[w]hen construing a statute, our primary objective is ‘to ascertain and give effect to legislative intent,’ as expressed by the language used in the statute.”<sup>1</sup> Nonetheless, statutes are not to be interpreted in isolation, but are to be read *in pari materia*.<sup>2</sup> Moreover, “[s]tatutes must be construed consistently with each other and so as to reasonably and logically effectuate their intended purpose.”<sup>3</sup> “Remedial statutes are to be ‘construed liberally, so as to suppress the mischief and advance the remedy’ in accordance with the legislature’s intended purpose. All other rules of construction are subservient to that intent.”<sup>4</sup>

EPOs in instances of family abuse are governed by § 16.1-253.4 of the *Code of Virginia*. The law provides that “[a]ny judge of a circuit court, general district court, juvenile and domestic relations district court or magistrate may issue [an EPO] in order to protect the health or safety of any person.”<sup>5</sup> When issuing an EPO, the judge or magistrate may impose certain conditions on the respondent.<sup>6</sup> During its 2014 legislative session, the General Assembly amended § 16.1-253.4 to allow the judge or magistrate additionally to “[grant] the petitioner the possession of any companion animal as defined in § 3.2-6500[,] if such petitioner meets the definition of owner in § 3.2-6500.”<sup>7</sup> While a violation of any other condition of an EPO is subject to the criminal sanctions contained in § 16.1-253.2, § 16.1-253.4(L) provides that a violation of a companion animal provision “shall constitute contempt of court.”<sup>8</sup>

In declaring the failure to obey a companion animal provision of an EPO contempt of court, § 16.1-253.4 makes no distinction between EPOs that are issued by magistrates and those that are issued by judges. By providing the same sanction irrespective of who issues the EPO, the General Assembly has shown its intent to treat a companion animal provision in a magistrate-issued EPO as equivalent to a court order or process for purposes of enforcement.

“The power of a court to punish for contempt is inherent in the nature and constitution of the court,”<sup>9</sup> but a magistrate has no such inherent power, and no statute confers such enforcement power upon magistrates.<sup>10</sup>

The General Assembly has given JDR courts jurisdiction over all “[p]etitions filed for the purpose of obtaining an order of protection pursuant to . . . [§] 16.1-253.4 . .

.” that fall within [the court’s] geographic territory.<sup>11</sup> Moreover, except for those EPOs issued by a circuit court, a copy of an EPO is required to be filed with the JDR court, and all returns of service of EPOs are to be made to JDR court, irrespective of who issued the protective order.<sup>12</sup> Also, amendments to EPOs remain within the province of the JDR court.<sup>13</sup> Accordingly, in light of the broad jurisdiction conferred by the General Assembly upon JDR courts over family abuse EPOs and the clear mandate that violations of any companion animal provision of such orders be punishable as contempt of court, I conclude that a JDR court may use its inherent contempt powers to enforce a companion animal provision in a magistrate-issued EPO.<sup>14</sup>

Because a violation of a companion animal provision in an EPO presumably will occur outside the presence of the court, the court’s power to employ summary contempt proceedings is not applicable,<sup>15</sup> and the offense is indirect contempt.<sup>16</sup> Accordingly, an aggrieved party first must file a petition with the court,<sup>17</sup> and then, “the offender must be brought before the court by a rule or some other sufficient process.”<sup>18</sup> Here, the proper procedure is for the court to issue a show cause summons to provide the alleged violator with notice and the opportunity to be heard.<sup>19</sup> Should the alleged violator fail to appear on the return date, the court may issue a *capias* to secure his appearance.<sup>20</sup> For indirect contempt, the sanctions that may be imposed by the court are subject only to the constitutional limitation that there may not be a jail sentence in excess of six months or a fine in excess of \$500 unless the defendant is afforded the right to trial by jury.<sup>21</sup>

### CONCLUSION

Accordingly, it is my opinion that a JDR court may enforce, through indirect contempt proceedings, a provision of an EPO granting the petitioner the possession of a companion animal when a magistrate has issued the EPO. Further, it is my opinion that the contempt proceedings may be initiated by the JDR court through the issuance of a show cause summons. Finally, it is my opinion that a JDR court has discretion in imposing punishment for a violation of a companion animal provision in an EPO, but the punishment may not exceed a jail sentence in excess of six months or a fine in excess of \$500 without affording the defendant the right to trial by jury.

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<sup>1</sup> *Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 283 Va. 420, 425, 722 S.E.2d 626, 629 (2012) (quoting *Commonwealth v. Amerson*, 281 Va. 414, 418, 706 S.E.2d 879, 882 (2011)) (further citation and internal quotation marks omitted).

<sup>2</sup> *See, e.g.*, 2012 Op. Va. Att’y Gen. 90, 91 (citing *Prillaman v. Commonwealth*, 199 Va. 401, 405, 100 S.E.2d 4, 7 (1957)).

<sup>3</sup> *Nelson v. Cnty. of Henrico*, 10 Va. App. 558, 561, 393 S.E.2d 644, 646 (1990).

<sup>4</sup> *Univ. of Va. v. Harris*, 239 Va. 119, 124, 387 S.E.2d 772, 775 (1990) (quoting *Bd. of Supvrs. v. King Land Corp.*, 238 Va. 97, 103, 380 S.E.2d 895, 898 (1989)).

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<sup>5</sup> VA. CODE ANN. § 16.1-253.4(A). I note that, in contrast to EPOs, which can be issued by a magistrate, preliminary and final protective orders may be issued only by a court. *See* §§ 16.1-253.1 (Supp. 2014); 16.1-279.1 (Supp. 2014).

<sup>6</sup> Section 16.1-253.4(A).

<sup>7</sup> 2014 Va. Acts ch. 346. The 2014 legislation similarly amended the statutes governing preliminary and final protective orders in cases of family abuse as well those that apply to protective orders issued pursuant to Title 19.2 of the Code.

<sup>8</sup> Section 16.1-253.4(L) expressly provides that, “Except as provided in 16.1-253.2, a violation of a protective order issued under this section shall constitute contempt of court.” Section 16.1-253.2 sets forth criminal penalties for all EPO violations, with the exception of violations of companion animal provisions. *See* § 16.1-253.2 (Supp. 2014). By process of elimination, therefore, § 16.1-253.4(L) applies only to companion animal provisions, and establishes contempt as the applicable enforcement mechanism.

<sup>9</sup> *Bryant v. Commonwealth*, 198 Va. 148, 152, 93 S.E.2d 130, 133 (1956).

<sup>10</sup> Although deemed a judicial officer for certain purposes, *see* VA. SUP. CT. R. 3A:2; *Berry v. Smith*, 148 Va. 424, 426-27, 139 S.E. 252, 253 (1927), a magistrate’s powers are limited by statute. *See* VA. CODE ANN. § 19.2-45 (Supp. 2014) (providing that a magistrate’s authority is limited to the powers enumerated therein and “such other acts or functions specifically authorized by law”); *Fenner v. Dawes*, 748 F. Supp. 404, 411 (E.D. Va. 1990); *cf., e.g., Wall v. Am. Bank & Trust Co.*, 159 Va. 871, 875, 167 S.E. 425, 426 (1933) (referring to the limited powers of justices of the peace, the historical predecessors to magistrates in Virginia). I find no statutory provision authorizing a magistrate to conduct contempt proceedings, nor to impose fines or jail sentences.

<sup>11</sup> Section 16.1-241(M) (Supp. 2014).

<sup>12</sup> Section 16.1-253.4(E).

<sup>13</sup> *See* § 16.1-253.4(C) (“The respondent may at any time file a motion with the court requesting a hearing to dissolve or modify the order[.]”).

<sup>14</sup> This conclusion comports with the directive of § 16.1-227, which establishes that the law related to JDR courts

shall be construed liberally and as remedial in character, and the powers hereby conferred are intended to be general to effect the beneficial purposes herein set forth. It is the intention of this law that in all proceedings the welfare of the child and the family, the safety of the community and the protection of the rights of victims are the paramount concerns of the Commonwealth and to the end that these purposes may be attained, the judge shall possess all necessary and incidental powers and authority, whether legal or equitable in their nature.

<sup>15</sup> Summary contempt proceedings dispense with formal process normally afforded defendants; summary contempt is available only for behavior that occurs in the presence of the court. *See Parham v. Commonwealth*, 60 Va. App. 450, 729 S.E.2d 734 (2012) (explaining differences between “direct” and “indirect” contempt); *Scialdone v. Commonwealth*, 279 Va. 422, 442-43, 689 S.E.2d 716, 727-28 (2010) (concluding that, because “all the essential elements of the alleged contemptible conduct did not occur in the presence of the [ ] court[,] . . . the defendants were, therefore, entitled to the due process rights associated with a plenary proceeding”). *See also United Steelworkers of Am. v. Newport News Shipbuilding & Dry Dock Co.*, 200 Va. 547, 550, 260 S.E.2d 222, 224 (1979) (quoting *Gompers v. Bucks Stove & Range Co.*, 221 U.S. 418, 441 (1911)); *Davis v. Commonwealth*, 219 Va. 395, 398, 247 S.E.2d 681, 682 (1978) (quoting *Burdett’s Case*, 103 Va. 838, 845-846, 48 S.E. 878, 880-881 (1904)).

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<sup>16</sup> “In dealing with indirect contempts -- that is, such as are committed not in the presence of the court -- the offender must be brought before the court by a rule or some other sufficient process.” *Burdett*, 103 Va. at 845-46, 48 S.E. at 880-81.

<sup>17</sup> See JUVENILE & DOMESTIC RELATIONS DIST. COURT MANUAL, at 8-18, 8-19 (rev. Sept. 2013), available at <http://www.courts.state.va.us/courts/jdr/jdrman/chapter08.pdf>.

<sup>18</sup> *Davis*, 219 Va. at 398, 247 S.E.2d at 682 (quoting *Burdett*, 103 Va. at 845-46, 48 S.E. at 880-81).

<sup>19</sup> See § 19.2-11 (2008); *Morris v. Creel*, 3 Va. 333, 334 (1814); but see *Commonwealth v. Dandridge*, 4 Va. 408, 426-27 (1824) (noting that a show cause summons is sometimes dispensed with in favor of a direct attachment on the defendant).

<sup>20</sup> *Dandridge*, 4 Va. at 427.

<sup>21</sup> See *Greene v. Tucker*, 375 F. Supp. 892, 898-99 (E.D. Va. 1974) (citing *Cheff v. Schnackenberg*, 384 U.S. 373 (1966)); *Kessler v. Commonwealth*, 18 Va. App. 14, 17, 441 S.E.2d 223, 225 (1994).

## OP. NO. 14-038

### ADMINISTRATION OF GOVERNMENT: ADMINISTRATIVE PROCESS ACT

### ELECTIONS: CAMPAIGN FINANCE DISCLOSURE ACT OF 2006

### ELECTIONS: CAMPAIGN FUNDRAISING; LEGISLATIVE SESSIONS

### ELECTIONS: POLITICAL CAMPAIGN ADVERTISEMENTS

Regulations adopted by the State Board of Elections (“SBE”) for the purpose of administering Chapters 9.3, 9.4, and 9.5 of Title 24.2 of the *Code of Virginia* concerning campaign finance laws do not relate to “the conduct of elections or eligibility to vote,” and therefore do not qualify for an exemption from the Administrative Process Act (“APA”) regulatory process under § 2.2-4002(B)(8).

THE HONORABLE EDGARDO CORTÉS  
COMMISSIONER OF ELECTIONS  
DEPARTMENT OF ELECTIONS  
OCTOBER 1, 2014

### ISSUE PRESENTED

You ask whether regulations administering Chapters 9.3, 9.4, and 9.5 of Title 24.2 of the *Code of Virginia*, which concern campaign finance laws, relate to “the conduct of elections or eligibility to vote,” thereby qualifying for an exemption from the Virginia Administrative Process Act (“APA”) regulatory process.

### RESPONSE

It is my opinion that regulations implementing Chapters 9.3, 9.4, and 9.5 of Title 24.2 of the *Code of Virginia* do not relate to “the conduct of elections and eligibility

to vote,” and therefore do not qualify for an exemption from the regulatory process established by the APA.

### APPLICABLE LAW AND DISCUSSION

The Virginia Administrative Process Act<sup>1</sup> governs the adoption of regulations by agencies of the Commonwealth. Pursuant to the APA, prior to becoming effective, agency regulations are subject to various requirements:

- public notice and, potentially, public hearings;<sup>2</sup>
- public comment and, potentially, the taking of evidence;<sup>3</sup>
- review by both the Attorney General and the Governor;<sup>4</sup> and
- legislative review.<sup>5</sup>

Nevertheless, the APA contains several exemptions from its applicability, including blanket exemptions for certain agencies<sup>6</sup> and exemptions based on the subject matter of the agency action.<sup>7</sup> Although the APA does not contain a blanket exemption for the Department of Elections, it does exempt agency action that relates to “[t]he conduct of elections or eligibility to vote.”<sup>8</sup>

The Chapters about which you inquire contain the Campaign Finance Disclosure Act of 2006,<sup>9</sup> restrictions on fundraising by and for statewide officials while the General Assembly is in session,<sup>10</sup> and disclosure requirements for campaign advertisements.<sup>11</sup> These provisions regulate certain financial aspects of candidates’ campaigns for elected office. Because regulations implementing such provisions would not affect voter eligibility issues,<sup>12</sup> your request requires only an analysis of whether regulations addressing campaign finance laws relate to “the conduct of elections.”

That matters related to “the conduct of elections” do not encompass all regulations implementing the election laws is evident from the General Assembly’s decision not to provide a blanket APA exemption to the Department of Elections, the state agency charged with the administration of the election laws.<sup>13</sup> Moreover, such a broad interpretation would render the specific exemption of agency action related to the eligibility to vote superfluous.<sup>14</sup> Thus, action related to “the conduct of elections” does not include all regulations that may implicate an activity associated with the election process.<sup>15</sup> Rather, based on the General Assembly’s general treatment of election-related activities and organization of the statutory provisions governing them, as well as related case law, I conclude that the phrase is limited to activities occurring on, or in preparation for, election day, so that regulations addressing campaign finance laws do not relate to “the conduct of elections.”

The *Code of Virginia* constitutes a single body of law, and it is well established that other portions of it provide interpretative guidance.<sup>16</sup> Although not dispositive, it is notable that the portion of Title 24.2 entitled “Conduct of Election; Election

Results” is codified separately as Article 4 of Chapter 6.<sup>17</sup> Chapters 9.3, 9.4, and 9.5 are not included there, nor does Article 4 of Chapter 6 contain provisions relating to financial matters. Rather, the statutes included in Article 4 govern activities that occur on the day of an election. For example, certain sections provide the procedures by which qualified voters are to vote at a polling place,<sup>18</sup> while other sections address the appropriate use and handling of ballots and voting equipment on the day of an election,<sup>19</sup> as well as the counting of ballots at the close of the election day.<sup>20</sup> The context of other parts of the Code where “conduct of election” is used also suggests that the term is limited to election-day operations.<sup>21</sup>

In addition, the legislature has vested oversight of the “conduct of elections” in local electoral boards.<sup>22</sup> As part of this duty, electoral boards are responsible for the appointment and training of officers of election,<sup>23</sup> who are assigned to precincts on election day to manage polling place operations and to maintain order.<sup>24</sup> These activities are limited, by their essence, to events occurring on election day. In contrast, further evincing that issues related to campaign finance regulation are distinct from the conduct of elections, the role of local electoral boards in administering the provisions about which you inquire is very limited: they are charged with implementing the provisions of Chapter 9.3 only as they apply to candidates seeking local office,<sup>25</sup> and they possess no authority with respect to Chapters 9.4 and 9.5. The General Assembly otherwise has vested the State Board of Elections with the administration of campaign finance laws.<sup>26</sup>

Furthermore, although the phrase “the conduct of elections” has not been defined for purposes of the exemption under the APA, similar language has been held to be limited to the management of events occurring on election day. In construing the constitutional prohibition against enacting local or special laws “[f]or registering voters, conducting elections, or designating the place of voting[,]”<sup>27</sup> the Supreme Court of Virginia has considered the extent to which this language applies to overall operations of electoral boards. In two cases, the Court distinguished between activity tied to the management of an election on election day, and other electoral board functions.

In *Porter v. Joy*, plaintiffs challenged legislation that permitted the election, rather than appointment, of school board members.<sup>28</sup> In upholding the enactment, the Court acknowledged that a local law authorizing a county “to set up its own regulations with respect to the time of opening and closing the polls, the selection of the judges of election, and the many other matters related to the conduct of elections, would be obviously undesirable[,]”<sup>29</sup> but concluded that the constitutional prohibition “clearly was not intended as a restriction upon the General Assembly to provide what offices in a county should be filled by election.”<sup>30</sup> The Court reached a similar conclusion in *Davis v. Dusch*, which addressed an amendment to a city charter that ordered redistricting based on consolidation of the city and a county.<sup>31</sup>

In finding no constitutional violation in amending the charter, the Court stated that the constitutional provision

‘refers to the manner in which an election is conducted.’ We are not concerned in this case with the manner of conducting an election. Our concern is whether the city council has the power to reapportion itself and has the authority to order the election of a new council -- an entirely different matter from that envisioned by [the restriction on enacting local or special law related to conducting elections].<sup>[32]</sup>

This Office, in applying the constitutional prohibition, also has interpreted the term “the conduct of elections” as a reference to overseeing and managing elections on an election day. In a previous Opinion, the Attorney General considered whether proposed legislation to establish guidelines for the nomination of candidates for certain positions constituted an unconstitutional special law.<sup>33</sup> The Attorney General concluded that the prohibition “refers purely to the manner in which elections are conducted, whereas Senate Bill No. 70 refers only to the method of nominating candidates for office.”<sup>34</sup> Later opinions also have limited contextually the application of the phrase “the conduct of elections” to those events which take place on, or are taken to directly prepare for, an election day.<sup>35</sup>

As a result, the case law and prior opinions of this Office addressing the phrase “the conduct of elections” are consistent with the statutory analysis of the Code detailed above. As “the conduct of elections” routinely has been determined to include only those activities that occur on, or in preparation for, election days, campaign finance laws do not fall within the scope of this phrase. Consequently, regulations adopted for the administration of the provisions of the Campaign Finance Disclosure Act are not exempt from the APA regulatory process.

### CONCLUSION

Accordingly, it is my opinion that regulations adopted by the SBE for the purpose of administering Chapters 9.3, 9.4, and 9.5 of Title 24.2 of the *Code of Virginia* concerning campaign finance laws do not relate to “the conduct of elections or eligibility to vote,” and therefore do not qualify for an exemption from the APA regulatory process under § 2.2-4002(B)(8).

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<sup>1</sup> VA. CODE ANN. §§ 2.2-4000 through 2.2-4031 (2011 & Supp. 2014).

<sup>2</sup> Section 2.2-4007.01 (2011).

<sup>3</sup> Sections 2.2-4007 (2011); 2.2-4009 (Supp. 2014).

<sup>4</sup> Section 2.2-4013 (2011).

<sup>5</sup> Section 2.2-4014 (2011).

<sup>6</sup> See § 2.2-4002(A) (Supp. 2014).

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<sup>7</sup> Section 2.2-4002(B).

<sup>8</sup> Section 2.2-4002(B)(8).

<sup>9</sup> Chapter 9.3, “Campaign Finance Disclosure Act of 2006,” VA. CODE ANN. §§ 24.2-945 through 24.2-953.5 (2011 & Supp. 2014).

<sup>10</sup> Chapter 9.4, “Campaign Fundraising; Legislative Sessions,” § 24.2-954 (2011).

<sup>11</sup> Chapter 9.5, “Political Campaign Advertisements,” §§ 24.2-955 through 24.2-959.1 (2011 & Supp. 2014).

<sup>12</sup> The eligibility to vote in the Commonwealth of Virginia is governed by Article II, § 1 of the Constitution of Virginia, entitled “Qualifications of voters” and various chapters of Title 24.2 of the Code, including Chapter 4, which establishes the requirements for voter qualification and registration.

<sup>13</sup> See § 24.2-103(A) (Supp. 2014). The newly created Department of Elections continues to fulfill many of its duties through the State Board of Elections.

<sup>14</sup> “The rules of statutory interpretation argue against reading any legislative enactment in a manner that will make a portion of it useless, repetitious, or absurd.” *Jones v. Conwell*, 227 Va. 176, 181, 314 S.E.2d 61, 64 (1984).

<sup>15</sup> Cf. *Moore v. Pullem*, 150 Va. 174, 189-91, 142 S.E. 415, 419-20 (1928) (distinguishing between distinct aspects of the election process and the provisions governing them, including voter qualifications, voter registration, and the method of voting, noting that laws concerning the qualification of voters do not relate, except incidentally, to the conduct of elections)

<sup>16</sup> See, e.g., 1990 Op. Va. Att’y Gen. 126, 128 (quoting *King v. Commonwealth*, 2 Va. App. 708, 710, 347 S.E.2d 530, 531 (1986)).

<sup>17</sup> See §§ 24.2-643 through 24.2-680 (2011 & Supp. 2014).

<sup>18</sup> See §§ 24.2-643 through 24.2-644 (2011 & Supp. 2014).

<sup>19</sup> See §§ 24.2-645 through 24.2-648 (2011).

<sup>20</sup> See §§ 24.2-657 through 24.2-667 (2011).

<sup>21</sup> See §§ 24.2-114(5) (Supp. 2014) (general registrar to ensure “pollbooks used for the conduct of elections” identify those voters who registered by mail); 24.2-309 (2011) (procedure available for “the conduct of elections [in precincts] where all voters do not have the same choice of candidates; 24.2-310(B) (Supp. 2014) (localities required to provide funding for “adequate facilities at each polling place for the conduct of elections”).

<sup>22</sup> Section 24.2-109(B) (2011) (“The electoral board shall perform the duties assigned by this title including, but not limited to, the preparation of ballots, the administration of absentee ballot provisions, the conduct of the election, and the ascertaining of the results of the election.”).

<sup>23</sup> Section 24.2-115 (Supp. 2014).

<sup>24</sup> See, e.g., §§ 24.2-603 (2011); 24.2-606 through 24.2-608 (2011); 24.2-610(C) (2011); 24.2-643 (Supp. 2014); 24.2-649 (Supp. 2014); 24.2-654 (Supp. 2014); 24.2-657; 24.2-668 (2011).

<sup>25</sup> Section 24.2-948.1 (2011).

<sup>26</sup> See §§ 24.2-946 through 24.2-946.5 (2011 & Supp. 2014); 24.2-947.3:1 (2011); 24.2-947.4 (2011); 24.2-947.5 (2011); 24.2-955.3 (2011).

<sup>27</sup> VA. CONST. art. IV, § 14(11).

<sup>28</sup> *Porter v. Joy*, 188 Va. 801, 51 S.E.2d 156 (1949) (construing Va. Const. of 1902, art. IV, § 16, predecessor provision to current VA. CONST. art. IV, § 14(11)).

<sup>29</sup> *Id.*, 188 Va. at 806, 51 S.E.2d at 158.

<sup>30</sup> *Id.*

<sup>31</sup> *Davis v. Dusch*, 205 Va. 676, 139 S.E.2d 25 (1964).

<sup>32</sup> *Id.*, 205 Va. at 684, 139 S.E.2d at 30 (quoting *Porter*, 188 Va. at 805, 51 S.E.2d at 158 (1949)).

<sup>33</sup> 1969-70 Op. Va. Att’y Gen. 114.

<sup>34</sup> *Id.* at 115.

<sup>35</sup> See 2011 Op. Va. Atty Gen. 132, (addressing electoral boards’ authority to prevent actions which “impede the orderly conduct of elections” under § 24.2-604(D); 2003 Op. Va. Atty Gen. 108, 111 (concluding that while § 24.2-106 prohibits electoral board members from engaging in certain political activities, “[t]he partisan nature of selecting participants to conduct elections, however, does not require [electoral board members] to perform their duties in a partisan fashion.” The participants mentioned are officers of election, who are responsible for the administration of polling places on election days under §§ 24.2-115 and 24.2-116).

## OP. NO. 14-039

### GAME, INLAND FISHERIES AND BOATING: WILDLIFE AND FISH LAWS - HUNTING AND TRAPPING

The word “landowner” in paragraph (A)(1)(iii) of Chapter 482 of the 2014 Virginia Acts of Assembly, which amends and reenacts § 29.1-521 of the *Code of Virginia*, is not limited to landowners who are natural persons.

The exception to the general prohibition on Sunday hunting created by paragraph (A)(1)(iii) of Chapter 482 of the 2014 Virginia Acts of Assembly is limited to private lands.

MR. ROBERT W. DUNCAN

EXECUTIVE DIRECTOR, VIRGINIA DEPARTMENT OF GAME AND INLAND FISHERIES

AUGUST 22, 2014

### ISSUES PRESENTED

You inquire whether the word “landowner” in paragraph (A)(1)(iii) of Chapter 482 of the 2014 Virginia Acts of Assembly (“Chapter 482” or “the Act”), which amends and reenacts § 29.1-521 of the *Code of Virginia*, is limited to natural persons. If the word “landowner” is not limited to natural persons, you ask whether the exception created by paragraph (A)(1)(iii) to the general prohibition on Sunday hunting is limited to private lands.

### RESPONSE

It is my opinion that the word “landowner” in paragraph (A)(1)(iii) of the Act is not limited to landowners who are natural persons. The exception to the general

prohibition on Sunday hunting created by paragraph (A)(1)(iii) is limited to private lands.

### APPLICABLE LAW AND DISCUSSION

In relevant part, Chapter 482 provides that it shall be unlawful “[t]o hunt or kill . . . on Sunday.”<sup>1</sup> The Act further provides:

The provision of this subdivision that prohibits the hunting or killing of any wild bird or wild animal, including nuisance species, on Sunday shall not apply to (i) raccoons, which may be hunted until 2:00 a.m. on Sunday mornings; (ii) any person who hunts or kills waterfowl, subject to geographical limitations established by the Director and except within 200 yards of a place of worship or any accessory structure thereof; or (iii) any landowner or member of his family or any person with written permission from the landowner who hunts or kills any wild bird or wild animal, including any nuisance species, on the landowner’s property, except within 200 yards of a place of worship or any accessory structure thereof.<sup>[2]</sup>

The term “landowner” in paragraph (A)(1)(iii) is ambiguous.<sup>3</sup> Doctrines of statutory construction provide guidance for the interpretation of a statute; such doctrines are used to resolve ambiguity.<sup>4</sup>

The doctrine *in pari materia* teaches that “statutes are not to be considered as isolated fragments of law, but as a whole, or as parts of a great, connected, homogenous system, or a single and complete statutory arrangement.”<sup>5</sup> Where there is ambiguity in statutory language, courts thus should interpret statutes *in pari materia*, “in such manner as to reconcile, if possible, any discordant feature which may exist, and make the body of the laws harmonious and just in their operation.”<sup>6</sup> Reading § 29.1-521 in conjunction with other parts of Chapter 5 of Title 29.1 suggests that “landowner” must refer to all landowners, not only natural persons.<sup>7</sup>

The absurd results doctrine of statutory construction, furthermore, supports an interpretation of “landowner” that does not distinguish arbitrarily between natural persons and other entities owning land for purposes of (A)(1)(iii). The absurd results doctrine holds that if applying the plain language of a statute causes “illogical or unworkable conflict,” the plain language is “insufficient to [determine] the statute’s meaning.”<sup>8</sup> Arguably, it would be an absurd result to treat lands owned by a limited liability corporation, for example, differently than lands owned by an individual for purposes of § 29.1-521(A)(1)(iii). The term “landowner” thus should be interpreted to encompass both natural and non-natural persons.

Turning to your question regarding whether the exception to the general prohibition on Sunday hunting created by the newly enacted § 29.1-521(A)(1)(iii) is limited to private lands, I conclude that it is so limited. The text of paragraph (A)(1)(iii) does not use the term “private lands” or otherwise distinguish between public and private lands. Nevertheless, Chapter 482 is entitled, with emphasis added, “An Act to amend and reenact § 29.1-521 of the Code of Virginia, relating to hunting wild animals and wild birds on *private property* and *state waters* on Sundays.” In construing Acts of Assembly, Virginia courts have held that the title may be indicative of legislative intent and guide judicial interpretation.<sup>9</sup> Here, the General Assembly in the title of Chapter 482 expressly distinguishes between and includes both private property and public (“state”) waters. There would be no reason to include the phrase “on private property and state waters” had the drafters intended the Act to apply to all property (private and public lands and waters).

### CONCLUSION

Accordingly, it is my opinion that the word “landowner” in paragraph (A)(1)(iii) of Chapter 482 of the 2014 Virginia Acts of Assembly is not limited to landowners who are natural persons. The exception to the general prohibition on Sunday hunting created by paragraph (A)(1)(iii) is limited to private lands.

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<sup>1</sup> 2014 Va. Acts ch. 482 at ¶ (A)(1).

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

<sup>3</sup> “Statutory language is ambiguous when it may be understood in more than one way.” *Herndon v. St. Mary’s Hosp., Inc.*, 266 Va. 472, 475, 587 S.E.2d 567, 569 (2003). “Landowner” standing alone may refer to natural persons, business entities, or governmental entities who own land. “Landowner” read together with “or member of his family,” however, may give rise to an interpretation that “landowners” are natural persons only. *See Rowland v. Cal. Men’s Colony*, 506 U.S. 194, 204-205 (1993) (finding that in the context of interpreting a statute, use of the term “he” suggests a natural person); *see also* VA. CODE ANN. § 32.1-102.3:2 (Supp. 2014); VA. CODE ANN. § 37.2-100 (Supp. 2014); VA. CODE ANN. § 51.1-500 (2013); and VA. CODE ANN. § 54.1-2410 (2013) (each defining the term “family member” in terms limited in application to natural persons). Because the term “landowner” may be understood in more than one way, it is ambiguous.

<sup>4</sup> *See United States v. Holland*, 48 F. Supp. 2d 571, 575 (E.D. Va. 1999) (“If the statute is ambiguous, the court must then construe the statute in accordance with the applicable canons of construction.”), *aff’d*, 214 F.3d 523 (4th Cir. 2000); *Boynton v. Kilgore*, 271 Va. 220, 227, 623 S.E.2d 922, 926 (2006) (“[C]ourts apply the plain language of a statute unless the terms are ambiguous, or applying the plain language would lead to an absurd result.”).

<sup>5</sup> *Lillard v. Fairfax Cnty. Airport Auth.*, 208 Va. 8, 13, 155 S.E.2d 338, 342 (1967).

<sup>6</sup> *Lucy v. Cnty. of Albemarle*, 258 Va. 118, 129-130, 516 S.E.2d 480, 485 (1999).

<sup>7</sup> Section 29.1-509(A) defines the term “landowner” as the “legal title holder . . . lessee, occupant or any other person in control of land or premises.” Section 29.1-509(C) provides broad liability protections to “any landowner” who gives permission to another person to hunt upon that landowner’s property. It does not distinguish between property held by corporate entities and that held by natural persons. Courts, furthermore, have allowed entities that are not natural persons to claim liability protection under § 29.1-509. *See, e.g., City of Va. Beach v. Flippen*, 251 Va. 358, 362, 467 S.E.2d 471, 474 (1996) (rejecting

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plaintiff's argument that § 29.1-509 should apply only to private landowners and holding that the City of Norfolk in its capacity as a landowner is entitled to the protections of the statute). Should § 29.1-521(A)(1)(iii) be interpreted to apply only to natural landowners, that interpretation would be inconsistent with § 29.1-509.

<sup>8</sup> *Boynton*, 271 Va. at 228 n.11, 623 S.E.2d at 926.

<sup>9</sup> See *Hawkins v. Commonwealth / Southside Va. Training Ctr.*, 255 Va. 261, 269, 497 S.E.2d 839, 842 (1998) (“[I]n construing the act we shall look first to its title. A title may be read in an attempt to ascertain an act’s purpose, though it is no part of the act itself.”); *Commonwealth v. Dare To Be Great, Inc.*, 5 Va. Cir. 430, 434 (Richmond 1971) (stating that the purpose of the referenced act was made clear in the title of the act); cf. *White v. Commonwealth*, 203 Va. 816, 820, 127 S.E.2d 594, 597 (1962) (engaging in an analysis of an act’s title).

## OP. NO. 14-044

### CRIMES AND OFFENSES GENERALLY: CRIMES AGAINST PROPERTY - ARSON AND RELATED CRIMES

The recreational use of Tannerite for its intended purpose is not illegal, even though Tannerite is an explosive material within the meaning of § 18.2-85 of the *Code of Virginia*.

THE HONORABLE WILLIAM W. DAVENPORT  
COMMONWEALTH’S ATTORNEY, CHESTERFIELD COUNTY  
OCTOBER 1, 2014

### ISSUE PRESENTED

You inquire whether the recreational use of Tannerite violates § 18.2-85 of the *Code of Virginia*. In relevant part, that statute makes it a Class 5 felony to use or possess an explosive material, unless for a lawful purpose.

### RESPONSE

Tannerite, like many other substances, is an explosive material within the meaning of § 18.2-85 of the *Code of Virginia*, but its use or possession is not illegal so long as the use or possession is for a lawful purpose such as the recreational use for which it is intended. Whether any particular use or possession of Tannerite is for an illegal purpose would be a question of fact about which I can express no opinion.

### BACKGROUND

Tannerite is the brand name of a binary explosive that is marketed as a shot indicator for firearms practice.<sup>1</sup> Other binary explosives that are similar to Tannerite are sold under different brand names. They are in common use and are sold by large sporting goods chain stores. Binary explosives are supplied as two separate powders. After the powders are mixed, they will detonate when hit with a bullet from a high-powered rifle.<sup>2</sup>

In your request, you indicate that Tannerite has been used in Chesterfield County on private property with the consent of the property owner and also by the property owner. You relate that when it is shot with a high-powered rifle, it produces an explosion that can be heard for miles and has made nearby homeowners concerned.

### APPLICABLE LAW AND DISCUSSION

Section 18.2-85 provides, in relevant part, that “[a]ny person who . . . (ii) manufactures, transports, distributes, possesses or uses a fire bomb or explosive materials or devices shall be guilty of a Class 5 felony.” It defines “explosive material” as:

[A]ny chemical compound, mechanical mixture or device that is commonly used or can be used for the purpose of producing an explosion and which contains any oxidizing and combustible agents or other ingredients in such proportions, quantities or packaging that an ignition by fire, friction, concussion, percussion, detonation or by any part of the compound or mixture may cause a sudden generation of highly heated gases.

As described above, Tannerite is a product made up of two chemical compounds that a user mixes together to form a combined powder. This combined powder is then ignited by the concussion of a shot from a high-powered rifle, causing a sudden generation of highly heated gases. Accordingly, Tannerite constitutes an “explosive material” as defined in § 18.2-85.<sup>3</sup>

Although § 18.2-85 generally prohibits the use or possession of explosive materials, that use or possession is not a violation of the statute if done with a lawful purpose:

Nothing in this section shall prohibit the authorized manufacture, transportation, distribution, use or possession of any material, substance, or device . . . for scientific research, educational purposes or for any lawful purpose, subject to the provisions of §§ 27-97 and 27-97.2.<sup>[4]</sup>

While “any lawful purpose” is not further defined in § 18.2-85, recreational usage fits the ordinary and plain meaning of that phrase.<sup>5</sup> Therefore, possession or use of Tannerite for a recreational purpose alone - in the absence of other circumstances - is not illegal. In this regard, Tannerite is no different from any number of other substances, such as gunpowder, black powder, butane, match heads, paint thinner, or gasoline, that meet the literal definition of “explosive material,” but that may be possessed legally in the absence of illegal acts or illegal intent.<sup>6</sup>

While the use of Tannerite for its intended recreational purpose on private property, in the absence of other facts tending to show illegal intent, is thus not a felony violation of § 18.2-85, I express no opinion about whether such use might comprise

a misdemeanor violation of other statutes or ordinances such as disturbing the peace or any applicable zoning or noise ordinances.<sup>7</sup>

### CONCLUSION

It is therefore my opinion that while Tannerite is an explosive material within the meaning of § 18.2-85 of the *Code of Virginia*, its use or possession is not illegal so long as the use or possession is for a lawful purpose, such as the recreational use for which it is intended. Whether any particular use or possession of Tannerite is for an illegal purpose would be a question of fact about which I can express no opinion.

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<sup>1</sup> <http://www.tannerite.com/>.

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

<sup>3</sup> See also *United States v. Leeper*, 2006 U.S. Dist. LEXIS 87193, 1, 7 (D. Kan 2006) (describing Tannerite as an “explosive material”).

<sup>4</sup> Section 18.2-85. Sections 27-97 and 27-97.2 relate to the Virginia Statewide Fire Prevention Code, contained in 13 VA. ADMIN. CODE § 5-51-11 through 13 VA. ADMIN. CODE § 5-51-155. Although these regulations do not apply to the factual scenario you describe, they do place limits on the possession, storage, and use of explosive materials and fireworks. See 13 VA. ADMIN. CODE § 5-51-150. Commercial possession, storage, and use of Tannerite, as well as persons possessing, storing, or using large quantities of Tannerite, may be subject to Virginia Statewide Fire Prevention Code regulations. If that is the case, certain permits may be required in order to meet the statutory requirements.

<sup>5</sup> Statutes are to be interpreted according to their plain language, for “[w]here the legislature has used words of a plain and definite import the courts cannot put upon them a construction which amounts to holding the legislature did not mean what it has actually expressed.” *Barr v. Town & Country Props*, 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990) (quoting *Watkins v. Hall*, 161 Va. 924, 930, 172 S.E. 445, 447 (1933)).

<sup>6</sup> It has been held that the absence of a lawful purpose is not a negative element of the offense of unlawfully possessing explosive materials; and instead, the presence of a lawful purpose is an affirmative defense. *Flanagan v. Commonwealth*, 58 Va. App. 681, 699, 714 S.E.2d 212, 220 (Va. Ct. App. 2011). The facts of that case, however, involve a defendant’s possession of acetone peroxide, sulphuric acid, hydrogen peroxide, acetone, fuses, and a .223 caliber assault pistol (collectively, evidence that the defendant was making bombs), and his statement that he purchased some of the materials for making explosives because “he just liked to hear things go boom or bang.” The case is thus clearly distinguishable from the facts you relate, which entail the possession of a recreational material that is being used on private property for its intended recreational purpose.

<sup>7</sup> Even if the noise generated by recreational use of Tannerite does give rise to a misdemeanor violation of some other statute or ordinance, that fact alone would not make its use a felony violation of § 18.2-95, for the actual purpose of using it would still be recreational, which is a “lawful purpose” under the statute.

OP. NO. 14-045

CONSTITUTION OF VIRGINIA: FRANCHISE AND OFFICERS - QUALIFICATIONS TO HOLD ELECTIVE OFFICE

COUNTIES, CITIES AND TOWNS: LOCAL GOVERNMENT PERSONNEL, QUALIFICATION FOR OFFICE, BONDS, DUAL OFFICE HOLDING AND CERTAIN LOCAL GOVERNMENT OFFICERS - QUALIFICATIONS, ELIGIBILITY, ETC., OF LOCAL ELECTED OFFICERS

ELECTIONS: FEDERAL, COMMONWEALTH, AND LOCAL OFFICERS - VACANCIES IN ELECTED CONSTITUTIONAL AND LOCAL OFFICES

When a constitutional office becomes vacant, the highest ranking deputy within the office need not be a resident of the locality of service in order to temporarily assume the powers of the office by operation of law pursuant to § 24.2-228.1(B) of the *Code of Virginia*.

THE HONORABLE REX A. DAVIS  
CLERK, NEWPORT NEWS CIRCUIT COURT  
NOVEMBER 13, 2014

### **ISSUE PRESENTED**

Where a constitutional office becomes vacant and the highest ranking deputy of that office temporarily assumes the powers of the office by operation of law pursuant to § 24.2-228.1(B), you inquire whether the residency requirement imposed upon elected and appointed constitutional officers applies to the deputy.<sup>1</sup>

### **RESPONSE**

It is my opinion that, when the powers of a vacant constitutional office are assumed by the highest ranking deputy within the office as provided by § 24.2-228.1(B), the deputy need not be a resident of the locality of service.

### **APPLICABLE LAW AND DISCUSSION**

Prior to the year 2000, vacancies in constitutional offices were filled, on a temporary or interim basis only, by judicial appointment until a special election could be held,<sup>2</sup> and there was a residency requirement: the appointee had to have resided in the locality of service for at least thirty days prior to appointment.<sup>3</sup> This residency requirement for judicial appointments remains in effect.

In 2000, the General Assembly enacted § 24.2-228.1, which provides a different procedure for filling vacancies in local constitutional offices.<sup>4</sup> The current procedure accelerates the special election,<sup>5</sup> and, by operation of law, without judicial appointment, vests the powers of the office in the highest ranking deputy until the special election can be held.<sup>6</sup> The vacancy is filled by judicial appointment only if there is no deputy, or if the deputy declines to serve.

At the time this automatic succession statute was enacted, it was unmistakably clear that deputies of constitutional officers were not subject to a residency requirement: § 15.2-1525(B), as in effect at the time and now, expressly provides that the

nonelected deputies of constitutional officers “shall not be required to reside in the jurisdiction in which they are appointed.”<sup>7</sup>

It is thus clear beyond reasonable debate that at the time of enacting the automatic succession statute, § 24.2-228.1, the General Assembly was aware that there was no residency requirement for deputies. Had the General Assembly intended to make automatic succession subject to residency, it could have easily included such a requirement in the statute. It did not do so. We assume that the legislature chose, with care, the words it used when it enacted the relevant statute.<sup>8</sup> When construing a statute, the primary objective is “to ascertain and give effect to legislative intent,” as expressed by the language of the statute.<sup>9</sup>

In notable contrast, the General Assembly maintained a residency requirement for judicial appointments to fill constitutional vacancies.<sup>10</sup> The significance of an explicit statutory residency for interim judicial appointments to fill constitutional vacancies and the absence of such a requirement for automatic succession cannot be ignored. The plain language of a statute should be applied unless doing so creates an absurd result.<sup>11</sup> I therefore must conclude that the legislative intent in enacting this statute was that automatic succession - for a brief period of time until a prompt special election occurs - is not subject to a residency requirement. This conclusion is consistent with the apparent purpose of the statute, which is to ensure continuous competent leadership of constitutional offices in the event of vacancies.

The question then becomes whether the Constitution of Virginia requires a different interpretation of § 24.2-228.1. I note that statutes are presumed to be constitutional;<sup>12</sup> and the Supreme Court will give the Constitution a liberal construction in order to sustain an enactment, if practicable.<sup>13</sup>

Article II, § 5 of the Constitution of Virginia establishes a residency requirement for constitutional officers:

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 . . . .

To be qualified to vote for an elective office, a voter must reside within the territorial jurisdiction served by that office.<sup>14</sup> The precise question, then, is whether a person who assumes the powers of a constitutional office by operation of law on an interim basis, and without election or appointment, “holds” that office.

The language of § 24.2-228.1 suggests that automatic succession is not intended to be the same as officially “holding” an office by election or appointment. Section 24.2-228.1 expressly states that

The highest ranking deputy officer . . . if there is such a deputy or assistant in the office, shall be vested with the powers and shall perform all of the duties of the office, and shall be entitled to all the privileges and protections afforded by law to elected or appointed constitutional officers, until the qualified voters fill the vacancy by election and the person so elected has qualified and taken the oath of office.

The statute does not provide that the deputy shall “become” the constitutional officer, nor that he shall “hold” the constitutional office.<sup>15</sup> Instead, it states that he shall have the powers, perform the duties, and be entitled to the privileges “afforded by law to . . . constitutional officers . . .”<sup>16</sup> This is an important distinction. The deputy does not “hold . . . [an] office . . . elective by the people,” as contemplated by Article II, § 5. Instead, the deputy is authorized, on a temporary basis, to exercise the powers, duties, and privileges of the office.

Finally, there are similar situations where there are legal requirements for holding office, but where those requirements are inapplicable in certain temporary or interim situations. With respect to the constitutional residency requirement, members of the General Assembly, who otherwise would lose their offices for failure to remain residents of their districts,<sup>17</sup> do not forfeit their positions when redistricting results in the official no longer living in the district. Instead, they are able to complete the term to which they were elected.<sup>18</sup> The same is true for local elected officials.<sup>19</sup> Additionally, administrative officers appointed by the Governor who are subject to General Assembly confirmation serve prior to confirmation, until confirmation is either granted or denied.<sup>20</sup> Finally, I also note that a person appointed to a state board or commission or a regional authority for a fixed term remains in office after the conclusion of his term until his successor is appointed.<sup>21</sup>

### CONCLUSION

Accordingly, it is my opinion that, when the powers of a vacant constitutional office are assumed by the highest ranking deputy officer within the office, as provided by § 24.2-228.1, the deputy officer need not be a resident of the locality of service.

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<sup>1</sup> You specifically ask for a review of a 2003 Opinion of this Office that concludes that there is a residency requirement for automatic succession under § 24.2-228.1. 2003 Op. Va. Att’y Gen. 104. Based on the analysis set forth herein, the 2003 Opinion is expressly overruled.

<sup>2</sup> See 2000 Va. Acts ch. 787.

<sup>3</sup> VA. CODE ANN. § 15.2-1525(A) (2012).

<sup>4</sup> See VA. CONST. art. VII, § 4 (identifying which offices are local constitutional offices).

<sup>5</sup> VA. CODE ANN. § 24.2-228.1(A) (2011) requires a writ of election to be issued “within fifteen days of the occurrence of the vacancy,” and a companion statute, § 24.2-682, requires that special elections to fill vacancies in constitutional offices be held “promptly.”

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<sup>6</sup> Section 15.2-1525(A).

<sup>7</sup> Until 1984, there was a residency requirement for deputies. *See* 1984 Va. Acts ch. 711 (replacing the original language of former § 15.1-51, which imposed a residency requirement on the nonelected deputies of constitutional officers, with language exempting such deputies from the residency requirement applicable to constitutional officers).

<sup>8</sup> *Alger v. Commonwealth*, 267 Va. 255, 261, 590 S.E.2d 563, 556 (2004).

<sup>9</sup> *Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 283 Va. 420, 425, 722 S.E.2d 626, 629 (2012) (quoting *Commonwealth v. Amerson*, 281 Va. 414, 418, 706 S.E.2d 879, 882 (2011)).

<sup>10</sup> Section 15.2-1525(A).

<sup>11</sup> *City of Albemarle v. Camirand*, 285 Va. 420, 424, 738 S.E.2d 904, 906 (2013).

<sup>12</sup> *Marshall v. N. Va. Transp. Auth.*, 275 Va. 419, 427, 657 S.E.2d 71, 75 (2008).

<sup>13</sup> *Id.*, 275 Va. at 428, 657 S.E.2d at 75.

<sup>14</sup> *See* VA. CONST. art. II, § 1.

<sup>15</sup> *Compare* § 24.2-228.1 with §§ 24.2-226(A) (Supp. 2014) and 24.2-227 (2011) (providing that persons elected or appointed to fill vacancies in local elective offices other than constitutional offices “shall hold office” for the duration of their permitted service).

<sup>16</sup> Entitlement to the privileges of office include receiving approved compensation for the position. *See* STATE COMPENSATION BOARD, POLICY & PROCEDURE: A MANUAL FOR CONSTITUTIONAL OFFICERS at 50 (2011), available at <http://www.scb.virginia.gov/policy/FY11General.pdf>.

<sup>17</sup> “A senator or delegate who moves his residence from the district for which he is elected shall thereby vacate the office.” VA. CONST. art. IV, § 4.

<sup>18</sup> VA. CODE ANN. § 24.2-311(A) (Supp. 2014). *See also* 2001 Op. Va. Att’y Gen. 34.

<sup>19</sup> VA. CODE ANN. § 24.2-304.6 (2011). *See* 1981-82 Op. Va. Att’y Gen. 324; 1991 Op. Va. Att’y Gen. 159 (same conclusion for school board members).

<sup>20</sup> VA. CONST. art. V, §§ 10, 11.

<sup>21</sup> 2013 Op. Va. Att’y Gen. 220.

## OP. NO. 14-046

### ELECTIONS: GENERAL PROVISIONS AND ADMINISTRATION - REGISTRARS

Section 24.2-112 of the *Code of Virginia* authorizes a general registrar, in his discretion, to hire additional temporary, part-time employees when needed and requires the local governing body to compensate such employees as provided for by law.

MR. GERALDE W. MORGAN

MR. ARTHUR D. ROANE

MS. LAVERNE B. ABRAMS

KING WILLIAM COUNTY ELECTORAL BOARD

OCTOBER 1, 2014

### ISSUE PRESENTED

You ask whether, under § 24.2-112 of the *Code of Virginia*, a general registrar has the authority to hire, as needed, additional employees on a temporary, part-time basis, irrespective of local government approval and budgeting.

### RESPONSE

It is my opinion that § 24.2-112 authorizes a general registrar, in his discretion, to hire additional temporary, part-time employees when needed and requires the local governing body to compensate such employees as provided for by law.

### APPLICABLE LAW AND DISCUSSION

In Virginia, a general registrar is appointed by each local electoral board to serve the city or county<sup>1</sup> in the administration of matters related to the registration of voters and the maintenance of pollbooks and voter registration records.<sup>2</sup> Pursuant to § 24.2-112, the general registrar may appoint assistant registrars to aid him in fulfilling his statutory duties. The number of such assistant registrars is to be determined by the electoral board, and assistant registrars, with few exceptions, must meet the same qualifications as the general registrar.<sup>3</sup> Section 24.2-112 also provides implicitly that assistant registrars may serve without pay.

In addition, § 24.2-112 expressly provides that “[t]he general registrar may hire additional temporary employees on a part-time basis as needed.” Because statutes are to be applied according to their plain language,<sup>4</sup> I must conclude that the General Assembly has authorized general registrars to hire part-time, temporary employees as their work load demands.

This authority is not made contingent upon approval or agreed-upon appropriation of funds by the local governing body. Rather, the plain language § 24.2-112 clearly shows that the General Assembly has vested hiring decisions in the discretion of the general registrar. Once a temporary, part-time employee is hired, § 24.2-112 further provides that “[t]he compensation of . . . employees of the general registrar shall be fixed and paid by the local governing body.”<sup>5</sup> Except for assistant registrars who agree to serve without pay, such compensation “shall be the equivalent of or exceed the minimum hourly wage established by federal law in 29 U.S.C. § 206(a)(1), as amended.”<sup>6</sup>

In sum, under § 24.2-112, general registrars are authorized to hire, as needed, temporary, part-time employees, and such employees are to be compensated by the local governing board at a rate that meets or exceeds the minimum hourly wage established under 29 U.S.C. § 206(a)(1).

## CONCLUSION

Accordingly, it is my opinion that § 24.2-112 authorizes a general registrar, in his discretion, to hire additional temporary, part-time employees when needed and requires the local governing to compensate such employees as provided for by law.

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<sup>1</sup> VA. CODE ANN. § 24.2-109(A) (2011).

<sup>2</sup> See § 24.2-114 (Supp. 2014) (providing non-exclusive list of duties and powers of general registrars).

<sup>3</sup> Section 24.2-112 (2011).

<sup>4</sup> “When the language of a statute is unambiguous, we are bound by the plain meaning of that language.” *Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 283 Va. 420, 425, 722 S.E.2d 626, 629 (2012) (quoting *Kozmina v. Commonwealth*, 281 Va. 347, 349, 706 S.E.2d 860, 862 (2011)) (further citation and internal quotation marks omitted).

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

<sup>6</sup> Section 24.2-112.

### Op. No. 14-049

#### ADMINISTRATION OF GOVERNMENT: VIRGINIA FREEDOM OF INFORMATION ACT

#### CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT - DEBT

#### COUNTIES, CITIES & TOWNS: LOCAL GOVERNMENT PERSONNEL, QUALIFICATION FOR OFFICE, BONDS, DUAL OFFICE HOLDING & CERTAIN LOCAL GOVERNMENT OFFICERS

#### EDUCATION: DIVISION SUPERINTENDENTS

#### PENSIONS, BENEFITS, AND RETIREMENT: LOCAL RETIREMENT SYSTEMS

A school superintendent could not legally participate in the school board’s Early Retirement Incentive Program because (1) she did not meet the terms and conditions of the program, and (2) the school board’s vote in favor of her participation was legally null and void due to its noncompliance with Freedom of Information Act requirements.

A county’s future debt must be authorized in a manner consistent with Article VII, §10(b) of the Constitution of Virginia.

THE HONORABLE R. LEE WARE, JR.  
MEMBER, HOUSE OF DELEGATES  
JULY 22, 2014

## ISSUES PRESENTED

You ask whether the Powhatan County School Board legally may authorize the former Powhatan County Superintendent of Schools to participate in a Supplemental Retirement Program by working part time at a reduced salary in the retirement program in the position of Associate Superintendent, after which she will receive supplemental retirement compensation for several years. A related question

is whether the Powhatan County Board of Supervisors may rescind its prior authorization of funding for the program.

### **RESPONSE**

It is my opinion that the former Superintendent legally may not participate in the Supplemental Retirement Program under the facts you present. It is also my opinion that the Board of Supervisors, in its sound discretion, may modify, discontinue, or elect not to make annual appropriations to the program.

### **BACKGROUND**

You relate that, in October 1996, the Powhatan County Board of Supervisors, acting at the request of the School Board, established a trust fund for an Early Retirement Incentive Program for School Division employees, later renamed the Supplemental Retirement Program (the “SRP”). The approval by the Board of Supervisors was made without a public hearing by a 3-2 vote.<sup>1</sup> Prior to this action being taken by the Board of Supervisors, on August 6, 1996, the School Board had adopted plan documents specifying the terms of the SRP, with that action made effective retroactively to July 1, 1996.<sup>2</sup> Official records indicate that, at the time of approving the program’s creation, the Board of Supervisors was aware of its general terms, as outlined in narrative form in a letter from the School Board Chairman, but the records fail to disclose that the supervisors either voted to approve the plan documents or voted to endorse the School Board’s prior approval of the plan documents.<sup>3</sup>

As set forth in the School Board’s plan documents,<sup>4</sup> eligible school division employees<sup>5</sup> may participate in the SRP by working part-time for either one half of the school year or one full school year at reduced salary.<sup>6</sup> One critical requirement for this part-time employment is that it must be “in the same or equivalent position as when the Participant was previously employed by the Employer.”<sup>7</sup> Thereafter, the employee receives supplemental retirement compensation for several years, with the amount and length of payment varying depending on which of several options is selected.<sup>8</sup> The plan documents also establish a trust fund to administer the SRP.<sup>9</sup> In addition, on an unknown date, the School Division enacted a personnel regulation providing in relevant part that “eligibility for [SRP] benefits is subject to approval by the Superintendent or designee.”<sup>10</sup>

The minutes of the November 13, 2012 School Board meeting recite, “Mrs. Ayers made a motion to approve the SRP Consideration, seconded by Mr. Cole. The vote was Ayers-Aye; Poe-Aye; Cole-Aye, and Jones-Nay. The Motion carried.” The minutes do not disclose what was meant by “the SRP Consideration.”

Nonetheless, a confidential agenda for the “Personnel Docket” of the closed session that occurred earlier during this meeting identifies that item as follows:

**REQUEST APPROVAL FOR SUPPLEMENTAL RETIREMENT PROGRAM**     **Effective Date: July 1, 2013**

**Name**

[Name of former Superintendent]

**Position**

Division Superintendent

Subsequently, the School Board took certain actions to facilitate the former Superintendent’s entry into the SRP. Because state law requires a Superintendent to be full-time,<sup>11</sup> while the SRP requires participants to work part-time, the position of part-time Associate Superintendent was created, and the then-Superintendent assumed that position. She then was allowed to complete the requisite part-time work as Associate Superintendent, and her benefits are now scheduled to commence this August.

**APPLICABLE LAW AND DISCUSSION<sup>[12]</sup>**

State law authorizes local governing bodies to establish retirement plans, including plans that supplement the Virginia Retirement System.<sup>13</sup> It is important to note that the authority to create such plans is granted only to local governing bodies. It is not a power conferred on school boards.<sup>14</sup> This is a legislative power, and the Supreme Court of Virginia has reaffirmed recently that legislative powers of one governmental body may not be delegated to another governmental body.<sup>15</sup> As suggested above, the available records indicate that, while the Board of Supervisors approved a trust fund for the SRP, as the SRP was described in a letter provided by the School Board Chairman, the Board of Supervisors neither adopted plan documents nor approved the plan documents previously approved by the School Board. The plan documents were adopted by the School Board alone.

The SRP was adopted in 1996; thus, eligibility criteria and benefits have been in effect and a matter of public knowledge for approximately eighteen years. In other words, the SRP, as described by the School Board’s plan documents, has been in effect for almost two decades, and until recently, the Board of Supervisors has not taken any steps to alter it. Under these circumstances, there is a maxim of construction that a legislative body is presumed to be cognizant of an agency’s construction of a statute, and when such construction continues without legislative alteration, the legislature will be presumed to have acquiesced in it.<sup>16</sup> It is therefore my opinion that the Board of Supervisors, which did vote to approve the conceptual terms of the SRP, has acquiesced over time to the terms and conditions set forth in the plan documents implementing those conceptual terms. The plan documents therefore should be viewed as being effective and controlling, as if they formally had been adopted by the Board of Supervisors.

Accordingly, the relevant provision of the 1996 Plan is the requirement that a participant must “provide continued service *in the same or equivalent position*” for the requisite time period.<sup>17</sup> As indicated, the former Superintendent did not continue as Superintendent upon entering the SRP. Instead, she entered the SRP in the newly created position of part-time Associate Superintendent.

The qualifications, work conditions, and responsibilities of superintendents are set forth in great detail in state law. They are unique to superintendents and are not necessarily applicable to associate superintendents.<sup>18</sup> The duties of the Associate Superintendent are set forth in a July, 2013 job description of Powhatan County Public Schools that was signed by the former Superintendent. Those duties differ in several material ways from the duties under state law of a Superintendent. For that reason, it is my opinion that the position of Associate Superintendent is not “the same or equivalent position” as the position of Superintendent. Therefore, under the terms of the 1996 Plan, the former Superintendent is not eligible to participate in the SRP.

Moreover, the vote to make the former Superintendent a plan participant was legally defective. The records indicate that there was a closed session discussion of making her a plan participant, but when the vote was taken later in open session, she was not identified by either name or position, and it was not even disclosed that the School Board was voting to admit someone to the SRP, regardless of who that person was, nor did it even disclose that “SRP” was an abbreviation for the Supplemental Retirement Program. The vote was merely “to approve SRP consideration,” which does not identify in any meaningful way the substantive action to be taken.

In order for a public vote to be valid, the subject of the vote must be publicly disclosed. Robert’s Rules of Order provides that, “A motion is a proposal that the assembly take certain action, or that it express itself as holding certain views.”<sup>19</sup> The requirement to specify the subject matter of a vote is particularly true where, as here, the subject has been discussed in a closed meeting. The Virginia Freedom of Information Act provides,

No resolution, ordinance, rule, contract, regulation or motion adopted, passed, or agreed to in a closed meeting shall become effective unless the public body, following the meeting, reconvenes in open meeting and takes a vote of the membership on such resolution, ordinance, rule, contract, regulation, or motion *that shall have its substance reasonably identified in the open meeting.*<sup>[20]</sup>

The Supreme Court of Virginia has held that, “[t]he [Freedom of Information] Act specifically mandates a liberal construction in order that public business shall be conducted so far as possible in public.”<sup>21</sup> Because the open meeting vote to admit

the former Superintendent to the SRP did not “have its substance reasonably identified” as required by the Virginia Freedom of Information Act, it is my opinion that that vote was legally defective, and therefore null and void.<sup>22</sup>

With respect to the continuation of and funding for the SRP, I observe that the Constitution of Virginia limits the power of a county to incur future debt.<sup>23</sup> Pursuant to Article VII §10(b), such debt requires statutory authorization and a referendum:

No debt shall be contracted on behalf of any county. . . except by authority conferred by the General Assembly by general law. . . The General Assembly shall not authorize any such debt [with certain exceptions] . . . unless in the general law authorizing the same, provision be made for submission to the qualified voters of the county. . . for approval or rejection by a majority vote of the qualified voters. . . . Such approval shall be a prerequisite to contracting such a debt.<sup>[24]</sup>

A county’s future pension obligations are a future debt. In applying the constitutional restriction to such retirement plans, a prior Opinion of this Office concludes that their funding is subject to annual appropriations. The Opinion explains:

Article VII §10(b) explicitly provides that “[n]o debt shall be contracted by or on behalf of any county except by authority conferred by the General Assembly by general law.” In Virginia, the local school boards have no appropriation power. Furthermore, the General Assembly has explicitly provided that “[n]o school board shall expend or contract to expend in any fiscal year, any sum of money in excess of the funds available for school purposes without the consent of the governing body or bodies appropriating funds to the school board.” See § 22.1-91 of the Code of Virginia. *Thus, the plan must be made subject to annual appropriations by the board of supervisors.*<sup>[25]</sup>

In sum, because the Constitution of Virginia bars counties from incurring future debt without a referendum, the Board of Supervisors cannot be under a legal obligation to provide future appropriations to the SRP.

In addition, the power of a locality to create a retirement plan necessarily implies the power later to amend it, and also to rescind it, unless there is a statutory limitation on those powers. There is no such statutory limitation. Notably, the plan documents for the SRP, as adopted by the School Board in 1996, suggest that benefits are subject to available funding. The documents state that

It is intended that this Plan, together with the Trust Agreement established to carry out the funding of the Plan, *provided that the Employer [(the School Board)] has sufficient funds to meet its obligations* hereunder as set forth under applicable law, meet all the requirements of the [Internal Revenue Code]. . . .<sup>[26]</sup>

Moreover, under the 1996 Plan, there is no contractual obligation to continue the SRP, and the right to terminate it is reserved unto the School Board, with the approval of the Board of Supervisors.<sup>27</sup>

For these reasons, it is my opinion that the Supervisors have the legal authority, in their sound discretion, to modify or to repeal the SRP, or to decide not to appropriate future funding for it. Nonetheless, to the extent there are existing trust funds being held, they may be expended consistently with the trust terms to legal participants in the SRP, as those trust funds will not entail a future appropriation.

### CONCLUSION

Therefore, for the reasons stated above, it is my opinion that the former Superintendent may not legally participate in the Supplemental Retirement Program under the facts presented here. It is also my opinion that the Board of Supervisors may in its sound discretion elect to modify or to discontinue the program, or not make future appropriations to it.

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<sup>1</sup> See Board of Supervisors of Powhatan County, Va., Meeting Minutes (Oct. 14, 1996) (recording that “Mrs. McWaters felt it was a fantastic proposal but there was some concern from some of the teachers in relation to the 10 year retirement. Mr. Harrison and Ms. Manning agreed with Mrs. McWaters. Mr. Cosby stated he felt the School Board, as an elected body, was responsible for the adoption and implementation of the trust fund. Dr. Meara stated she would pass the comments of the three Board members on to the School Board. Mr. Burruss made a motion to accept the proposal to establish a trust fund for the early retirement program as outlined in the October 2, 1996 letter from T. J. Bise. All voted AYE except Mrs. McWaters and Ms. Manning who vote NO.”).

<sup>2</sup> See POWHATAN COUNTY SCHOOL BOARD, EARLY RETIREMENT INCENTIVE PLAN FOR EMPLOYEES OF POWHATAN COUNTY PUBLIC SCHOOLS (hereinafter “1996 Plan”), *effective* July 1, 1996, cover page and at 51 (Aug. 6, 1996). A current School Board document also recites that the SRP became effective on July 1, 1996, before it was approved by the Board of Supervisors. POWHATAN COUNTY PUBLIC SCHOOLS, “Personnel - Retirement - Early Retirement Incentive Plan” (hereinafter “Personnel Policy”), Section A (stating “The Early Retirement Incentive Plan . . . was initiated July 1, 1996.”).

<sup>3</sup> See *supra* note 1.

<sup>4</sup> There have been several changes to the SRP over the years, including its temporary suspension and later partial reactivation, but because none of the changes have a material bearing on the analysis of the legal issues presented, they will not be summarized here.

<sup>5</sup> To be eligible, a School Division employee must be eligible for retirement under the Virginia Retirement System, have at least ten years of service with Powhatan County Public Schools, and be at least age 55. 1996 Plan, *supra* note 2, § 2.02.

<sup>6</sup> *Id.*

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<sup>7</sup> *Id.*, § 3.01.

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

<sup>9</sup> *Id.*, § 4.02.

<sup>10</sup> Personnel Policy, *supra* note 2, Section D(1).

<sup>11</sup> VA. CODE ANN. §§ 22.1-58 (2011); 22.1-62 (2011).

<sup>12</sup> I must note this Opinion is subject to the following qualification: because the facts presented cover a period of almost two decades, some facts that might be relevant simply are not known given the passage of time and the absence of adequate records and documentation; thus, if additional facts later are discovered, the analysis and conclusions herein may no longer be valid.

<sup>13</sup> See VA. CODE ANN. § 15.2-1510 (2012); VA. CODE ANN. §§ 51.1-800 through 51.1-806 (2013) (providing generally for local retirement systems).

<sup>14</sup> See § 22.1-79 (Supp. 2014) (setting forth the powers of school boards, with no power being granted to create retirement systems for school division employees). “School boards . . . constitute public quasi corporations that exercise limited powers and functions of a public nature granted to them expressly or by necessary implication, and none other . . . .” *Kellam v. Sch. Bd.*, 202 Va. 252, 254, 117 S.E.2d 96, 98 (1960).

<sup>15</sup> *Marshall v. No. Va. Transp. Auth.*, 275 Va. 419, 657 S.E.2d 71 (2008).

<sup>16</sup> See, e.g., 2011 Op. Va. Att’y Gen. 351, 353.

<sup>17</sup> Personnel Policy at 2, Section D(2) (emphasis added).

<sup>18</sup> See, e.g., VA. CODE ANN. §§ 22.1-59 (2011) (minimum qualifications of superintendents to be prescribed by Board of Education); 22.1-60 (2011) (superintendent to be appointed by School Board for term of two to four years); 22.1-60.1 (superintendent to be evaluated annually by school board); 22.1-62 (2011) (superintendent may not be part-time without approval of Board of Education); 22.1-63 (2011) (holders of certain offices ineligible to be superintendents); 22.1-64 (2011) (superintendent to take oath of office); 22.1-65 (2011) (superintendents may be fined for cause); 22.1-67 (2011) (school board to pay travel and office expenses of superintendent; documentation required); 22.1-68 (2011) (superintendent to maintain certain specified records and statistics); 22.1-69 (2011) (superintendent must attend all school board meetings); 22.1-70.1 (2011) (certain annual reports to be made to school board by superintendent); 22.1-70.2 (2011) (superintendent to enforce school board’s computer and internet policies); 22.1-70.3 (2011) (superintendent to identify teacher shortage areas).

<sup>19</sup> Robert’s Rules of Order, Article I, §4.

<sup>20</sup> VA. CODE ANN. § 2.2-3711(B) (Supp. 2014) (emphasis added) .

<sup>21</sup> *Marsh v. Richmond Newspapers, Inc.*, 223 Va. 245, 254 (1982).

<sup>22</sup> Because of the opinion I reach herein, it is not necessary for me to determine whether the School Board even had legal authority to place the former Superintendent in the SRP, since under the SRP that determination is to be made by the Superintendent, unless the Superintendent designates someone else to make the decision. It is not known whether that authority was designated here by the Superintendent to the School Board.

<sup>23</sup> See VA. CONST. art VII, § 10(b).

<sup>24</sup> *Id.*

<sup>25</sup> 1984-85 Op. Va. Att’y Gen. 89, 89-90 (emphasis added) (addressing supplemental retirement system for employees of Albemarle County School Division).

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<sup>26</sup> 1996 Plan at 1 (emphasis added).

<sup>27</sup> *Id.*, § 7.02.

## OP. NO. 14-050

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

Virginia Beach does not have zoning authority to prohibit or otherwise to regulate advertising signs on bicycles or bicycle trailers using public streets.

THE HONORABLE WILLIAM R. DESTEPH, JR.  
MEMBER, HOUSE OF DELEGATES  
NOVEMBER 20, 2014

### ISSUE PRESENTED

You inquire whether the City of Virginia Beach has legal authority under its zoning ordinance to ban certain types of advertising on bicycles and bicycle trailers using public streets.

### RESPONSE

It is my opinion that Virginia Beach does not have zoning authority to prohibit or otherwise to regulate advertising signs on bicycles or bicycle trailers using public streets. I express no opinion about whether Virginia Beach may impose such regulations under its police powers.

### BACKGROUND

You relate that Virginia Beach takes the position that advertising signs may not be displayed on bicycles or bicycle trailers being ridden in public streets or on sidewalks because such activity is in violation of the city's zoning ordinance.

The Virginia Beach zoning ordinance prohibits stationary signs placed in any public right-of-way, subject to certain exceptions,<sup>1</sup> and it also applies to signs on motor vehicles, with some of the restrictions varying by location. With respect to motor vehicles, the ordinance provides as follows:

(b) No motor vehicle shall be driven on any street within a residential subdivision for the purpose of displaying advertising, except as required by detour or upon order of a public safety employee of the city or state.

(c) The following types of signs shall be prohibited while the motor vehicle on which they are displayed is operated or parked on a public street or in such locations to be visible from the main traveled way of a public street:

- (1) Flashing, pulsating or blinking signs;
  - (2) Signs in which the message displayed changes more frequently than once every four seconds;
  - (3) Electronic changeable copy signs, including signs containing light emitting diodes (LEDs), fiber optics, light bulbs or other illumination devices used to change the advertising displayed by such signs; and
  - (4) Signs that project more than one foot above the portion of the motor vehicle to which they are affixed or that obscure the vision of the driver of the motor vehicle or of other motorists.
- (d) Any sign greater than fifteen square feet in area that is displayed on a motor vehicle for purposes of advertising a business other than that of the owner of the vehicle shall require an annual permit. . . .
- (e) Violations of any provision of this section shall be punishable in accordance with section 104.
- (f) For purposes of this section:
- (1) “*Motor vehicle*” shall be defined in accordance with Section 46.2-100 of the Code of Virginia or any successor statute, and shall also include any trailer or other vehicle drawn by or affixed to a motor vehicle . . . .<sup>[2]</sup>

The zoning administrator is authorized to remove signs that are in violation of this ordinance,<sup>3</sup> and a violation is made punishable initially by fines, and also as a criminal misdemeanor if there are repeated offenses resulting in a fine of \$5,000 or more, or when the illegal sign causes injury to any person.<sup>4</sup>

The statutory definition of “motor vehicle” referred to in the City Code does not include bicycles.<sup>5</sup> Although the City Code includes a chapter dealing with bicycles, that chapter does not contain any sections related to signs on bicycles.<sup>6</sup> To the same effect, the City Code also has a separate chapter dealing with motor vehicles, but it does not contain any sections related to signs on vehicles, be they motor vehicles or bicycles.<sup>7</sup> Thus, Virginia Beach’s claimed authority to regulate signs on bicycles resides solely in its zoning ordinance.<sup>8</sup>

### APPLICABLE LAW AND DISCUSSION

Local government authority in Virginia is determined by Dillon’s Rule, 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.<sup>9</sup> “If there is a reasonable doubt whether

legislative power exists, the doubt must be resolved against the local governing body.”<sup>10</sup>

Here, Virginia Beach purports to regulate signs on bicycles through its zoning ordinance. Zoning ordinances, like all other local ordinances, are enacted pursuant to state enabling legislation, and therefore their permissible scope is limited to the extent authorized by statute. Accordingly, the *Code of Virginia* must be reviewed to determine the proper scope and limitations of Virginia Beach’s zoning ordinance.

Section 15.2-2280 of the *Code of Virginia* authorizes the enactment of zoning ordinances for the purpose of regulating various aspects of land use. It specifically provides that

Any locality may, by ordinance, classify the territory under its jurisdiction or any substantial portion thereof into districts of such number, shape and size as it may deem best suited to carry out the purpose of this article, and in each district it may regulate, restrict, permit, prohibit, and determine the following:

- (1) The use of land, buildings, structures and other premises for agricultural, business, industrial, residential, flood plain and other specific uses;
- (2) The size, height, area, bulk, location, erection, construction, reconstruction, alteration, repair, maintenance, razing, or removal of structures;
- (3) The areas and dimensions of land, water, and air space to be occupied by buildings, structures and uses, and of courts, yards, and other open spaces to be left unoccupied by uses and structures, including variations in the sizes of lots based on whether a public or community water supply or sewer system is available and used; or
- (4) The excavation of mining of soil or other natural resources.

Section 15.2-2286 further establishes provisions that are permitted in zoning ordinances. The provisions are primarily procedural, but it is clear from the context that they all involve land use and the rights of real property owners. Nothing in this section reasonably can be interpreted as applying to the regulation of bicycles, motor vehicles, or traffic on public streets as such.<sup>11</sup> Various fines, but not incarceration, are authorized for enforcing violations of zoning ordinances.<sup>12</sup>

State enabling legislation for zoning ordinances makes clear that zoning power extends only to land use, not to traffic or vehicle regulation.<sup>13</sup> The physical appearance of bicycles and signage on bicycles as they are ridden in public rights of

way is not land use. Therefore, I must conclude that Virginia Beach lacks authority to regulate signs on bicycles through its zoning ordinance.<sup>14</sup>

I additionally must note that the Virginia Beach City Charter does not grant Virginia Beach any additional powers that are relevant to this analysis, above and beyond those powers already granted by statutes of general application.

I do note that Virginia Beach has general authority to adopt ordinances

which are necessary or desirable to secure and promote the general welfare of the inhabitants . . . and the safety, health, peace, good order, comfort, [and] convenience . . . of the municipality and the inhabitants thereof, and the enumeration of specific powers shall not be construed or held to be exclusive or as a limitation upon any general grant of power, but shall be construed and held to be in addition to any general grant of power.<sup>15]</sup>

These powers are commonly referred to as “police powers.”<sup>16</sup> While it is my opinion that, for the reasons discussed above, Virginia Beach does not have authority to regulate signs on bicycles through its zoning ordinance, I express no opinion about whether it may impose such regulations through its police power.

### CONCLUSION

For the foregoing reasons, it is my opinion that Virginia Beach does not have authority under its zoning ordinance to prohibit or otherwise to regulate advertising signs on bicycles or bicycle trailers using public streets. I express no opinion about whether Virginia Beach may impose such regulations under its police powers.

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<sup>1</sup> CITY OF VIRGINIA BEACH, VA., CODE OF ORDINANCES, Appendix A - Zoning Ordinance § 212(c).

<sup>2</sup> *Id.*, § 212.2.

<sup>3</sup> *Id.*, § 212.1.

<sup>4</sup> *Id.*, § 104(b).

<sup>5</sup> VA. CODE ANN. § 46.2-100 (Supp. 2014) defines “motor vehicle” as “every vehicle . . . that is self-propelled or designed for self-propulsion . . .,” and it defines “bicycle” as “a device propelled solely by human power . . .”

<sup>6</sup> CITY OF VIRGINIA BEACH, VA., CODE OF ORDINANCES, Chapter 7.

<sup>7</sup> *Id.*, Chapter 21.

<sup>8</sup> Chapter 3 of Virginia Beach’s *Code of Ordinances* deals with commercial signs in public rights of way. It is assumed for the purpose of this Opinion that this Chapter is applicable only to signs at fixed locations, but not to signs on moving vehicles.

<sup>9</sup> *Lamar Co. v. City of Richmond*, 287 Va. 348, 352, 756 S.E.2d 444, 446 (2014).

<sup>10</sup> *Bd. of Supvrs. v. Reed’s Landing Corp.*, 250 Va. 397, 400, 463 S.E.2d 668, 670 (1995).

<sup>11</sup> The effect on traffic of a particular land use is one factor that may be considered in determining the land use, but that is not the same as purporting to regulate traffic *per se*, independent of any land use. *See, e.g.*, VA. CODE ANN. § 15.2-2242(A)(4)(a) (Supp. 2014) (authorizing traffic studies as a condition of subdivision approval).

<sup>12</sup> *See* § 15.2-2209 (2012) (\$200 civil penalty for first violation, \$500 for subsequent violations, cap of \$5,000 for civil penalties, violation that causes personal injury or has fines in excess of \$5,000 may be a criminal violation); *see also* § 15.2-2286 (Supp. 2014) (misdemeanor punishable by fines).

<sup>13</sup> The “Zoning and Planning” title in Volume 21 of *Michie’s Jurisprudence* begins by saying, at page 403, “This title deals with the subject of *the regulation of land use* through zoning, planning, and the control of the subdivision and development of land.” (emphasis added).

<sup>14</sup> This Opinion addresses only the question of whether signs on bicycles that are being ridden in public streets can be regulated through zoning. No opinion is expressed or implied about the ability of Virginia Beach to regulate signs on bicycles or other vehicles that are parked on private property, nor is any opinion expressed or implied about the ability of Virginia Beach to regulate the parking or storage of any type of vehicle, trailer, or boat on private property or on public streets.

<sup>15</sup> Section 15.2-1102 (2012). *See also* CITY OF VIRGINIA BEACH, VA., CHARTER, § 2.01 (“General grant of powers”).

<sup>16</sup> “Police power” is generally described as the sovereign power to enact laws to promote the health, peace, morals, education, and good order of the people. *See* *Elizabeth River Crossings v. Weeks*, 286 Va. 286, 321, 749 S.E.2d 176, 194 (2013). A local governing body must necessarily enjoy broad discretionary powers to protect the public health and general welfare of its residents. *McMahon v. City of Va. Beach*, 221 Va. 102, 267 S.E.2d 130, *cert. denied* 449 U.S. 954 (1980).

## OP. NO. 14-051

### AVIATION: AIRCRAFT, AIRMEN AND AIRPORTS GENERALLY

### COUNTIES, CITIES AND TOWNS: POLICE AND PUBLIC ORDER – GENERAL PROVISIONS

### POLICE (STATE): DEPARTMENT OF STATE POLICE

Chapter 755 of the 2013 Acts of Assembly temporarily prohibits the use of even a single remotely controlled aerial vehicle by state or local law enforcement for the purpose of gathering evidence pursuant to a search warrant. The legislation does not, however, prohibit the use of unmanned aircraft systems for specified humanitarian purposes.

THE HONORABLE RONALD K. ELKINS

COMMONWEALTH’S ATTORNEY, WISE COUNTY AND CITY OF NORTON

OCTOBER 9, 2014

### ISSUE PRESENTED

You inquire whether the temporary prohibition against use of an “unmanned aircraft system” by state or local law enforcement departments, as set forth in Chapter 755 of the 2013 Acts of Assembly (“Chapter 755”),<sup>1</sup> applies to the use by law

enforcement of a single unmanned aerial vehicle operating to gather evidence pursuant to a search warrant.

### **RESPONSE**

It is my opinion, based on the accepted industry definition of an “unmanned aircraft system” and what I understand to be legislative intent, that Chapter 755, which is effective until July 1, 2015, temporarily prohibits the use of even a single remotely controlled aerial vehicle by state or local law enforcement for the purpose of gathering evidence pursuant to a search warrant. Chapter 755, however, does not prohibit the use of unmanned aircraft systems for specified humanitarian purposes.

### **BACKGROUND**

You relate that the Wise County Sheriff’s Office “possesses unmanned, remote controlled quad copters equipped with cameras that can take photographic images and record video,” and you indicate that these instruments “have an approximate 20-minute flight time, and require human control.” You inquire whether Chapter 755 prohibits the Sheriff’s Office from deploying one of these devices to gather evidence pursuant to a search warrant.<sup>2</sup>

### **APPLICABLE LAW AND DISCUSSION**

In 2013, the General Assembly passed H.B. 2012 which was enacted, without codification, as Chapter 755. Chapter 755 provides, in pertinent part, as follows:

No state or local government department, agency, or instrumentality having jurisdiction over criminal law enforcement and regulatory violations, including but not limited to the Department of State Police, and no department of law enforcement as defined in § 15.2-836 of the Code of Virginia of any county, city, or town shall utilize an unmanned aircraft system before July 1, 2015.<sup>[3]</sup>

Beyond reasonable debate, the legislation evinces a legislative intent temporarily to prohibit use of this emerging technology - unmanned aircraft systems - by law enforcement. Nevertheless, it does provide several humanitarian exceptions to the prohibition. Specifically, an unmanned aerial system may be deployed when responding to an Amber Alert, a Senior Alert, or a Blue Alert, or during a search and rescue mission “where use of an unmanned aircraft system is determined to be necessary to alleviate an immediate danger to any person,” or “for training exercises related to such uses.”<sup>4</sup> None of these exceptions can be reasonably interpreted to include a search for evidence pursuant to a warrant.

As an initial matter, I note the following principles of statutory construction that guide this analysis. “When construing a statute, our primary objective is ‘to ascertain and give effect to legislative intent,’ as expressed by the language used in the statute.”<sup>5</sup> Nonetheless, statutes are not to be interpreted by singling out a particular

word, but as a whole;<sup>6</sup> and, although undefined terms are to be construed according to their “plain and ordinary meaning,” “courts should be guided by ‘the context in which [the word or phrase] is used.’”<sup>7</sup> And, of particular importance, “[t]echnical terms or terms of art in a statute have their technical meaning, absent legislative intent to the contrary, or other overriding evidence of a different meaning.”<sup>8</sup> Similarly, “[i]n general, commercial terms in a statute related to trade or commerce have their trade or commercial meaning.”<sup>9</sup> In an overall sense, “[s]tatutes must be construed . . . so as to reasonably and logically effectuate their intended purpose[,]”<sup>10</sup> while interpretations producing an absurd result are to be avoided.<sup>11</sup>

Your inquiry turns upon the meaning of the term “unmanned aircraft system.”<sup>12</sup> Neither Chapter 755 nor any other Virginia statute defines the term “unmanned aircraft system.” Although “unmanned aircraft system” could be construed narrowly to exempt single, particularized uses and to require regular, open-ended monitoring of unspecified targets, such an interpretation ignores the commonly accepted technical definition of an “unmanned aircraft system” and federal usage of that term. Further, it would circumvent the clear intent of the General Assembly, which is to temporarily limit the use of an unmanned aircraft to the humanitarian situations specifically listed in Chapter 755.

Federal law defines “unmanned aircraft system” as “an unmanned aircraft and associated elements (including communication links and the components that control the unmanned aircraft) that are required for the pilot in command to operate safely and efficiently in the national airspace system.”<sup>13</sup> The Federal Aviation Administration, the federal agency responsible for regulating aircraft, defines “unmanned aircraft system” as “a UA [unmanned aircraft] and its associated elements related to safe operations, which may include control stations (ground-, ship-, or air-based), control links, support equipment, payloads, Flight Termination Systems (FTA), and launch/recovery equipment.”<sup>14</sup> In addition, the Congressional Budget Office, the Department of Defense, commentators, and at least two other states use fundamentally identical definitions.<sup>15</sup>

Although the General Assembly did not expressly define “unmanned aircraft system” in its final, enacted legislation, it is my opinion - based on the accepted principles of statutory interpretation discussed above - that the General Assembly used this term in accordance with its accepted industry definition, that definition having been utilized consistently by the federal government, federal agencies, and other jurisdictions. Indeed, to conclude otherwise would undermine the clear legislative intent to impose a temporary moratorium on the use of unmanned aerial vehicles by law enforcement to gather evidence in criminal cases.

It is my opinion, therefore, that an “unmanned aircraft system” is the unmanned aircraft itself, combined with the equipment and other components that permit that aircraft to be remotely operated. Even employing the definition of “system,” used

in isolation, that you provide comports with this interpretation. An unmanned aircraft, coupled with its supporting equipment, is a “regularly interacting or independent group of items forming a unified whole” and “a group of devices or artificial objects . . . forming a network especially distributing something or serving a common purpose.”<sup>16</sup> The equipment you describe - an unmanned quad copter that is remotely controlled by a device in the hands of a human operator - falls within the ambit of an “unmanned aircraft system.” The aircraft itself is the “unmanned aircraft,” and, when that device is coupled with the requisite equipment and controls to permit its remote operation, it is properly considered an “unmanned aircraft system.” When set up for remote use by a human operator, even a single quad copter will, therefore, be deemed an “unmanned aircraft system.”<sup>17</sup>

### CONCLUSION

Accordingly, it is my opinion that the term “unmanned aircraft system,” in conformity with its accepted industry definition, encompasses a single unmanned aerial vehicle that has corresponding equipment and controls permitting its remote use by a human operator. It therefore is my further opinion that Chapter 755, which is effective until July 1, 2015, temporarily prohibits law enforcement from using a remotely controlled quad copter to gather evidence pursuant to a warrant.<sup>18</sup> Nevertheless, Chapter 755 does not prohibit the use of unmanned aircraft systems for specified humanitarian purposes.

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<sup>1</sup> Your opinion request refers to House Bill 1611, introduced during the 2012 legislative session. The substance of the 2012 bill was more recently addressed by the General Assembly during its 2013 session when it considered House Bill 2012, recorded as Chapter 755 of the 2013 Acts of Assembly (the enactment is uncodified). This Opinion refers only to the enacted, more recent bill, which is currently in effect.

<sup>2</sup> VA. CODE ANN. § 19.2-56.2 (Supp. 2014), which sets forth the manner of obtaining warrants for “tracking devices,” defines “use of a tracking device” as excluding “the capture, collection, monitoring, or reviewing of images.” The devices you describe, therefore, do not fall within the ambit of this statute.

<sup>3</sup> 2013 Va. Acts ch. 755.

<sup>4</sup> *Id.*

<sup>5</sup> *Cuccinelli v. Rector & Visitors of the Univ. of Va.*, 283 Va. 420, 425, 722 S.E.2d 626, 629 (2012) (quoting *Commonwealth v. Amerson*, 281 Va. 414, 418, 706 S.E.2d 879, 882 (2011)) (further citation and internal quotation marks omitted).

<sup>6</sup> *See Commonwealth v. Jones*, 194 Va. 727, 731, 74 S.E.2d 817, 820 (1953) (“A statute should be construed so as to give effect to its component parts. Its meaning should not be derived from single words isolated from the true purpose of the Act.”).

<sup>7</sup> *Protestant Episcopal Church v. Truro Church*, 280 Va. 6, 21, 694 S.E.2d 555, 563 (2010) (citing *Sansom v. Bd. of Supvrs.*, 257 Va. 589, 595, 514, S.E.2d 345, 349 (1999) (quoting *Dep’t of Taxation v. Orange-Madison Coop. Farm Serv.*, 220 Va. 655, 658, 261 S.E.2d 532, 533-34 (1980)).

<sup>8</sup> NORMAN J. SINGER & J.D. SHAMBIE SINGER, *SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION* § 47:29 (7th ed. 2007).

<sup>9</sup> *Id.*, § 47:31.

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<sup>10</sup> Nelson v. Cnty. of Henrico, 10 Va. App. 558, 561, 393 S.E.2d 644, 646 (1990).

<sup>11</sup> See Jones v. Conwell, 227 Va. 176, 181, 314 S.E.2d 61, 64 (1984) (“The rules of statutory interpretation argue against reading any legislative enactment in a manner that will make a portion of it useless, repetitious, or absurd.”).

<sup>12</sup> Although the General Assembly - in accordance with prevailing industry standards - used the phrase “unmanned aircraft system,” or “UAS,” in its legislation, a UAS is often referred to, colloquially, as a “drone.” See, e.g., Elec. Frontier Fdn v. Dep’t of Homeland Sec., No. C12-5580PJH, 2014 U.S. Dist. LEXIS 44863, at \*2 (N.D. Cal. Mar. 31, 2004) (noting that “unmanned aircraft systems” are also referred to as “drones”).

<sup>13</sup> FAA Modernization and Reform Act of 2012, 112 Pub. L. 95, 126 Stat. 11, 72, § 331(9) (2012).

<sup>14</sup> FAA Order 8900.1, Flight Standards Information Management System, Vol. 16, Ch. 1, § 2 (June 23, 2014), available at <http://fsims.faa.gov/PICDetail.aspx?docId=8900.1,Vol.16,Ch1,Sec2>.

<sup>15</sup> See, respectively, CONG. BUDGET OFFICE, POLICY OPTIONS FOR UNMANNED AIRCRAFT SYS., Pub. No. 4083, at 4 (2011) (defining “unmanned aircraft system” as “an unmanned aircraft *plus the necessary equipment, communications network, ground stations, personnel, and infrastructure to control it.*”) (emphasis added), available at <http://www.cbo.gov/doc.cfm?index-12163>; DEP’T OF DEFENSE, JOINT PUBLICATION 3-52, JOINT AIRSPACE CONTROL, at GL-13 (May 20, 2010) (defining “unmanned aircraft system” as “[t]hat system whose components include the necessary equipment, network, and personnel to control an unmanned aircraft.”), available at [www.dtic.mil/doctrine/new\\_pubs/jp3\\_52.pdf](http://www.dtic.mil/doctrine/new_pubs/jp3_52.pdf), accord DEP’T OF DEFENSE, DICTIONARY OF MILITARY & ASSOCIATED TERMS 351 (2012) (same definition); John Villasenor, *Privacy, Security, & Human Dignity in the Digital Age: Observations from Above: Unmanned Aircraft Systems & Privacy*, 36 HARV. J.L. & PUB. POL’Y, 457, 458 n.1 (2013) (discussing the term “unmanned aircraft system,” and noting that, while “unmanned aerial vehicle” refers “to the aircraft itself,” “[t]he term unmanned aircraft system (UAS) refers to an unmanned aircraft as well as the associated communication and control components used in its operations”); IDAHO CODE ANN. § 21-213(1)(a) (2014) (defining “unmanned aircraft system” as “an unmanned aircraft vehicle, drone, remotely piloted vehicle, remotely piloted aircraft or remotely operated aircraft that is a power aerial vehicle that does not carry a human operator, can fly autonomously or remotely, and can be expendable or recoverable”); 2013 N.C. Sess. Laws 360, § 7.16(2)(2) (defining “unmanned aircraft system” as “an unmanned aircraft and associated elements, including communication links and components that control the unmanned aircraft that are required for the pilot in command to operate safely and efficiently in the national airspace system.”). See also N.D. CENT. CODE § 54-60-2 (2013) (establishing an “unmanned aircraft systems program fund”); TEX. GOV’T CODE ANN. § 423.002 (2014) (permitting the use of “unmanned aircraft” by law enforcement officers under certain circumstances); cf. FLA. STAT. ANN. § 934.50 (2013) (defining “drone”); 725 ILL. COMP. STAT. 167/5 (2014) (same); 720 ILL. COMP. STAT. 5/48-3(b)(10) (2014) (same); OR. REV. STAT. § 837.300(1) (2013) (same); TENN. CODE ANN. § 39-13-609(b)(1) (2014) (same).

<sup>16</sup> <http://www.merriam-webster.com/dictionary/system> (last visited Sept. 9, 2014).

<sup>17</sup> Cf. 49 C.F.R. § 830.2 (defining “unmanned aircraft accident” as an incident “that takes place between the time that the system is activated with the purpose of flight and the time that the system is deactivated at the conclusion of its mission,” thereby implying that an “unmanned aircraft system” is a single item, rather than multiple aircraft vehicles).

<sup>18</sup> Because the issue you present is one of statutory interpretation, I do not address other questions outside the scope of this request, such as whether the warrantless use of an unmanned aircraft system might violate certain expectations of privacy, or whether the Virginia legislation might be preempted by federal aviation law.

Op. No. 14-054

**TAXATION: MISCELLANEOUS TAXES - OTHER PERMISSIBLE TAXES**

In order to qualify for the tax exemption set forth in § 58.1-3840 for meals sold as part of a fundraising activity, the meals must be sold by the qualifying entity to raise money exclusively for nonprofit educational, charitable, benevolent, or religious purposes.

The IRS definition of “fundraising activity” is not applicable to the meals tax exemption of § 58.1-3840.

Virginia law does not limit the frequency of exempt fundraising activities described in § 58.1-3840, but it does impose a statutory cap related to frequency.

THE HONORABLE ROSS A. MUGLER  
COMMISSIONER OF THE REVENUE, CITY OF HAMPTON  
OCTOBER 3, 2014

**ISSUES PRESENTED**

Your inquiry relates to the application of the term “fundraising activity” as used in § 58.1-3840(A)(b), which provides an exemption from local excise taxes on meals sold by certain organizations for fundraising activities. You first present two scenarios and ask whether the exemption applies to the meals sold in each. You then ask whether Virginia law follows the definition of “fundraising activity” as set forth by the Internal Revenue Service; and whether availability of the exemption otherwise depends on the activity being open to the public rather than restricted to the organization’s members. You also ask whether there is a difference between “fundraising activity” and activities that occur on a regular and continuous basis when in both instances the gross proceeds are used by the organization for its nonprofit charitable or benevolent purposes.

**BACKGROUND**

In your first scenario, a qualifying organization has an ongoing activity that occurs on a regular and continuous basis and is open to the public. The gross proceeds are used by the organization for its nonprofit educational, charitable, benevolent, or religious purposes. This activity occurs at a commercial location and is in competition with nearby for-profit businesses that are required to collect the local meals tax. Your second scenario involves an organization that has an ongoing activity that occurs on a regular and continuous basis and is open only to members of the organization but not to the general public. In both scenarios, the gross proceeds are used by the organization for its nonprofit educational, charitable, benevolent, or religious purposes. You note that the same activity, if engaged in by a for-profit business, would be subject to the collection of the local meals tax. You

ask whether the selling of meals in these circumstances constitutes “fundraising activity” under § 58.1-3840(A)(b).

### RESPONSE

It is my opinion that, in order to qualify for the tax exemption afforded meals sold as part of a fundraising activity, the meals must be sold by the qualifying entity to raise money exclusively for nonprofit educational, charitable, benevolent, or religious purposes. Virginia law does not make competition with private, for-profit businesses a factor to be used in determining tax status, nor does it differentiate between activities that are open only to members and activities that are open to the public. Also, Virginia law does not limit the frequency of such activities, but it does impose a statutory cap related to frequency. Finally, the IRS definition of “fundraising activity” is not applicable. Whether a particular activity satisfies the requirements for exemption is a factual determination to be made by the commissioner of the revenue or other appropriate tax official.

### APPLICABLE LAW AND DISCUSSION

Section 58.1-3840 of the *Code of Virginia* authorizes localities, subject to certain restrictions, to impose an excise tax on, among other things, meals sold within their jurisdiction. Section 58.1-3840 further provides that no such taxes on meals may be imposed when sold or provided by

volunteer fire departments and rescue squads; nonprofit churches or other religious bodies; or educational, charitable, fraternal, or benevolent organizations, the first three times per calendar year and, beginning with the fourth time, on the first \$100,000 of gross receipts per calendar year from sales of meals (excluding gross receipts from the first three times), *as a fundraising activity*, the gross proceeds of which are to be used by such church, religious body or organization exclusively for nonprofit educational, charitable, benevolent, or religious purposes....<sup>[1]</sup>

Your inquiry involves the meaning of the term “fundraising activity” and whether meals sold under particular circumstances constitute such activity.

“Fundraising activity” is not defined in the Virginia Code. “When . . . a statute contains no express definition of a term, the general rule of statutory construction is to infer the legislature’s intent from the plain meaning of the language used.”<sup>2</sup> “Fundraising” generally means “the organized activity of raising funds (as for an institution or political cause).”<sup>3</sup> Thus, in order to qualify as a fundraising activity for purposes of exemption from the local meals tax, the meals must be sold to raise money for the qualifying entity for its use for a qualifying purpose. Whether a particular activity satisfies this condition requires a factual determination by the commissioner of the revenue or other appropriate tax official.<sup>4</sup> Accordingly, I am unable to provide a definite response to whether the exemption applies in the

situations you present. Nonetheless, I note that, in making this determination, a prior Attorney General's Opinion concluded that Virginia law requires that "[i]f there is any doubt concerning the exemption, [such] doubt must be resolved against the party claiming the exemption."<sup>5</sup>

In response to your next inquiry, I conclude that "fundraising activity" as used in § 58.1-3840 does not follow the Internal Revenue Service's application of the term.<sup>6</sup> While the terms used in Chapter 3 of Title 58.1 of the *Code Virginia*, entitled "Income Tax," "shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required,"<sup>7</sup> no similar conformity provision applies to terms used in § 58.1-3840. Thus, there is no requirement that "fundraising activity," as used in § 58.1-3840, be construed according to IRS standards.

Further, the language of § 58.1-3840(A) makes no distinction between activities that are open to the public and activities that are limited to members of the organization. Nor does the statute, in providing the exemption, refer to the frequency at which qualifying activities may occur. I also note that Virginia law does not make competition between activities of tax-exempt organizations and taxable private businesses a factor to be considered in determining whether particular activities of a tax-exempt organization should be taxed. Thus, provided the gross proceeds are used by the organization for its nonprofit charitable or benevolent purposes, nothing in § 58.1-4800 suggests there is a difference between "fundraising activity" and activities that occur on a regular and continuous basis. Rather, as discussed above, the determining factor is whether or not the activity is raising money for the qualifying entity to be used exclusively for nonprofit educational, charitable, benevolent, or religious purposes.

The availability of tax exemptions, however, as this Office expressly has stated in addressing exemptions in other contexts, "rests within the judgment of the commissioner of the revenue, after consideration of all attendant facts."<sup>8</sup>

### CONCLUSION

For the reasons stated, it is my opinion that, in order to qualify for the tax exemption afforded meals sold as part of a fundraising activity, the meals must be sold by the qualifying entity to raise money exclusively for nonprofit educational, charitable, benevolent, or religious purposes. Virginia law does not make competition with private, for-profit businesses a factor to be used in determining tax status, nor does it differentiate between activities that are open only to members and activities that are open to the public. Also, Virginia law does not limit the frequency of such activities, but it does impose a statutory cap related to frequency. Finally, the IRS definition of "fundraising activity" is not applicable. Whether a particular activity satisfies the requirements for exemption is a factual determination to be made by the commissioner of the revenue or other appropriate tax official.

<sup>1</sup> VA. CODE ANN. § 58.1-3840(A) (2013) (emphasis added).

<sup>2</sup> *Hubbard v. Henrico Ltd. P'ship*, 255 Va. 335, 340, 497 S.E.2d 335, 338 (1998) (citing *City of Va. Beach v. Flippen*, 251 Va. 358, 362, 467 S.E.2d 471, 473-74 (1996) and *Marsh v. City of Richmond*, 234 Va. 4, 11, 360 S.E.2d 163, 167 (1987)).

<sup>3</sup> MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 473 (10th ed. 1996).

<sup>4</sup> *See, e.g.*, 2013 Op. Va. Att'y Gen. 308, 309 (citing 2002 Op. Va. Att'y Gen. 338, 340; 1989 Op. Va. Att'y Gen. 338, 339). The Attorney General "refrain[s] from commenting on matters that would require additional facts[.]" 2010 Op. Va. Att'y Gen. 56, 58.

<sup>5</sup> 2002 Op. Va. Att'y Gen. 331, 335 (citing *Westminster-Canterbury v. City of Va. Beach*, 238 Va. 493, 501, 385 S.E.2d 561, 565 (1989)).

<sup>6</sup> I note that, although your request refers to an IRS definition of "fundraising activity," I can find no applicable federal or statutory definition of the term. Rather, the basis of your inquiry appears to come from the guidance IRS provides in its instructions for reporting "fundraising activity" expenses on certain tax returns. *See* INTERNAL REVENUE SERVICE, 2013 INSTRUCTIONS FOR FORM 990, RETURN OF ORGANIZATION EXEMPT FROM INCOME TAX at 59, available at <http://www.irs.gov/pub/irs-pdf/i990.pdf>.

<sup>7</sup> Section 58.1-301 (2013).

<sup>8</sup> 2002 Op. Va. Att'y Gen. 331, 336.

## OP. NO. 14-056

### ELECTIONS: GENERAL PROVISIONS AND ADMINISTRATION - STATE BOARD OF ELECTIONS

#### ELECTIONS: THE ELECTION - CONDUCT OF ELECTION; ELECTION RESULTS

The State Board of Elections ("SBE") possesses the regulatory authority to define the term "valid" as used in § 24.2-643(B) of the *Code of Virginia*.

THE HONORABLE MARK D. OBENSHAIN  
MEMBER, SENATE OF VIRGINIA  
DECEMBER 18, 2014

### ISSUE PRESENTED

You ask whether the State Board of Elections ("SBE") possesses the regulatory authority to define the term "valid" as used in § 24.2-643(B) of the *Code of Virginia*.<sup>1</sup>

### RESPONSE

It is my opinion that SBE possesses regulatory authority to define the term "valid" as used in § 24.2-643(B).

## BACKGROUND

Section 24.2-643 sets forth procedures and requirements with respect to voter identification at polling places within the Commonwealth. Since 2012, the statute has provided that a voter must present acceptable identification in order to be eligible to cast a nonprovisional ballot.<sup>2</sup> In 2013, the General Assembly amended the statute to provide that only certain photo identification is acceptable to satisfy the voter identification requirement: *inter alia*, a valid Virginia driver's license, a valid United States passport, a valid student photo identification, or a valid employee photo identification.<sup>3</sup> The amendment, however, does not define the term "valid." Prior to implementing the photo identification requirement, which became effective July 1, 2014, the SBE promulgated a regulation defining the term "valid." You inquire whether the SBE possesses the authority to define the term via regulation.

## APPLICABLE LAW AND DISCUSSION

The SBE is an administrative agency of the Commonwealth that is authorized to operate in accord with its enabling legislation.<sup>4</sup> Its general responsibilities and regulatory authority are set forth in § 24.2-103, which provides, in relevant part, that it

shall supervise and coordinate the work of the county and city electoral boards and of the registrars to obtain uniformity in their practices and proceedings and legality and purity in all elections. It shall make rules and regulations and issue instructions and provide information consistent with the election laws to the electoral boards and registrars to promote the proper administration of election laws.

As the language of the section indicates, the SBE is not directly responsible for the implementation of election laws; instead, those laws are implemented at the local level by electoral boards and general registrars in each of Virginia's 133 localities.<sup>5</sup> Pursuant to its supervisory authority, the SBE is charged with promulgating regulations and issuing guidance on the appropriate methods by which local authorities are to implement the Commonwealth's election laws. One of the primary goals of this directive is to ensure uniformity among the localities in their implementation of these laws.

To fulfill its responsibilities, the SBE is vested with broad authority to adopt reasonable regulations not inconsistent with general law.<sup>6</sup> The SBE also possesses the specific authority to issue interpretive guidance clarifying the meaning of statutes it is charged with administering.<sup>7</sup> Considered together, these powers demonstrate that the SBE may clarify the meaning of statutes through regulation in order to further its mission of ensuring uniform election procedures. In particular,

the SBE may issue regulations resolving the meaning of ambiguous terms in statutes it is charged with administering.<sup>8</sup>

The meaning of the term “valid” within the specific context of § 24.2-643 is ambiguous.<sup>9</sup> A statutory term is ambiguous if it lacks “clearness and definiteness”<sup>10</sup> or may be understood in more than one way.<sup>11</sup> While the term “valid” is used throughout the *Code of Virginia* and in some instances defined for the limited purposes of specific statutes, the *Code of Virginia* provides no general definition.<sup>12</sup> Although the term was included in prior versions of § 24.2-643, no definition of “valid” is incorporated into this section. Under the previous version of § 24.2-643,<sup>13</sup> which also contained the term “valid,” the SBE issued guidance interpreting the term.<sup>14</sup> This supports the conclusion that the term may be understood in more than one manner, and that administrative guidance is necessary to ensure a uniform application of § 24.2-643.

Because the term “valid,” as used in the context of § 24.2-643, is susceptible to more than one interpretation, binding administrative guidance ensures uniformity in local election practice. In clarifying the meaning of the term, the SBE provides uniform guidance to local election officials across the Commonwealth who review the documents presented by voters as proof of identity. In so doing, the SBE acts in accord with its statutory mandate and not in opposition to other law.<sup>15</sup> It is therefore my opinion that, in the absence of a statutory definition, the SBE has the authority to issue a regulation defining the term “valid” as used in § 24.2-643(B).<sup>16</sup>

This conclusion is further supported by the SBE’s prior practice of providing an interpretation of the term “valid” under the previous version of § 24.2-643.<sup>17</sup> The legislature is presumed to be cognizant of the agency’s practice of interpreting statutes it is tasked with administering and enforcing.<sup>18</sup> Because the legislature amended § 24.2-643 without either providing a definition for the term “valid,” or prohibiting the SBE from further defining this term, which SBE previously had defined, it is my opinion that the SBE has not been deprived of its authority to continue its established practice of defining the term.<sup>19</sup>

### CONCLUSION

Accordingly, for the reasons expressed above, it is my opinion that SBE possesses regulatory authority to define the term “valid” as used in § 24.2-643(B).

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<sup>1</sup> Your request also asks whether the definition of “valid” adopted by the Board in June 2014 is consistent with state law and a proper exercise of its regulatory authority. Because the particular definition referenced in your request was amended by SBE in August 2014 and is no longer in effect, that inquiry is now moot, and it will not be addressed in this opinion. See 2005 Op. Va. Att’y Gen. 84, 85 (declining to opine about a possible conflict of interest arising from certain payments from a locality to a public defender’s office because such payments are not legally authorized, thus making the question moot). See

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*also Elizabeth River Crossings v. Meeks*, 286 Va. 286, 749 S.E.2d 176 (2013) (Court declining to rule on an issue because it had been rendered moot by the Court's decision).

<sup>2</sup> See 2012 Va. Acts chs. 838 & 839.

<sup>3</sup> See 2013 Va. Acts ch. 725. In its amended form, § 24.2-643(B) provides specifically that

The [election] officer shall ask the voter to present any one of the following forms of identification: his valid Virginia driver's license, his valid United States passport, or any other photo identification issued by the Commonwealth, one of its political subdivisions, or the United States; any valid student identification card containing a photograph of the voter and issued by any institution of higher education located in the Commonwealth; or any valid employee identification card containing a photograph of the voter and issued by an employer of the voter in the ordinary course of the employer's business.

<sup>4</sup> See *Hurt v. Caldwell*, 222 Va. 91, 97, 279 S.E.2d 138, 142 (1981); *Segaloff v. City of Newport News*, 209 Va. 259, 261, 163 S.E.2d 135, 137 (1968). The SBE is assisted in its operations by the Department of Elections. See VA. CODE ANN. § 24.2-103(A) (Supp. 2014).

<sup>5</sup> See §§ 24.2-109 (2011) (setting forth the general powers and duties of local electoral boards); 24.2-114 (Supp. 2014) (setting forth the general powers and duties of local registrars).

<sup>6</sup> See *Volkswagen of Am., Inc. v. Smit*, 279 Va. 327, 340-341, 689 S.E.2d 679, 687 (2010); *Judicial Inquiry & Review Comm'n v. Elliot*, 272 Va. 97, 115, 630 S.E.2d 485, 494 (2006) ("When an administrative body is delegated rulemaking authority by the General Assembly, it is given broad discretion to determine the procedures it will employ in carrying out its legislative mandate, so long as the rules it adopts are not inconsistent with the authority of the statutes that govern it or with principles of due process."); see also § 24.2-103(A) (providing that regulations issued by the SBE shall not conflict with general law).

<sup>7</sup> See VA. CODE ANN. §§ 2.2-4001 (2014); 2.2-4008 (2014); 24.2-103(A); *Jackson v. W.*, 14 Va. App. 391, 399-400, 419 S.E.2d 385, 390 (1992); 2009 Op. Va. Att'y Gen. 94, 99.

<sup>8</sup> Cf. 1974-75 Op. Va. Att'y Gen. 237, 238 (citing *Commonwealth v. Greyhound Lines, Inc.*, 206 Va. 550, 145 S.E.2d 206 (1965)) ("If a statute is ambiguous and construction is necessary an agency charged with its administration may interpret the statute."). I note, however, that an agency may not interpret a statutory term in a manner inconsistent with its plain meaning. See *Superior Steel Corp. v. Commonwealth*, 147 Va. 202, 206, 136 S.E. 666, 667 (1927).

<sup>9</sup> In determining whether the meaning of an undefined term within a statute is plain, courts look to the context in which the term appears. See *Protestant Episcopal Church v. Truro Church*, 280 Va. 6, 21, 694 S.E.2d 555, 563 (2010).

<sup>10</sup> *Ayres v. Harleysville Mut. Casualty Co.*, 172 Va. 383, 393, 2 S.E.2d 303, 307 (1939).

<sup>11</sup> *Lincoln National Life Ins. Co. v. Commonwealth Corrugated Container Corp.*, 229 Va. 132, 136-37, 327 S.E.2d 98, 101 (1985).

<sup>12</sup> For examples of this type of limited definition, see, e.g., VA. CODE ANN. § 2.2-3301 (2011) (acts, business transactions, legal proceedings, etc. on holidays valid); VA. CODE ANN. § 8.01-328.1 (Supp. 2014); VA. CODE ANN. § 22.1-298.1 (Supp. 2014) (regulations governing licensure); VA. CODE ANN. § 40.1-31 (2013) (assignment of wages and salaries; requirements); VA. CODE ANN. § 55-122 (2012) (acts of notaries public, etc., who have held certain other offices); VA. CODE ANN. § 64.2-1604 (2012) (validity of power of attorney).

<sup>13</sup> See 2012 Va. Acts chs. 838 & 839.

<sup>14</sup> See VA. DEP'T OF ELECTIONS, VOTER IDENTIFICATION CHART (former agency guidance, rev. 9/12) (available upon request of the agency) (defining "valid" as "unexpired or expired with 30 days prior to the election").

<sup>15</sup> See 2014 Op. Va. Att'y Gen. No. 13-111, available at <http://www.oag.state.va.us/index.php/citizen-resources/opinions?id=61#september> (stating that the SBE has discretion to act in the absence of a statutory mandate or prohibition providing otherwise).

<sup>16</sup> I note that "Virginia courts . . . afford great weight to the interpretation of a statute by the state agency charged with its enforcement." 2011 Op. Va. Att'y Gen. 143, 145 (citing *Forst v. Rockingham Poultry Mktg. Coop., Inc.*, 222 Va. 270, 276, 279 S.E.2d 400, 403 (1981); *Dep't of Taxation v. Progressive Cmty. Club*, 215 Va. 732, 739, 213 S.E.2d 759, 763 (1975)).

<sup>17</sup> See *supra* note 14.

<sup>18</sup> See *Peyton v. Williams*, 206 Va. 595, 600, 145 S.E.2d 147, 151 (1965).

<sup>19</sup> Cf. *Gomes v. City of Richmond*, 220 Va. 449, 258 S.E.2d 582 (1979) (noting that "legislative acquiescence in administrative practices may be considered as evidence of legislative intent").

## OP. NO. 14-059

### WILLS, TRUSTS AND FIDUCIARIES: INVENTORIES AND ACCOUNTS

Of the classes of parties mentioned in § 64.2-1302, only the claims of a creditor must exceed the value of the estate in order to qualify for the exemptions.

What constitutes sufficient proof of a creditor's claim exceeding the value of the estate under § 64.2-1302 is a matter within the reasonable discretion of the clerk.

THE HONORABLE BRENDA S. HAMILTON  
CLERK OF COURT, CIRCUIT COURT OF THE CITY OF ROANOKE  
NOVEMBER 20, 2014

### ISSUES PRESENTED

You inquire regarding the authority of a circuit court clerk, under § 64.2-1302 of the *Code of Virginia*, to waive inventory and settlement filing requirements associated with the administration of a decedent's estate. You specifically ask whether heirs, beneficiaries, and creditors, in order to qualify for the filing waiver, all must have claims that exceed the value of an estate. You further ask what proof is required to show that a person has a claim that exceeds the value of the estate.

### RESPONSE

It is my opinion that only the claims of a creditor seeking qualification for the filing waiver must exceed the value of the estate in order for the exemptions provided in § 64.2-1302 to apply. Further, it is my opinion that what constitutes sufficient proof of a claim exceeding the value of the estate is a matter within the discretion of the clerk.

### APPLICABLE LAW AND DISCUSSION

Generally, as part of qualifying as a personal representative or other fiduciary responsible for the administration of a decedent's estate, the person seeking qualification must file an inventory of the decedent's assets<sup>1</sup> and a settlement of the account.<sup>2</sup> The General Assembly, however, has provided an exemption from these filing requirements for estates below a certain value. Specifically, § 64.2-1302 of the *Code of Virginia* provides that

When a decedent's personal estate passing by testate or intestate succession does not exceed \$25,000 in value and an heir, beneficiary, or creditor *whose claim exceeds the value of the estate* seeks qualification, the clerk of the circuit court shall waive the inventory under § 64.2-1300 and the settlement under § 64.2-1206. This section shall not apply if the decedent died owning any real estate over which the person seeking qualification would have the power of sale.<sup>[3]</sup>

You first ask whether any named class of person seeking qualification, whether heir, beneficiary, or creditor, must have a claim that exceeds the value of the estate. A 1987 Opinion of this Office directly addresses this question.<sup>4</sup> That Opinion construed identical language contained in a predecessor statute to § 64.2-1302. In interpreting the earlier statute, this Office stated that, “[w]hile the statute is ambiguous on its face, it must be afforded that interpretation which gives it a rational and sensible effect.”<sup>5</sup> The Opinion then reasons that, because neither an heir nor a beneficiary can claim more than the entire value of a decedent's estate, “the phrase ‘whose claim exceeds the value of the estate’ applies only to a creditor.”<sup>6</sup> I similarly conclude that the language cannot apply to heirs and beneficiaries. Moreover, although the provision at issue has been recodified since the issuance of the 1987 Opinion, the General Assembly otherwise has not amended the operative language to warrant a different conclusion.<sup>7</sup> Thus, for estates valued under \$25,000, waiver of the inventory and settlement filing requirements is available to heirs and beneficiaries irrespective of the value of their share of the estate, but a creditor must have a claim that exceeds the value of the estate.

You next ask what proof the creditor must present in order to establish that his claim exceeds the value of the estate.<sup>8</sup> The 1987 Opinion also provides guidance with respect to this inquiry. Although the Opinion discusses the proof required to establish that the estate, rather than a claim, does not exceed the statutory limit,<sup>9</sup> the conclusions of the prior opinion are restated here. Because the statute does not direct what proof the creditor must offer, it is my opinion that such required evidence is a matter within the discretion of the clerk, and should consist of whatever is reasonable and credible under the circumstances.<sup>10</sup>

## CONCLUSION

Accordingly, it is my opinion that only a creditor seeking qualification must have a claim exceeding the value of the estate in order for the exemptions provided in § 64.2-1302 to apply. Further, it is my opinion that what constitutes sufficient proof of a claim exceeding the value of the estate is a matter within the reasonable discretion of the clerk.

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<sup>1</sup> See VA. CODE ANN. § 64.2-1300 (2012).

<sup>2</sup> See § 64.2-1206 (2012).

<sup>3</sup> Section 64.2-1302 (Supp. 2014) (emphasis added).

<sup>4</sup> 1987-88 Op. Va. Att’y Gen. 360 (construing former § 26-12.3, predecessor statute to § 64.2-1302).

<sup>5</sup> *Id.* at 360 (citing *Whitlock v. Hawkins*, 105 Va. 242, 267, 53 S.E. 401, 409 (1906)).

<sup>6</sup> *Id.*

<sup>7</sup> “The legislature is presumed to have had knowledge of the Attorney General’s interpretation of the statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General’s view.” *Beck v. Shelton*, 267 Va. 482, 492, 593 S.E.2d 195, 200 (2004) (quoting *Browning-Ferris, Inc. v. Commonwealth*, 225 Va. 157, 161-62, 300 S.E.2d 603, 605-06 (1983)). The only substantial change to the statute since the issuance of the prior Opinion is the value of the estate that triggers the waiver. Former § 26-12.3 applied to estates valued at no more than \$5,000. See 1987-88 Op. Va. Att’y Gen. 360. In 2014, the amount was raised from \$15,000 to \$25,000. 2014 Va. Acts ch. 532.

<sup>8</sup> Because I conclude that only a creditor can have a claim that exceeds the value of the estate, only a creditor would be required to provide proof that the claim actually exceeds the value of the estate.

<sup>9</sup> 1987-88 Op. Va. Att’y Gen. at 361.

<sup>10</sup> See *id.* (suggesting a sworn statement from an heir concerning the value of the estate may be acceptable as proof of the value of the estate).

### OP. NO. 14-061

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

#### CONSTITUTION OF VIRGINIA: BILL OF RIGHTS - DUE PROCESS OF LAW; OBLIGATION OF CONTRACTS; TAKING OR DAMAGING OF PRIVATE PROPERTY; PROHIBITED DISCRIMINATION; JURY TRIAL IN CIVIL CASES.

As a prerequisite for approving a site plan and issuing a building permit, a local governing body may require dedication of land for street widening and construction of drainage improvements only when the need for such conditions is generated by the proposed development.

THE HONORABLE LIONELL SPRUILL, SR.  
MEMBER, HOUSE OF DELEGATES  
NOVEMBER 3, 2014

### **ISSUE PRESENTED**

You inquire whether, as a prerequisite to approving a site plan and issuing a building permit, a local governing body may require a landowner to dedicate land for a street widening and to construct certain drainage improvements.

### **RESPONSE**

It is my opinion that a local governing body may require dedication of land for street widening and construction of drainage improvements only when the need for such conditions is generated by the proposed development. Whether that standard has been met in any particular situation is a question of fact that this Office does not determine.

### **BACKGROUND**

According to facts provided by you and the City of Chesapeake, a constituent is seeking a building permit to construct a 4,000 square-foot office warehouse on a parcel of land that is zoned M-1 Industrial. The anticipated use would be for storage and distribution of industrial steel beams, plates, and other steel products. The property has been zoned M-1 for approximately thirty years, and the proposed use is permitted under present zoning. Although the property will not be subdivided for the proposed use, Chesapeake requires approval of a site plan before a building permit will be issued.

A two-lane street ends at approximately the northern edge of the property, and the street in front of and to the south of the property is single-lane. It comes to a dead end a short distance to the south. The site plan for the proposed development has the proposed vehicular entrance to the property near the northern edge, close to or adjacent to the two-lane street, and the anticipated vehicular use generated by the property would be along the two-lane street, not in a southerly direction along the single-lane, dead-end street.

In addition, on the front of the property, directly adjacent to the single-lane street, there is a deep drainage ditch. Because the drainage ditch prevents driving on the shoulder, the single-lane street is wide enough for only one car. Across the street, there is a residential subdivision, with houses constructed on several of the lots, and with the remaining lots to be developed in the future. The residential subdivider was not required to dedicate any property for street widening. The existing homes are situated toward the south end of the residential subdivision; accordingly, traffic generated by those houses uses the single-lane street until it reaches the two-lane street.

As conditions for approval of the site plan, Chesapeake is requiring the property owner to dedicate a fifteen-foot strip running the length of the property for street widening and a ten-foot strip as a drainage easement. Because the street dedication strip contains a deep drainage ditch, Chesapeake also is requiring the owner to relocate and to reconstruct the drainage ditch farther back on the property. Without

the owner agreeing to the street dedication and relocation of the drainage ditch, Chesapeake will not approve the site plan and will not issue a building permit.

### APPLICABLE LAW AND DISCUSSION

Generally, “[t]he legislative branch of a local government in the exercise of its police power has wide discretion in the enactment and amendment of zoning ordinances. Its action is presumed to be valid so long as it is not unreasonable and arbitrary.”<sup>1</sup> Also, “[a]s a general rule, the decision whether to . . . improve a particular street is a matter within the legislative discretion of the governing body of a municipality. In the absence of fraud, collusion, or a clear abuse of discretion, the municipality’s decision will not be disturbed by the courts.”<sup>2</sup>

Nevertheless, such local power is limited. First, in determining the legislative powers of local governing bodies, Virginia follows the Dillon Rule of strict construction,<sup>3</sup> which states that local governing bodies “have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.”<sup>4</sup> Accordingly, if no delegation from the legislature can be found to authorize the enactment of a local ordinance or act, that ordinance or act is void.<sup>5</sup> This Office consistently has opined that when the legislature has created an express grant of authority, that authority exists only to the extent specifically granted.<sup>6</sup> Second, local authority is subject to constitutional constraints: the scenario you present implicates the constitutional protection that private property may not be taken for public use without just compensation.<sup>7</sup>

The Uniform Statewide Building Code requires compliance with all applicable local laws and ordinances to obtain a building permit.<sup>8</sup> Correspondingly, as part of its zoning power, localities may require submission and approval of a site plan as a condition for issuing a building permit.<sup>9</sup> A locality is statutorily authorized to impose requirements for site plan approval to the same extent as authorized for subdivision approval.<sup>10</sup> A locality is authorized to condition approval of a site plan on compliance with local regulations that provide

2. For the coordination of streets within and contiguous to the subdivision with other existing or planned streets within the general area as to location, widths, grades and drainage . . .
3. For adequate provisions for drainage and flood control . . .
4. For the extent to which and the manner in which streets shall be graded, graveled or otherwise improved and water and storm and sanitary sewer and other public utilities or other community facilities are to be installed;
5. For the acceptance of dedication for public use of any right-of-way located within any subdivision or section thereof, which has

constructed or proposed to be constructed within the subdivision or section thereof, any street, curb, gutter, sidewalk, bicycle trail, drainage or sewerage system, waterline as part of a public system or other improvement dedicated for public use, and maintained by the locality, the Commonwealth, or other public agency, and for the provision of other site-related improvements required by local ordinances for vehicular ingress and egress . . . .<sup>[11]</sup>

In applying these provisions, this Office has determined that localities may impose reasonable construction and improvement requirements for streets and water and sewer systems.<sup>12</sup> This Office additionally has found that the enabling statutes authorize a locality to impose reasonable dedication requirements for streets and public facilities.<sup>13</sup>

While Chesapeake may withhold a building permit until a valid site plan is approved, it may deny approval only within statutory and constitutional limits. Decisions of the Supreme Court of Virginia establish that a locality's general legal authority to condition approval of a site plan on the landowner's provision of adequate drainage and/or dedication of property for right-of-way is limited by application of the Dillon Rule and the constitutional guarantees due process and just compensation. Thus, in order for a locality to impose the authorized conditions, the requested improvements must be necessitated by the proposed development.<sup>14</sup>

For example, in *James City County v. Rowe*,<sup>15</sup> the locality rezoned numerous properties on approach streets to a large amusement park that was to be constructed. Under the new zoning, property owners were required to dedicate fifty-five feet of frontage for right-of-way widening. The purpose of the right-of-way dedication was to accommodate anticipated heavy traffic to the amusement park. The Supreme Court specifically addressed

whether a local governing body has the power to enact a zoning ordinance that requires individual landowners, as a condition to the right to develop their parcels, to dedicate a portion of their fee for the purpose of providing a street, the need for which is substantially generated by public traffic demands rather than by the proposed development.<sup>[16]</sup>

Finding no statutory authority for the actions of the locality,<sup>17</sup> the Court further concluded that

[T]he Constitution of Virginia expressly and unequivocally provides "that the General Assembly shall not pass any law . . . whereby private property shall be taken or damaged for public uses, without just compensation." The dedication requirement . . . offends that constitutional guarantee, and we hold that it is invalid.<sup>[18]</sup>

The Court took a similar approach in a subsequent case, *Cupp v. Board of Supervisors*.<sup>19</sup> In this case, the Cupps operated a nursery on land they owned. Although the nursery initially was permitted as a use-by-right, this use later changed to a special exception use, whereby the nursery enjoyed grandfathered status until the owners sought to replace or enlarge any building. When the Cupps filed a special exception application to so build, the county required them to construct a deceleration/right turn lane and to dedicate 100 feet of right-of-way upon which they were required to build a service street. The Court, applying the Dillon Rule, held that even though the enabling statute<sup>20</sup> afforded localities wide latitude in enacting zoning regulations and provisions regarding special exception and use permits, it did not grant “the power to require a citizen to turn land over to the county and build streets for the benefit of the public.”<sup>21</sup> The Court further stated that even if a local governing body were authorized to impose such conditions, it could only do so where the dedication and construction requirements were related to a problem generated by the use of the subject property.<sup>22</sup> The *Cupp* Court reasoned that requiring off-site expenditures not directly related to development may constitute an unconstitutional taking of property without just compensation.<sup>23</sup>

In both cases, the Supreme Court also considered the scope of a locality’s general police power in determining whether the locality had the authority to impose the challenged conditions. The Court articulated its position as follows:

“The county contended that under its general police power, it could require construction of the street. We said the police power, while flexible, could not stretch that far because if it did, “no property right, indeed, no personal right, could co-exist with it.” We stated that as a general proposition, when the government takes property from a citizen it should pay for it. We held as follows: “The Board cites nothing in the constitution, enabling statutes, or case law of Virginia which empowers the sovereign to require private landowners, as a condition precedent to development, to construct or maintain public facilities on land owned by the sovereign, when the need for such facilities is not substantially generated by the proposed development. The private money necessary to fund the performance of such requirements is ‘property’, and we hold that such requirements violate the constitutional guarantee that ‘no person shall be deprived of his life, liberty, or property without due process of law.’ Constitution of Virginia, Art. I, § 11.”<sup>[24]</sup>

In summary, while Chesapeake has authority to require adequate drainage and/or dedication of right-of-way as conditions of approving a site plan, and while its decisions in such matters are presumed to be valid, its power to withhold a building permit until a site plan is approved is subject to the Dillon Rule and the

constitutional limits discussed above. To the point, such conditions may be imposed only if they are reasonably necessitated by the proposed development. If they are not, they exceed statutory authority and may constitute an unconstitutional taking of private property without just compensation. Whether these limits have been exceeded in any particular case is a question of fact to be determined by the appropriate authorities and is therefore beyond the scope of an official Opinion of this Office.<sup>25</sup>

## CONCLUSION

Accordingly, it is my opinion that a local governing body, when approving a building permit, may require drainage improvements and dedication of land for street widening, but only when the need for the improvements is generated by the proposed development. Whether that standard has been met in any particular situation is a question of fact this Office cannot determine.

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<sup>1</sup> *Cupp v. Bd. of Supvrs.*, 227 Va. 580, 596, 318 S.E.2d 407, 415 (1984) (quoting *Bd. of Supvrs. v. Carper*, 200 Va. 653, 660, 107 S.E.2d 390, 395 (1959)).

<sup>2</sup> *City of Staunton v. Cash*, 220 Va. 742, 747, 263 S.E.2d 45, 48 (1980) (citing *Appalachia v. Mainous*, 121 Va. 666, 678, 93 S.E. 566, 570 (1917) and *City of Lynchburg v. Peters*, 145 Va. 1, 13, 133 S.E. 674, 678 (1926)).

<sup>3</sup> *Richmond v. Confrere Club of Richmond, Inc.* 239 Va. 77, 79, 387 S.E.2d 471, 473 (1990).

<sup>4</sup> *Sinclair v. New Cingular Wireless PCS, LLC*, 283 Va. 567, 576, 727 S.E.2d 40, 44 (2012) (internal quotation marks omitted).

<sup>5</sup> *Id.* (citing *Marble Techs., Inc. v. City of Hampton*, 279 Va. 409, 416-17, 690 S.E.2d 84, 88 (2010)).

<sup>6</sup> *Cf. e.g.*, 2010 Op. Va. Att’y Gen. 87, 89 n.3; 2010 Op. Va. Att’y Gen. 10, 11; 2002 Op. Va. Att’y Gen. 109, 111; 1992 Op. Va. Att’y Gen. 145, 146.

<sup>7</sup> U.S. CONST. amend. IV; VA. CONST. art. I, § 11.

<sup>8</sup> *See* USBC § 110.1. While the General Assembly has charged the State Board of Housing and Community Development with promulgating a Uniform Statewide Building Code, VA. CODE ANN. § 36-98 (2011), the enforcement of the promulgated regulations is “the responsibility of the local building department.” Section 36-105(A) (Supp. 2014). The Uniform Statewide Building Code supersedes local regulations, § 36-98, and no provision of the Building Code authorizes a locality to require a landowner to dedicate land or construct off-site street improvements under any circumstances.

<sup>9</sup> VA. CODE ANN. § 15.2-2286 (Supp. 2014).

<sup>10</sup> Section 15.2-2246 (2012) (“Site plans or plans of development which are required to be submitted and approved in accordance with subdivision A 8 of § 15.2-2286 shall be subject to the provisions [governing subdivision ordinances,] §§ 15.2-2241 through 15.2-2245, mutatis mutandis.”).

<sup>11</sup> Section 15.2-2241(A) (2012)

<sup>12</sup> *See* 1987-88 Op. Va. Att’y Gen. 204, 206 (citing 1985-86 Op. Va. Att’y Gen. 83, 86 n.2; 1981-82 Op. Va. Att’y Gen. 106; 1973-74 Op. Va. Att’y Gen. 342).

<sup>13</sup> *Id.* (citing 1985-86 Op. Va. Att’y Gen. at 85; 1982-83 Op. Va. Att’y Gen. 165; 1978-79 Op. Va. Att’y Gen. 165; 1973-74 Op. Va. Att’y Gen. at 343; 1966 Op. Va. Att’y Gen. 272. There have been no legislative changes evincing that this interpretation is incorrect; the General Assembly is presumed to

have had knowledge of the Attorney General's interpretation of statutes, and its failure to make corrective amendments evinces legislative acquiescence in the Attorney General's view. *See Beck v. Shelton*, 267 Va. 482, 492, 593 S.E.2d 195, 200 (2004) and cases cited therein.

<sup>14</sup> *See* 1985-86 Op. Va. Att'y Gen. 83, 85 (requirement for dedication for right-of-way or other public use must be related to the need generated, in whole or in part, by the proposed development, as opposed to traffic demands unrelated to the proposed development), *accord* 1984-85 Op. Va. Att'y Gen. 296; 1982-83 Op. Va. Att'y Gen. 165 (in the absence of a finding that a need for a right-of-way dedication was generated by a proposed development, an ordinance requiring such dedication was invalid); 1978-79 Op. Va. Att'y Gen. 255, 256 ("subdivider cannot be required, as a precondition to subdivision plat approval, to dedicate land for improvements, the need for which is not substantially generated by the development itself"). I note that certain other related statutes, while not directly applicable here, explicitly tie the power of localities to require certain improvements or expenditures only to improvements or expenditures necessitated by the proposed development. *See, e.g.*, VA. CODE ANN. §§ 15.2-2242(A)(5) (2012) ("A subdivision ordinance may include . . . [in several identified localities, not including Chesapeake] provisions for payment by a subdivider or developer of land of a pro rata share of the cost of reasonable and necessary street improvements, located outside the property limits of the land owned or controlled by him but serving an area having *related traffic needs to which his subdivision or development will contribute* . . ."); 15.2-2319 (authorizing "impact fees" for street improvements, but only when the improvements "*benefit the new development.*") (emphasis added).

<sup>15</sup> 216 Va. 128, 216 S.E.2d 199 (1975).

<sup>16</sup> *Id.* at 138, 216 S.E.2d at 208.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> 227 Va. 580, 318 S.E. 2d 407 (1984).

<sup>20</sup> VA. CODE ANN. § 15.1-491 (predecessor statute to §§ 15.2-2280 through 15.2-2283 (2012)).

<sup>21</sup> *Cupp*, 227 Va. at 594, 318 S.E.2d at 414 (quoting *Hylton Enters., Inc. v. Bd. of Supvrs*, 220 Va. 435, 440, 258 S.E.2d 577, 581 (1979)).

<sup>22</sup> *Id.* at 594, 318 S.E.2d at 414.

<sup>23</sup> *Id.* at 595, 318 S.E.2d at 414-15 (quoting *Bd. of Supvrs. v. Rowe*, 216 Va. 128, 138-139; 216 S.E.2d 199 (1975) (emphasis added in *Cupp*)). *See also Cash*, 220 Va. at 746, 263 S.E.2d at 48 (1980) (upholding a city's denial of a building permit under its zoning power because the improvements to the public street under consideration were necessary to "safely and conveniently accommodate the vehicular and pedestrian traffic generated in the area" where the lot was located).

<sup>24</sup> *Id.* at 595-96, 318 S.E.2d at 415 (quoting *Rowe*, 216 Va. at 139-40, 216 S.E.2d at 209).

<sup>25</sup> "The authority of the Attorney General to issue advisory opinions is limited to questions that are legal in nature." 2010 Op. Va. Att'y Gen. 56, 59 n.5. "Attorneys General consistently have declined to render official opinions on specific factual matters . . ." 2009 Op. Va. Att'y Gen. 80, 81, and n.17.

## OP. NO. 14-062

### COUNTIES, CITIES AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING - ZONING

Section 15.2-2306 of the *Code of Virginia* allows a locality to require - as a condition of developing property in an area of known historical or architectural significance -

documentation, reasonable under the circumstances, that the development will preserve or accommodate historical or archaeological resources. Whether an archaeological survey is necessary to meet the reasonable documentation requirement is a question of fact about which the Attorney General can express no opinion.

THE HONORABLE BRENDA L. POGGE  
MEMBER, HOUSE OF DELEGATES  
NOVEMBER 21, 2014

### ISSUE PRESENTED

You inquire whether § 15.2-2306 of the *Code of Virginia* grants localities the authority to require a property owner to procure an archaeological survey to determine the existence of historic or archaeological resources on his property.<sup>1</sup>

### RESPONSE

It is my opinion that § 15.2-2306 allows a locality to require - as a condition of developing property in an area of known historical or architectural significance - documentation, reasonable under the circumstances, that the development will preserve or accommodate historical or archaeological resources. Whether an archaeological survey is necessary to meet the reasonable documentation requirement is a question of fact about which this Office can express no opinion.

### APPLICABLE LAW AND DISCUSSION

Historic areas and sites have long been recognized in Virginia as important resources worthy of protection. Indeed, the Constitution of Virginia states, “it shall be the policy of the Commonwealth to conserve, develop, and utilize . . . its historical sites and buildings.”<sup>2</sup> The ability of localities to create historic districts as provided by § 15.2-2306(A)(1) has been recognized repeatedly by the Supreme Court of Virginia.<sup>3</sup>

Consistent with this policy, the General Assembly has granted localities wide powers to ensure historic and archaeological preservation. For instance, § 15.2-2306 authorizes localities to create historic districts and to control development in such areas in order to preserve historical, architectural, archaeological, or cultural resources:

A. 1. Any locality may adopt an ordinance setting forth . . . buildings or structures within the locality having an important historical, architectural, archaeological, or cultural interest, any historic areas within the locality as defined by § 15.2-2201 and areas of unique architectural value located within designated conservation, rehabilitation or redevelopment districts, amending the existing zoning ordinance and delineating one or more historic

districts . . . . A governing body may provide in the ordinance that the applicant must submit documentation that any development in an area of the locality of known historical or archaeological significance will preserve or accommodate the historical or archaeological resources.

The term “historic area” is defined as “an area containing one or more buildings or places in which historic events occurred or having special public value because of notable architectural, archaeological, or other features relating to the cultural or artistic heritage of the community, of such significance to warrant conservation and preservation.” Thus, it encompasses archaeological matters as well as architectural and historical matters.<sup>4</sup>

Section 15.2-2306(A)(1), quoted above, explicitly allows localities to require “documentation that any development in an area . . . of known historical or archaeological significance will preserve or accommodate the historical or archaeological resources.” The remaining questions, then, are whether an archaeological survey report is the type of documentation that reasonably may be required, and the circumstances under which it may be required.

Applying the standard of review set forth by statute,<sup>5</sup> the Supreme Court of Virginia has held that “our review of the decision of a local governing body relating to a historic district is limited by statute to ‘whether that decision is arbitrary and capricious and constitutes an abuse of discretion’ or is ‘contrary to law’ . . . . The decision of the governing body is presumed to be correct . . . . The party challenging the decision has the burden of proving ‘it is clearly unreasonable, arbitrary or capricious, and that it bears no reasonable or substantial relation to the public health, safety, morals, or general welfare.’”<sup>6</sup> Nonetheless, the Court has overturned a local historic preservation restriction when the locality failed to meet its burden of showing the restriction to be reasonable.<sup>7</sup>

Thus, the validity of any particular requirement imposed by a locality in connection with historic preservation is a question of reasonableness, and therefore one of fact, to be measured by the legal standards articulated by statute and the cases cited here. While some documentation may be required to demonstrate that the development will preserve resources of historical or archaeological significance, the requirement may not be unreasonable or arbitrary or capricious, and it must bear a substantial relation to the historic, archaeological, or historical interest in question. A party who is aggrieved by a local decision related to historic preservation, be it the requirement of an archaeological survey or any other decision or requirement, has a right of appeal to Circuit Court.<sup>8</sup>

## CONCLUSION

Accordingly, it is my opinion that § 15.2-2306 allows a locality to require certain documentation as a condition of developing property that is in a designated area of known historical or archaeological significance. Any documentation that may be required is subject to a standard of reasonableness. Whether an archaeological survey is a reasonable requirement for this type of documentation is a question of fact depending on the particular circumstances at hand, on which I can express no general opinion.

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<sup>1</sup> From the question presented, this inquiry entails only the scope of a locality's authority involving land within a designated historic district. Consequently, no opinion is expressed or implied herein about a locality's authority to preserve and protect historic, architectural, or archaeological resources that are not located in a historic district.

<sup>2</sup> VA. CONST. art. XI, § 1.

<sup>3</sup> See, e.g., *Bd. of Spvrs. v. Rowe*, 216 Va. 128, 216 S.E.2d 199 (1975); *Bell v. City Council*, 224 Va. 490, 297 S.E.2d 810 (1982); *Covel v. Town of Vienna*, 280 Va. 151, 694 S.E.2d 609 (2010).

<sup>4</sup> VA. CODE ANN. § 15.2-2201 (Supp. 2014).

<sup>5</sup> Section 15.2-2306(A)(3) (2012).

<sup>6</sup> *Covel*, 280 Va. at 157, 694 S.E.2d at 613.

<sup>7</sup> *Norton v. City of Danville*, 268 Va. 402, 602 S.E.2d 126 (2004).

<sup>8</sup> Section 15.2-2306(A)(3).

## OP. NO. 14-064

### UNITED STATES CONSTITUTION: RELIGIOUS AND POLITICAL FREEDOM (FREEDOM OF SPEECH)

It is constitutionally impermissible for Isle of Wight County to impose an absolute prohibition on political booths at the County Fair.

It is presumptively unconstitutional for Isle of Wight County to charge a higher fee for political booths than for other booths at the County Fair, unless justified by a compelling governmental interest, and unless the County's action is narrowly drawn to meet that interest.

THE HONORABLE RICHARD L. MORRIS  
MEMBER, HOUSE OF DELEGATES  
DECEMBER 18, 2014

## ISSUES PRESENTED

You inquire whether Isle of Wight County constitutionally may prohibit political organizations and candidates from reserving booth space at the Isle of Wight County Fair or may impose on political booths a fee greater than that charged other participating individuals or organizations.

## RESPONSE

It is my opinion that, under the facts presented, an absolute prohibition on political booths is not constitutionally permissible and that charging a higher fee for such booths than others is presumptively unconstitutional unless justified by a compelling governmental interest, and unless it is narrowly drawn to meet that interest.

## BACKGROUND

Based upon the information you provided, I understand that the Isle of Wight County Fair (the “Fair”) is sponsored and financed, at least in part, by Isle of Wight County (the “County”), and held on County property. The Board of Supervisors delegated authority to conduct the Fair to the Fair Committee (the “Committee”), which is assisted by County employees. Between 25,000 and 50,000 people attend the Fair each year, and it is the largest event held in the County.

You further explain that in the past nonprofit and governmental organizations have applied to operate booths at the Fair, which are designated spaces from which to “discuss and disseminate . . . information to the public.” These booths are grouped together in an area on the fairgrounds and have included the Virginia Department of Transportation, the Red Cross, various religious organizations, the NAACP, elected officials, candidates for elected office, and political organizations. Any organization could obtain a booth for a fee of \$25. You state that in 2013 the Committee increased the fee for only the political booths to \$750. In 2014, the Committee prohibited any political booths.

Attached to your request is a letter you received from the Chairman of the County’s Board of Supervisors, in which the County explains the decision to prohibit political booths. According to this correspondence, the County’s decision was based on complaints from commercial vendors who had booths near political booths. These vendors complained that they lost revenue because Fair patrons appeared to avoid, not only the political booths, but also other booths in the same area. In addition, Fair volunteers reported that some political booth attendants set up signs beyond their allotted space, and Fair patrons complained that they felt harassed, annoyed, or intimidated by political booth attendants. The letter does not discuss the 2013 decision to increase the fees applicable to political booths.

## APPLICABLE LAW AND DISCUSSION

Freedom of speech is protected by the First Amendment to the United States Constitution,<sup>1</sup> and political speech is at the core of the protections offered by the First Amendment.<sup>2</sup> While the First Amendment limits the restrictions governments may impose on the freedom of speech, it “does not guarantee access to property simply because it is owned or controlled by the government.”<sup>3</sup> Rather, the

constitutionality of a particular restriction on speech depends, in the first instance, on the nature of the property at issue.<sup>4</sup> The Supreme Court of the United States recognizes two main categories of property for purposes of public access for expressive activities: an area may be either a public forum or a nonpublic forum.<sup>5</sup>

A public forum may be one traditionally open to the public for the expression of ideas, such as a park or streets,<sup>6</sup> or a facility that, while not historically deemed a public forum, has been made a public forum by the government's opening the area for use by the public for assembly and communication and discussion of ideas, even if on a limited basis.<sup>7</sup> The government's ability to deny access to a public forum is limited by the First Amendment,<sup>8</sup> and the government generally may not restrict access to a public forum based on the content of the speech.<sup>9</sup> A nonpublic forum, on the other hand, is "[p]ublic property which is not by tradition or designation a forum for public communication [and] is governed by different [First Amendment] standards."<sup>10</sup>

A threshold issue, therefore, is whether the fairgrounds constitutes a public or nonpublic forum. Such a determination is a highly fact-specific inquiry, based on factors such as the location, purpose, and nature of the facility.<sup>11</sup> Based on the facts you provide, I conclude that, in hosting the Fair, the County is operating the fairgrounds as a public forum. Large numbers of citizens visit the Fair to gather as a community, to celebrate local achievements and happenings, to engage in commerce, and to enjoy various recreational and entertainment offerings. Vendors reserve booths to sell products and to distribute informational materials. Although the County has an understandable and reasonable interest in the orderly movement of the large crowds the Fair generates,<sup>12</sup> the County's efforts to maintain order must comply with the Constitution. Specifically, in a public forum, restrictions on the time, place, and manner of speech are valid only so long as they "are content-neutral, are narrowly tailored to serve a significant governmental interest, and leave open ample alternative channels of communication."<sup>13</sup>

You further advise that the County refuses to allow any politically affiliated group or individual, or any individual in office or running for office, to pay a fee and obtain a space to present information and discuss political views with patrons of the Fair. A regulation that bans public discourse on a specific classification of issues is a content-based restriction on speech, even where the regulation treats equally all viewpoints on those issues.<sup>14</sup> The restriction prohibits political speakers from having the same access to the forum as nonpolitical speakers. Accordingly, the described prohibition on political booths is a content-based regulation.

When government regulation of speech is based on the content of speech, the regulation will be strictly scrutinized:<sup>15</sup> "the Government bears the burden of proving the constitutionality of its actions"<sup>16</sup> and it must demonstrate that the "regulation is necessary to serve a compelling state interest and that it is narrowly

drawn to achieve that end.”<sup>17</sup> Such content-based restrictions on speech have been permitted to stand in very few, and only in rather extreme, situations.<sup>18</sup> In its letter, the Committee asserts that the purpose of its ban was to ensure fair attendees were not annoyed by political booths and that they continued to frequent the commercial booths at the fair. A speculative fear of disruption or mere desire to avoid discomfort generally is not a compelling state interest.<sup>19</sup>

The blanket prohibition, in addition, does not appear to be a regulation narrowly drawn to achieve the desired effect of protecting patrons at the Fair from interference with their commercial interests or their enjoyment of the Fair. The distinction made by the Committee between booths with a political message and those that are nonpolitical does not appear to be related to the County’s stated interest. Whether a booth operator annoys a fairgoer depends on what that fairgoer finds objectionable. Rather than selectively excluding political booths, the County could employ neutral and uniform enforcement of Fair rules relating to literature distribution, booth boundaries, and actual disruption, for example, to serve as a less restrictive measure to address the expressed concerns.<sup>20</sup> I therefore conclude that the County constitutionally may not exclude political booths from Fair participation.

With respect to your inquiry regarding fees, I note that the law permits a governmental entity to require a permit, license, or fee related to the use of public property in order to “regulate competing uses of public forums.”<sup>21</sup> Nevertheless, the Court has explained that these requirements “must not be based on the content of the message.”<sup>22</sup> Indeed, “[c]ontent-based burdens must satisfy the same rigorous scrutiny as its content-based bans.”<sup>23</sup> Further, the requirement or restraint must be based upon “narrow, objective and definite standards”<sup>24</sup> and may not vest “unbridled discretion in a government official.”<sup>25</sup> Moreover, “[t]he Equal Protection Clause requires that [regulations] affecting First Amendment interests be narrowly tailored to their legitimate objectives.”<sup>26</sup>

You state that in 2013, the Committee charged politically affiliated organizations or individuals \$750 to reserve a booth at the Fair, although other organizations or individuals paid only \$25 to reserve a booth. Your inquiry does not include an explanation regarding the basis upon which the Committee imposed the higher fee for political booths. If the content of the communication offered at the political booth was the sole basis for the higher fee, that higher fee “is presumptively inconsistent with the First Amendment if it imposes a financial burden on speakers because of the content of the speech.”<sup>27</sup> The County could overcome the presumption of unconstitutionality only by identifying a compelling state interest to justify higher fees for political booths and showing that the higher fees are narrowly tailored to meet that interest.

## CONCLUSION

Accordingly, for the reasons stated above, it is my opinion that, under the facts presented, an absolute prohibition on political booths is not constitutionally permissible and that charging a higher fee for such booths than others is presumptively unconstitutional unless justified by a compelling governmental interest, and unless it is narrowly drawn to meet that interest.<sup>28</sup>

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<sup>1</sup> U.S. CONST. amend. I (“Congress shall make no law ... abridging the freedom of speech.”). The First Amendment applies to the States through the Fourteenth Amendment. *Burstyn v. Wilson*, 343 U.S. 495. (1952). Freedom of speech also is protected by Article I, § 12 of the Constitution of Virginia. However, the Virginia Supreme Court generally has treated this provision of the Virginia Bill of Rights as coextensive with the First Amendment to the United States Constitution. See 2000 Op. Va. Att’y Gen. 177, 180.

<sup>2</sup> *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (“Political speech, of course, is ‘at the core of what the First Amendment is designed to protect.’”) (further citation omitted).

<sup>3</sup> *U.S. Postal Serv. v. Council of Greenburgh Civic Ass’ns*, 453 U.S. 114, 129 (1981).

<sup>4</sup> See *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 44 (1983).

<sup>5</sup> See *U.S. Postal Serv.*, 453 U.S. at 128-31. Case law also identifies two distinct categories of public fora: traditional and designated, see, e.g., note 7 *infra*.

<sup>6</sup> *Perry Educ. Ass’n*, 460 U.S. at 45 (citing *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939)).

<sup>7</sup> *Id.* at 45-46 (describing traditional and designated public fora).

<sup>8</sup> *United States v. Kokinda*, 497 U.S. 720, 726-27 (1990).

<sup>9</sup> “To safeguard free speech, the Supreme Court requires that a regulatory measure be content neutral.” *Adams Outdoor Adver. v. City of Newport News*, 236 Va. 370, 381, 373 S.E.2d 917, 922 (1988) (citing *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). See also *Carey v. Brown*, 447 U.S. 455, 462-63 (1980).

<sup>10</sup> *Perry Educ. Ass’n*, 460 U.S. at 46.

<sup>11</sup> See, e.g., 1996 Op. Va. Att’y Gen. 28, 29; 1994 Op. Va. Att’y Gen. 40, 43-44.

<sup>12</sup> See *Heffron v. Int’l. Soc’y for Krishna Consciousness, Inc.*, 452 U.S. 640, 649-50 (1981).

<sup>13</sup> *Perry Educ. Ass’n*, 460 U.S. at 45. See 1986-87 Op. Va. Att’y Gen. 246 (summarizing instances when the Supreme Court has allowed certain types of restrictions).

<sup>14</sup> *Consol. Edison Co. v. Pub. Serv. Comm’n*, 447 U.S. 530, 537 (1980) (“The First Amendment’s hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.”). See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 345 (1995) (finding state statute establishing speaker disclosure requirement for only those publications that contained speech designed to influence voters in an election to be content-based speech regulation: “even though this provision applies evenhandedly to advocates of differing viewpoints, it is a direct regulation of the content of the speech”).

<sup>15</sup> *Id.*, at 536. “[A] content-based restriction on political speech in a public forum [] must be subjected to the most exacting scrutiny.” *Boos v. Barry*, 485 U.S. 312, 321 (1988).

<sup>16</sup> *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 814 (2000) (citing *Greater New Orleans Broadcasting Ass’n v. United States*, 527 U.S. 173, 183 (1999)).

<sup>17</sup> *Boos*, 485 U.S. at 321 (quoting *Perry Educ. Ass’n*, 460 U.S. at 45).

<sup>18</sup> *United States v. Alvarez*, 132 S.Ct. 2537, 2539 (2012) (“Content-based restrictions on speech have been permitted, as a general matter, only when confined to the few historic and traditional categories of expression long familiar . . . . Among these categories are . . . obscenity, defamation, so-called fighting words, child pornography, fraud, true threats, and speech presenting some grave and imminent threat the Government has the power to prevent.”) (internal quotation and citations omitted)). Indeed, the Supreme Court has found that even the “objective of shielding children [from indecent speech] does not suffice to support a blanket ban, if the protection can be accomplished by a less restrictive alternative.” *Playboy Entm’t Grp.*, 529 U.S. at 814.

<sup>19</sup> *See, e.g., Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969); *Consol. Edison Co.*, 447 U.S. at 541.

<sup>20</sup> *See Heffron*, 452 U.S. at 640 (upholding certain content-neutral place and manner restrictions applicable to all participants at the Minnesota State Fair).

<sup>21</sup> *Forsyth Cnty. v. Nat’list Movement*, 505 U.S. 123, 130 (1992).

<sup>22</sup> *Id.*

<sup>23</sup> *Playboy Entm’t Grp.*, 529 U.S. at 812.

<sup>24</sup> *Forsyth Cnty.*, 505.U.S. at 131.

<sup>25</sup> *Id.* at 133.

<sup>26</sup> *Mosley*, 408 U.S. at 101.

<sup>27</sup> *See Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) (citing *Leathers v. Medlock*, 499 U.S. 439, 447 (1991)).

<sup>28</sup> This Opinion does not apply to the ability of the county to enact and enforce uniform regulations for conduct at the Fair, such as placing signs at locations other than booths, distributing written materials away from booths, or disruptive conduct, so long as the regulations are content-neutral and are enforced equally, without regard to content.

## OP. NO. 14-065

### ELECTIONS: THE ELECTION - SPECIAL ELECTIONS

Arlington County lacks the authority to conduct an advisory referendum regarding a proposed streetcar system.

THE HONORABLE PATRICK A. HOPE  
MEMBER, HOUSE OF DELEGATES  
NOVEMBER 6, 2014

### ISSUE PRESENTED

You ask whether Arlington County may conduct an advisory referendum regarding a proposed streetcar system.

### RESPONSE

It is my opinion that Arlington County lacks the authority to conduct an advisory referendum regarding a proposed streetcar system.

## BACKGROUND

Arlington County has proposed to develop a 7.4-mile streetcar system to reduce congestion and strengthen economic development.<sup>1</sup> The proposed streetcar system includes two segments: (i) the Columbia Pike segment stretching west to east from the Skyline area of Fairfax County to Pentagon City; and (ii) the Crystal City segment stretching north to south from Crystal City to Potomac Yard.<sup>2</sup> The cost of the Columbia Pike segment borne by Arlington County is projected to be in excess of \$250 million.<sup>3</sup> Arlington County has stated that the “streetcar funding plan relies on dedicated transportation funds and includes zero homeowner dollars through General Obligation bonds.”<sup>4</sup>

## APPLICABLE LAW AND DISCUSSION

In Virginia, localities are not sovereign bodies, but are mere local agencies of the state, having no powers other than such as are clearly and unmistakably granted by the law making power.<sup>5</sup> A county, including Arlington County, may exercise only those powers expressly granted by the General Assembly, or necessarily or fairly implied from those expressly granted powers, and those that are essential and indispensable.<sup>6</sup> “If there is a reasonable doubt whether legislative power exists, the doubt must be resolved against the local governing body.”<sup>7</sup>

A “referendum” is “any election held pursuant to law to submit a question to the voters for approval or rejection.”<sup>8</sup> Section 24.2-684 of the *Code of Virginia* expressly provides that: “[n]o referendum shall be placed on the ballot unless specifically authorized by statute or by charter.” While counties may be granted charters,<sup>9</sup> Arlington does not have one. Instead, it has operated under the County Manager Plan of Government, as set forth in Chapter 7 of Title 15.2 of the *Code of Virginia* since approximately 1930. Accordingly, its power to hold a referendum on any given subject exists only as may be authorized by either a statute of general application or a statute applicable only to the County Manager Plan of Government.

A number of statutes authorize counties in the Commonwealth to hold referenda in circumstances ranging from the establishment of a county police force<sup>10</sup> to determining whether the election of county supervisors should be staggered,<sup>11</sup> to the creation of an electric authority.<sup>12</sup> A review of the *Code of Virginia*, however, reveals no statute of general application that would allow Arlington County to conduct a referendum on the proposed streetcar system.

As stated, Arlington operates under the County Manager Plan of Government. Under this type of government, a referendum is authorized only for purposes of establishing a department of real estate assessments.<sup>13</sup> A referendum is not authorized for transportation matters such as streetcar systems.<sup>14</sup>

The only legal authority that might otherwise apply in this scenario — the constitutional requirement that a county conduct a referendum prior to assuming debt to be repaid by general obligation bonds<sup>15</sup> — is not implicated because of the financing plan put forward by the County, which does not include general obligation bonds.

I therefore must conclude that, because the General Assembly has neither granted a charter to Arlington County authorizing this type of referendum nor enacted a statute of general application applicable to the County Manager Form of Government granting such authority, Arlington County may not conduct an advisory referendum on the proposed streetcar system. This conclusion is consistent with several prior opinions of the Attorney General.<sup>16</sup>

### CONCLUSION

Accordingly, it is my opinion that Arlington County does not have authority to conduct an advisory referendum regarding a proposed streetcar system.

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<sup>1</sup>See ARLINGTON COUNTY, VA., *Streetcar Presentation (Streetcar Update)*, available at [http://sites.arlingtonva.us/streetcar/files/2014/07/Streetcar\\_handouts\\_Sept2014.pdf](http://sites.arlingtonva.us/streetcar/files/2014/07/Streetcar_handouts_Sept2014.pdf).

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

<sup>3</sup> *Id.*

<sup>4</sup> ARLINGTON COUNTY, VA., News Release: *Arlington & Fairfax County Choose Streetcar Program Management Team*, available at <http://news.arlingtonva.us/releases/arlington-and-fairfax-county-choose-streetcar-program-management-team>.

<sup>5</sup> *Sinclair v. New Cingular Wireless PCS, LLC*, 283 Va. 567, 576, 727 S.E.2d 40, 44 (citing *Marble Techs. v. City of Hampton*, 279 Va. 409, 418 (2010)).

<sup>6</sup> *Bd. of Supvrs. v. Horne*, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975) (citations omitted) (“In Virginia the powers of boards of supervisors are fixed by statute and are limited to those conferred expressly or by necessary implication. This rule is a corollary to Dillon’s Rule that municipal corporations have only those powers expressly granted, those necessarily or fairly implied therefrom, and those that are essential and indispensable.”); *accord Bd. of Supvrs. v. Countryside Inv. Co.*, 258 Va. 497, 503, 522 S.E.2d 610, 613 (1999).

<sup>7</sup> *Bd. of Supvrs. v. Reed’s Landing Corp.*, 250 Va. 397, 400, 463 S.E.2d 668, 670 (1995).

<sup>8</sup> VA. CODE ANN. § 24.2-101 (Supp. 2014).

<sup>9</sup> *Id.*, §15.2-201.

<sup>10</sup> *Id.*, § 15.2-1702 (2012).

<sup>11</sup> Sections 24.2-219 (2011) and 24.2-220 (2011).

<sup>12</sup> Section 15.2-5403 (2012).

<sup>13</sup> VA. CODE ANN. § 15.2-716 (2012).

<sup>14</sup> VA. CODE ANN. § 15.2-749 (2012) does set forth the procedures to be followed under the County Manager Plan for conducting a referendum, but only if the referendum is authorized by law. It does not expand or add to the subjects for which a referendum may be held under the County Manager Plan.

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<sup>15</sup> See VA. CONST. art. VII, § 10(b).

<sup>16</sup> See, e.g., 2001 Op. Va. Att’y Gen. No. 135 (finding no authority for the City of Colonial Heights to call for advisory referendum regarding the establishment of a recreation center); 1988 Op. Va. Att’y Gen. 359 (finding no authority for Rockbridge County to call for an advisory referendum on prohibiting the transportation of loaded rifles and shotguns on public highways in the county); 1983 Op. Va. Att’y Gen. 70 (concluding that the City of Fairfax may hold an advisory referendum for the abolition of constitutional officers); 1978 Op. Va. Att’y Gen. 72 (concluding that Washington County lacks the authority to hold an advisory referendum on the adoption of a comprehensive plan); 1975 Op. Va. Att’y Gen. 331 (concluding that the City of Fredericksburg has no authority to conduct an advisory referendum on a school bond issue); and 1974 Op. Va. Att’y Gen. 161 (concluding that Carroll County does not have the authority to conduct an advisory referendum on whether to terminate membership in the Mt. Rogers Planning District Commission).

## **OP. NO. 14-068**

### **MOTOR VEHICLES: REGULATION OF TRAFFIC - GOLF CART AND UTILITY VEHICLE OPERATION**

An institution of higher education within a city may not allow its employees to operate utility vehicles on public highways within the institution’s property limits unless the city has designated and posted the highways for such use following an appropriate review.

WALTER C. ERWIN, III, ESQUIRE  
CITY ATTORNEY, CITY OF LYNCHBURG  
DECEMBER 18, 2014

### **ISSUE PRESENTED**

You ask whether an institution of higher education located within a city has the authority to allow its employees to operate utility vehicles on public highways within the institution’s property limits if the city has not designated the highways for such use.

### **RESPONSE**

It is my opinion that an institution of higher education within a city may not allow its employees to operate utility vehicles on public highways within the institution’s property limits unless the city has designated and posted the highways for such use following an appropriate review.

### **BACKGROUND**

You relate that there is a four-year institution of higher education located within the City of Lynchburg. Several public highways are located on the campus, and none of them have been designated by the city for use by utility vehicles. The institution wishes to allow its employees to drive utility vehicles on these highways. Because the City and the institution have different interpretations of the applicable law, you seek guidance from this Office.

### APPLICABLE LAW AND DISCUSSION

The operation of golf carts and utility vehicles on public highways is governed by the provisions of Article 13.1 of Chapter 8 of Title 46.2.<sup>1</sup> Principles of statutory construction dictate that, while these provisions are to be construed according to their plain meaning,<sup>2</sup> they are not to be read in isolation, but rather are to be considered *in para materia*.<sup>3</sup>

The first principal statute is § 46.2-916.1. It provides that “[n]o person shall operate a golf cart or utility vehicle on or over any public highway in the Commonwealth except as provided in this article [Article 13.1, titled “Golf Cart and Utility Vehicle Operation”].”

The next principal statute, which is also in Article 13.1, is § 46.2-916.2. With certain conditions, it allows “[t]he governing body of any county, city or town . . . [to] authorize the operation of golf carts and utility vehicles on designated public highways within its boundaries . . . .”<sup>4</sup> It further emphasizes the necessity of local governmental approval by stating, “[n]o portion of the public highways may be designated for use by golf carts and utility vehicles unless the governing body of the county, city, or town in which that portion of the highway is located has reviewed and approved such highway usage.”<sup>5</sup> That review is to encompass the “speed, volume and character” of traffic on the highway and a determination that the operation of golf carts or utility vehicles is consistent with state and local transportation plans and the Commonwealth’s Statewide Pedestrian Policy.<sup>6</sup> If certain highways are designated by a locality for such use, signage must be posted by the locality.<sup>7</sup>

In enacting these provisions, the General Assembly clearly vested sole and exclusive authority to designate public highways for golf cart or utility vehicle usage with local governing bodies, and even then only subject to certain restrictions. One restriction relevant to this analysis is imposed by a third principal statute, § 46.2-916.3(A)(1), which provides that a locality is authorized to allow a golf cart or utility vehicle to be operated on a designated highway only where the posted speed limit is 25 miles per hour or less.<sup>8</sup>

A statutory exemption from the 25-miles-per-hour posted maximum speed limit on designated highways is set forth in § 46.2-916.3(B)(3). It provides that this maximum posted speed limit “shall not apply” to golf carts and utility vehicles being operated as necessary by employees of public or private two-year or four-year institutions of higher education where the public highway is within the property limits of such institution, provided the posted speed limit is 35 miles per hour or less.<sup>9</sup> This exemption applies only “on designated public highways.” It does not remove the requirement that a local governing body designate a public highway for golf cart and utility vehicle use before such use is legal. It merely changes the maximum permissible posted speed limit for such designated highways from 25 miles

per hour to 35 miles per hour for public highways within the property limits of institutions of higher education, and even then only when the golf cart or utility vehicle is being operated “as necessary by employees.”<sup>10</sup> If a highway has not been “designated” by the local governing body for such use, then this exemption does not apply, and neither employees of the institution nor anyone else may legally operate golf carts or utility vehicles on public highways there.

In short, the exemption created by § 46.2-916.3(B)(3) merely allows employee-operated utility vehicles to operate on highways within the campus of an institution of higher education with a higher posted speed limit than would otherwise be applicable, but it does not negate the clear statutory mandate of § 46.2-916.2 that no utility vehicle be operated on any public highway unless the locality has first designated and posted the highway for such use. The three key statutes within Article 13.1, as discussed above, compel this conclusion both by their plain meaning and when they are considered *in pari materia*.

### CONCLUSION

Accordingly, it is my opinion that an institution of higher education within a city may not allow its employees to operate utility vehicles on those portions of public highways that are within the institution’s property limits unless the city has designated and posted the highways for such use following an appropriate review.

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<sup>1</sup> VA. CODE ANN. §§ 46.2-916.1 through 46.2-916.3 (2014). For the applicable statutory definitions of “golf cart,” “utility vehicle,” and “highway,” see § 46.2-100 (2014).

<sup>2</sup> “A principal rule of statutory interpretation is that courts will give statutory language its plain meaning.” *Davenport v. Little-Bowser*, 269 Va. 546, 555, 611 S.E.2d 366, 371 (2005) (citing *Jackson v. Fidelity & Deposit Co.*, 269 Va. 303, 313, 608 S.E.2d 901, 904 (2005)).

<sup>3</sup> “The general rule is that 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. Statutes which have the same general or common purpose or are parts of the same general plan are also ordinarily considered as *in pari materia*.” *Prillaman v. Commonwealth*, 199 Va. 401, 405, 100 S.E.2d 4, 7 (1957).

<sup>4</sup> Section 46.2-916.2(B). It is noteworthy that approval may be granted only by the governing body, not by any administrative official such as a city manager or a traffic engineer.

<sup>5</sup> Section 46.2-916.2(A).

<sup>6</sup> Section 46.2-916.2(B).

<sup>7</sup> Section 46.2-916.2(E).

<sup>8</sup> Other restrictions are that a driver must have in his possession a valid driver’s license, and that the vehicles may be operated only between sunrise and sunset unless equipped with proper lights. Section 46.2-916.3(A)(3) and (5).

<sup>9</sup> Section 46.2-916.3(B)(3).

<sup>10</sup> *Id.*

OP. NO. 14-073

CRIMES AND OFFENSES GENERALLY: CRIMES AGAINST MORALS AND DECENCY - FAMILY OFFENSES; CRIMES AGAINST CHILDREN, ETC.

DOMESTIC RELATIONS: UNLAWFUL MARRIAGES GENERALLY

Virginia's laws voiding bigamous marriages and criminalizing bigamy are constitutional: the Fourth Circuit's decision in *Bostic v. Schaefer* does not invalidate §§ 18.2-362, 18.2-363, 20-38.1, 20-40, and 20-45.1 of the *Code of Virginia*, which prohibit bigamy by all persons, regardless of sexual orientation or gender identity.

Bisexual and transgender Virginians, like all Virginians, have the right to marry the person they choose, so long as the marriage is otherwise lawful.

THE HONORABLE ROBERT G. MARSHALL  
MEMBER, HOUSE OF DELEGATES  
DECEMBER 9, 2014

### ISSUES PRESENTED

Virginia law criminalizes bigamy and voids bigamous marriages. You ask whether these laws are facially unconstitutional in light of the Fourth Circuit Court of Appeals' decision in *Bostic v. Schaefer*.<sup>1</sup> You also ask whether bisexual and transgender Virginians have the right to marry a partner of the same sex.

### RESPONSE

It is my opinion that Virginia's laws voiding bigamous marriages and criminalizing bigamy are constitutional and that the Fourth Circuit's decision in *Bostic v. Schaefer* does not invalidate §§ 18.2-362, 18.2-363, 20-38.1, 20-40, and 20-45.1 of the *Code of Virginia*, which prohibit bigamy by all persons, regardless of sexual orientation or gender identity. I also conclude that bisexual and transgender Virginians, like all Virginians, have the right to marry the person they choose, so long as the marriage is otherwise lawful.

### APPLICABLE LAW AND DISCUSSION

#### I. Virginia's Bigamy Laws

The Commonwealth of Virginia defines a bigamous marriage as "a marriage entered into prior to the dissolution of an earlier marriage of one of the parties."<sup>2</sup> Virginia has a long history of prohibiting such unions. Virginia passed the first law expressly criminalizing marriage to more than one person over 200 years ago.<sup>3</sup> Today, a marriage is automatically void in the Commonwealth if either party is already married to a living spouse.<sup>4</sup> The Commonwealth also can charge an individual who commits bigamy with a Class 4 felony or misdemeanor pursuant to §§ 18.2-362 and 20-40 of the *Code of Virginia*.<sup>5</sup> These statutes are presumed

constitutional “unless [they] clearly violate a provision of the United States or Virginia Constitutions.”<sup>6</sup>

The United States Supreme Court has considered bigamy laws like Virginia’s and found them to be constitutional. In *Reynolds v. United States*, the Court upheld a federal law making bigamy illegal in the territories of the United States.<sup>7</sup> The Court found that “there cannot be a doubt that . . . it is within the legitimate scope of the power of every civil government to determine whether polygamy or monogamy shall be the law of social life under its dominion.”<sup>8</sup>

The *Reynolds* decision remains good law today. While the United States Supreme Court has struck down various state efforts to restrict monogamous marriage,<sup>9</sup> it has never overturned its holding that a state may choose to outlaw polygamy. To the contrary, the Court regularly has cited *Reynolds* with approval,<sup>10</sup> and lower federal and state courts continue to cite *Reynolds* in upholding state laws banning one person from entering into two state-recognized marriages.<sup>11</sup>

*Reynolds* remains controlling even after the Fourth Circuit’s recent decision in *Bostic v. Schaefer*. In *Bostic*, the court considered the Commonwealth’s constitutional and statutory ban on marriage for same-sex couples.<sup>12</sup> The Fourth Circuit found that, because the Commonwealth’s ban on marriage for same-sex couples interfered with an individual’s fundamental right to marry, the prohibition was subject to strict scrutiny. Because no compelling state interest supported the ban, it was held to be unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>13</sup>

The judgment entered by the district court in *Bostic*, which the Fourth Circuit affirmed, affects only the rights of same-sex couples. The judgment struck down Virginia’s marriage laws only “to the extent they deny the rights of marriage to same-sex couples or recognition of lawful marriages between same-sex couples that are validly entered into in other jurisdictions.”<sup>14</sup> The ruling further enjoins state and local officials from enforcing a Virginia marriage law only “if and to the extent that it denies to same-sex couples the rights and privileges of marriage that are afforded to opposite-sex couples.”<sup>15</sup> By its plain terms, then, the judgment in *Bostic* applies only to marriages between two persons. Bigamy entails a serial marriage process that ultimately encompasses more than two persons.

Moreover, nothing in the Fourth Circuit’s *Bostic* opinion questions the authority of the Commonwealth to limit state-recognized marriages to monogamous relationships. Rather, the Fourth Circuit found that the right to monogamous marriage could not be limited to “opposite-sex couples.”<sup>16</sup> The court described civil marriage as “one of the cornerstones of our way of life,” because it “allows individuals to celebrate and publicly declare their intentions to form lifelong partnerships . . . .”<sup>17</sup> The court worried that if it “limited the right to marry to

certain *couplings*, [it] would effectively create a list of legally preferred spouses, rendering the choice of whom to marry a hollow choice indeed.”<sup>18</sup> The court’s use of the word “couples” and “couplings” indicates that the court was concerned specifically with restrictions on the choice of partners within a monogamous-marriage regime.

In your request, you reference the District Court of Utah’s decision in *Brown v. Buhman*.<sup>19</sup> The relevant part of that lengthy decision expressly upheld the section of Utah’s law that, like Virginia’s law, criminalizes the state-sanctioned marriage of one person to more than one spouse.<sup>20</sup>

The United States Supreme Court has described marriage as a “fundamental freedom”<sup>21</sup> and “the most important relation in life.”<sup>22</sup> The fundamental right to marry “is of fundamental importance for all individuals.”<sup>23</sup> When describing this right, the Court describes marriage as between *two* individuals.<sup>24</sup> And as *Bostic* now makes clear, the Constitution protects the right to a state-recognized marriage between two consenting and legally competent persons, regardless of gender.<sup>25</sup> Because *Bostic* is distinguishable from the issue you present, because *Reynolds* remains good law, and in light of the presumption of constitutionality afforded to all enactments by the General Assembly,<sup>26</sup> I conclude that the Commonwealth’s laws criminalizing bigamy and voiding bigamous marriages and are constitutional and enforceable.

## II. Marriage of Bisexual and Transgender Individuals

The Commonwealth does not now, and never has, prevented bisexual and transgender Virginians from marrying. Beginning in 1975, however, Virginia explicitly prohibited any person from marrying another person of the same sex in the Commonwealth.<sup>27</sup> Until Virginia’s ban on marriages between same-sex couples was overturned in *Bostic*, all Virginians, including bisexual and transgender Virginians, could marry only a spouse of the opposite sex.

As noted above, *Bostic* invalidated that ban under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.<sup>28</sup> The Fourth Circuit characterized the right to marriage as “a broad right . . . that is not circumscribed based on the characteristics of individuals seeking to exercise that right.”<sup>29</sup> Accordingly, individuals’ right to marry is not limited by their own sexual orientation or gender identity, or by that of the person they marry. Like all Virginians, bisexual and transgender individuals have a fundamental constitutional right to marry the person they choose, so long as the marriage is otherwise lawful.

## CONCLUSION

Accordingly, it is my opinion that Virginia’s laws voiding bigamous marriages and criminalizing bigamy are constitutional and that the Fourth Circuit’s decision in *Bostic v. Schaefer* does not invalidate §§ 18.2-362, 18.2-363, 20-38.1, 20-40, and

20-45.1 of the *Code of Virginia*, which prohibit bigamy by all persons, regardless of sexual orientation or gender identity. I also conclude that bisexual and transgender Virginians, like all Virginians, have the right to marry the person they choose, so long as the marriage is otherwise lawful.

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<sup>1</sup> 760 F.3d 352 (4th Cir. 2014), *cert. denied sub nom.*, *Rainey v. Bostic*, 190 L. Ed. 2d 140 (2014), *Schaefer v. Bostic*, 190 L. Ed. 2d 140 (2014), *McQuigg v. Bostic*, 190 L. Ed. 2d 140 (2014).

<sup>2</sup> VA. CODE ANN. § 20-38.1(a)(1) (2008).

<sup>3</sup> *See Reynolds v. United States*, 98 U.S. 145, 165 (1878) (citing 12 Hening’s Stat. 691).

<sup>4</sup> VA. CODE ANN. §§ 20-28.1(1) (2008); 20-43 (2008); *see Kelderhaus v. Kelderhaus*, 21 Va. App. 721, 725, 467 S.E.2d 303, 304 (1996) (citing *Kleinfield v. Veruki*, 7 Va. App. 183, 190, 372 S.E.2d 407, 411 (1988)).

<sup>5</sup> VA. CODE ANN §§ 18.2-362 (2014), 20-40 (2008); *see Cole v. Commonwealth*, 58 Va. App. 642, 651, 712 S.E.2d 759, 764 (2011).

<sup>6</sup> *See Marshall v. N. Va. Transp. Auth.*, 275 Va. 419, 427, 657 S.E.2d 71, 75 (2008) (citing *In re Phillips*, 265 Va. 81, 85-86, 574 S.E.2d 270, 272 (2003); *City Council v. Newsome*, 226 Va. 518, 523, 311 S.E.2d 761, 764 (1984)).

<sup>7</sup> *Reynolds*, 98 U.S. at 166.

<sup>8</sup> *Id.* at 166.

<sup>9</sup> *See Turner v. Safley*, 482 U.S. 78 (1987) (striking down a Missouri law barring prisoners from marrying); *Zablocki v. Redhail*, 434 U.S. 374 (1978) (striking down a Wisconsin law prohibiting people owing child support from marrying); *Loving v. Virginia*, 388 U.S. 1 (1967) (striking down a Virginia law banning interracial marriages).

<sup>10</sup> *See Emp’t Div. v. Smith*, 494 U.S. 872, 899 (1990); *Braunfeld v. Brown*, 366 U.S. 599, 603-05 (1961); *Wisconsin v. Yoder*, 406 U.S. 205, 220 (1972).

<sup>11</sup> *See, e.g., Potter v. Murray City*, 760 F.2d 1065, 1068, 1070 (10th Cir. 1985) (“the state is justified, by a compelling interest, in upholding and enforcing its ban on plural marriage to protect the monogamous marriage relationship”); *Utah v. Green*, 99 P.3d 820, 826 (Utah 2004).

<sup>12</sup> *Bostic*, 760 F.3d 352.

<sup>13</sup> *Id.* at 384.

<sup>14</sup> Judgment at 1, *Bostic v. Rainey*, Case No. 2:13-cv-00395-AWA-LRL (E.D.Va. Feb. 24, 2014), ECF No. 139 (emphasis added).

<sup>15</sup> *Id.* at 2

<sup>16</sup> *Bostic*, 760 F.3d at 377.

<sup>17</sup> *Id.* at 384 (emphasis added).

<sup>18</sup> *Id.* at 377 (emphasis added).

<sup>19</sup> 947 F. Supp. 2d 1170 (D. Utah 2013).

<sup>20</sup> *Id.* at 1190 (“the broader Statute survives in prohibiting bigamy”).

<sup>21</sup> *Loving*, 388 U.S. at 12.

<sup>22</sup> *Maynard v. Hill*, 125 U.S. 190, 205 (1888).

<sup>23</sup> *Zablocki*, 434 U.S. at 384.

<sup>24</sup> See, e.g., *Turner*, 482 U.S. at 78; *Zablocki*, 434 U.S. at 374; *Loving*, 388 U.S. at 1 (describing marriage rights of “couples”); *United States v. Windsor*, 133 S. Ct. 2675, 2694 (2013) (describing marriage as involving “couples”).

<sup>25</sup> *Bostic*, 760 F.3d at 384.

<sup>26</sup> “[E]very reasonable doubt regarding the constitutionality of a legislative enactment must be resolved in favor of its validity.” *Marshall*, 275 Va. at 428, 657 S.E.2d at 75 (citing *Hess v. Snyder Hunt Corp.*, 240 Va. 49, 53, 392 S.E.2d 817, 820 (1990)). See *Blue Cross of Va. v. Commonwealth*, 221 Va. 349, 358-59, 269 S.E.2d 827, 832-33 (1980).

<sup>27</sup> *Bostic*, 760 F.3d at 367-68.

<sup>28</sup> *Id.* at 384.

<sup>29</sup> *Id.* at 376.

## OP. NO. 14-074

### TAXATION: STATE RECORDATION TAX

The Fourth Circuit Court of Appeal’s decision in *Bostic v. Rainey* requires clerks of court to interpret the term “husband and wife” as used in § 58.1-810.3 to include spouses of the same sex, and therefore, a deed to which the only parties are married individuals, regardless of whether the individuals are of the same or opposite sex, is exempt from the Virginia Recordation Tax pursuant to § 58.1-810.3.

THE HONORABLE JOHN T. FREY  
CLERK OF COURT, FAIRFAX COUNTY CIRCUIT COURT  
DECEMBER 18, 2014

### ISSUE PRESENTED

An injunction issued in the case of *Bostic v. Rainey*<sup>1</sup> prohibits enforcement of Virginia’s marriage laws to the extent they deny same-sex couples the same rights afforded other couples. You ask whether the injunction alters the term “husband and wife” as used in § 58.1-810.3 of the *Code of Virginia* for purposes of the recordation tax exemption.

### RESPONSE

It is my opinion that the decision in *Bostic v. Rainey* requires clerks of court to interpret the term “husband and wife” as used in § 58.1-810.3 to include spouses of the same sex. Accordingly, a deed to which the only parties are married individuals, regardless of whether such individuals are of the same or opposite sex, is exempt from the Virginia Recordation Tax pursuant to § 58.1-810.3.

### APPLICABLE LAW AND DISCUSSION

#### I. Ruling in *Bostic v. Rainey*

On February 13, 2014,<sup>2</sup> the United States District Court for the Eastern District of Virginia, Norfolk Division (“the District Court”) ruled that Virginia’s laws defining marriage as between one man and one woman and prohibiting recognition of a union between two people of the same sex were unconstitutional.<sup>3</sup> Specifically, the Court held that “[t]hese laws deny [same-sex couples] their rights to due process and equal protection guaranteed under the Fourteenth Amendment of the United States Constitution.”<sup>4</sup> In a Judgment entered on February 24, 2014, the District Court enjoined the

officers, agents, and employees of the Commonwealth of Virginia . . . from enforcing Article I, §15-A, of the Constitution of Virginia; Virginia Code § 20-45-2; Virginia Code § 20-45.3, and any other Virginia law if and to the extent that it denies to same sex couples the rights and privileges of marriage that are afforded to opposite sex couples.<sup>[5]</sup>

This judgment was stayed pending final disposition of any appeal by the United States Court of Appeals for the Fourth Circuit.<sup>6</sup> The Fourth Circuit affirmed the District Court’s judgment on July 28, 2014, specifically upholding the “decision to enjoin enforcement of the Virginia Marriage Laws.”<sup>7</sup> On August 20, 2014, the United States Supreme Court stayed the Fourth Circuit’s mandate pending the timely filing and disposition of a petition for writ of certiorari. Three petitions were filed, and on October 6, 2014, the Supreme Court denied them all.<sup>8</sup> The Fourth Circuit’s mandate issued at 1:00 p.m. on October 6, 2014, at which time the District Court’s judgment took effect.

The District Court’s opinion expressly used, and the Fourth Circuit Court of Appeals adopted, the term “Virginia’s Marriage Laws” to refer to “Article I, Section 15-A of the Virginia Constitution, Va. Code §§ 20-45.2, 20-45.3, *and any other law relating to marriage within the Commonwealth of Virginia.*”<sup>9</sup> This determination that these laws violate the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, therefore, reaches beyond the right of individuals to marry in this Commonwealth. It extends to any law that, facially or by application, recognizes the institution of marriage or confers a benefit or special recognition based on marital status. Such laws must apply equally to all such unions, regardless of the sex of its members.

## II. Application to the Virginia Recordation Tax

The Virginia Recordation Tax Act requires every circuit court clerk in Virginia to collect certain recordation taxes.<sup>10</sup> These taxes are based on the privilege of having access to the benefits of state recording and registration laws,<sup>11</sup> and there are numerous exemptions. Pertinent to your inquiry, the General Assembly has provided that “[w]hen the tax has been paid at the time of the recordation of the

original deed, no additional recordation tax shall be required for admitting to record . . . [a] deed to which a husband and wife are the only parties.”<sup>12</sup>

You ask whether the term “husband and wife” should be interpreted to encompass only a married man and woman, or whether the exemption extends to a married couple of the same sex. In light of the District Court’s and the Fourth Circuit’s rulings, the term not only should, but must, be interpreted to include couples of the same sex who are legally married.<sup>13</sup> To interpret it otherwise would be to grant recognition and a special privilege to the union of a man and a woman that is not similarly granted to a union between a man and a man or a woman and a woman. As the *Bostic* opinions make clear, the United States Constitution prohibits such an interpretation. I therefore conclude that a deed to which married individuals are the only parties, irrespective of whether the married individuals are of the same or opposite sex, is exempt from the Virginia Recordation Tax pursuant to § 58.1-810.3.<sup>14</sup>

### CONCLUSION

Accordingly, it is my opinion that the decision in *Bostic v. Rainey* requires clerks of court to interpret the term “husband and wife” as used in § 58.1-810.3 to include spouses of the same sex, and therefore, a deed to which the only parties are married individuals, regardless of whether the individuals are of the same or opposite sex, is exempt from the Virginia Recordation Tax pursuant to § 58.1-810.3.

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<sup>1</sup> *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014), *aff’d sub nom Bostic v. Schaefer*, 760 F.3d 352 (4th Cir. 2014), *cert. denied*, 190 L. Ed. 2d 140 (2014).

<sup>2</sup> As amended on February 14, 2014.

<sup>3</sup> *Rainey*, 970 F. Supp. 2d at 483.

<sup>4</sup> *Id.* at 484.

<sup>5</sup> Judgment at 1-2, *Bostic v. Rainey*, No. 2:13-cv-00395-AWA-LRL, (E.D. Va. 2014), ECF No. 139.

<sup>6</sup> *Id.* at 2.

<sup>7</sup> *Schaefer*, 760 F.3d at 384.

<sup>8</sup> *Rainey v. Bostic*, 190 L. Ed. 2d 140 (2014); *Schaefer v. Bostic*, 190 L. Ed. 2d 140 (2014); *McQuigg v. Bostic*, 190 L. Ed. 2d 140 (2014).

<sup>9</sup> *Rainey*, 970 F. Supp. 2d at 461, n.2 (emphasis added).

<sup>10</sup> See VA. CODE ANN. §§ 58.1-800 through 58.1-817 (2009 & Supp. 2014).

<sup>11</sup> See Va. Tax Comm’r Priv. Ltr. Rul., Pub. Doc. 92-234 (Nov. 9, 1992), *available at* <http://www.policylibrary.tax.virginia.gov/OTPolicy.nsf>.

<sup>12</sup> Section 58.1-810.3.

<sup>13</sup> “Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.” *United States v. Delaware & Hudson Co.*, 213 U.S. 366, 408 (1909). See also *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (“where an otherwise

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acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems . . .”); *Dean v. Paolicelli*, 194 Va. 219, 227, 72 S.E.2d 506, 511 (1952) (“No act of the legislature should be . . . so construed as to bring it into conflict with constitutional provisions unless such a construction is unavoidable.”).

<sup>14</sup> I note that, while your request addresses only one specific occurrence of “husband and wife”, the term, along with “man and wife,” “wife,” and “husband” appears in the *Code of Virginia* no fewer than 61 times, applying to subjects ranging from insurance contracts, to joint ownership of property, and to adoption. *See, respectively*, VA. CODE ANN. §§ 38.2-302 (2014), 55-20.2 (2012), 63.2-1215 (2012). The guarantees of equal protection and due process apply equally to these provisions, and they must be applied equally to all legal marriages. As *Bostic v. Rainey* makes clear, the Constitution of the United States requires no less.

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