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HIGHWAYS, BRIDGES AND FERRIES: OUTDOOR ADVERTISING IN SIGHT OF HIGHWAYS -- COMMONWEALTH TRANSPORTATION BOARD, ETC.

COUNTIES, CITIES AND TOWNS: LOCAL CONSTITUTIONAL OFFICERS, ETC. - ATTORNEY FOR THE COMMONWEALTH.

Placing of political signs within public highway rights-of-way violates laws and regulation governing outdoor advertising in sight of highways. Commonwealth's attorney may, in his discretion, prosecute such misdemeanors.

The Honorable James L. Camblos III
Commonwealth's Attorney for Albemarle County
August 31, 2000

You ask whether the Commonwealth's attorney is responsible for prosecuting candidates for local office who post campaign materials on state highway-owned rights-of-way.

You advise that your office receives reports that candidates for local office post campaign materials along the highways on state-owned rights-of-way. You advise further that a publication of the State Board of Elections indicates that reports of such violations regarding the use of campaign materials be submitted to the Commonwealth's attorney in the county or city in which the violation occurs. You conclude that the Commonwealth's attorney is not responsible for the prosecution of such matters.¹

Section 33.1-12(3) empowers the Commonwealth Transportation Board "[t]o make rules and regulations ... not in conflict with the laws of this Commonwealth, for the protection of and concerning traffic on and the use of systems of state highways and to add to, amend or repeal the same." Section 33.1-19 stipulates that "[t]he rules and regulations ... prescribed by the Board ... shall have the force and effect of law and any person, firm or corporation violating any such rule or regulation ... shall be guilty of a misdemeanor." Pursuant to its authority, the Board has adopted a regulation prohibiting the use or occupancy of rights-of-way within the system of state highways except for travel or as authorized by permit or as provided by law.²

Article 1, Chapter 7 of Title 33.1, §§ 33.1-351 through 33.1-378, governs outdoor advertising in sight of the public highways. Section 33.1-351 defines the terms used in Chapter 7:

"Advertisement" means any writing, printing, picture, painting, display, emblem, drawing, sign, or similar device which is posed or displayed outdoors on real property and is intended to invite or to draw the attention or to solicit the patronage or support of the public to *any* goods, merchandise, real or personal property, business, services, entertainment, or amusement [Emphasis added.]

* * *

"Sign" means any outdoor sign, display, device, figure, painting, drawing, message, placard, poster, billboard, or other thing which is designed, intended, or used to advertise or inform, any part of the advertising or informative contents of which is visible from any highway.

Section 33.1-373 provides for the assessment of a civil penalty of \$100 against any person who "erects, paints, prints, places, puts, or affixes any advertisement within the limits of any highway." Furthermore, § 33.1-375 declares any sign, advertisement or advertising structure that is not removed from the right-of-way after thirty days' written notice "to be a public and private nuisance." After declaring such outdoor advertising to be a nuisance, the Commonwealth Transportation Commissioner may remove, obliterate or abate any violating sign, advertisement or advertising structure from the right-of-way and collect the cost of such removal. Section 33.1-375, however, does not impose a penalty for failure to remove any such violating signs, advertisements or advertising structures. Section 33.1-377 provides:

Any person, firm or corporation violating *any provision of this article for which violation no other penalty is prescribed by this article* shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than ten dollars nor more than fifty dollars. Each day during which such violation is continued after conviction may be treated for all purposes as a separate offense. [Emphasis added.]

There are several rules of statutory construction that apply to this matter. The use of the word "shall" in a statute ordinarily implies that its provisions are mandatory.³ Obviously, a primary goal of statutory interpretation is to ascertain the intent of the General Assembly.⁴ In addition, statutes relating to the same subject should be considered *in pari materia*.⁵ When a statute creates a specific grant of authority, that power exists only to the extent plainly granted by the statute.⁶ Additionally, the mention of one thing in a statute implies the exclusion of another.⁷

It is clear that the placing of political signs within the public highway rights-of-way violates §§ 33.1-19 and 33.1-375, and the Board rule governing the use of rights-of-way within the system of state highways. The violation of § 33.1-19 is a misdemeanor. It is also my opinion that a violation of § 33.1-375 is a misdemeanor.⁸ Section 15.2-1627 provides that a Commonwealth's attorney "may in his discretion, prosecute Class 1, 2 and 3 misdemeanors, or any other violation, the conviction of which carries a penalty of confinement in jail, or a fine of \$500 or more, or both such confinement and fine." (Emphasis added.) I must, therefore, conclude that the Commonwealth's attorney may prosecute candidates for local office who post campaign materials on state highway-owned rights-of-way.⁹

¹Section 2.1-118 requires that any request by a Commonwealth's attorney for an opinion from the Attorney General "shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions."

²See 24 VAC 30-20-80 (Law. Coop. 1996).

³See *Andrews v. Shepherd*, 201 Va. 412, 414, 111 S.E.2d 279, 281 (1959) ("shall" is word of command, used in connection with mandate); see also *Schmidt v. City of Richmond*, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965) ("shall" generally indicates procedures are intended to be mandatory, imperative or limited); Op. Va. Att'y Gen.: 1997 at 16, 17; 1996 at 20, 21; 1991 at 126, 126, and opinions cited therein; *id.* at 127, 129, and opinions cited therein.

⁴See *Turner v. Commonwealth*, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983).

⁵See *Prillaman v. Commonwealth*, 199 Va. 401, 405-06, 100 S.E.2d 4, 7 (1957); 1996 Op. Va. Att'y Gen. 134, 135.

⁶1996 Op. Va. Att'y Gen. 88, 88.

⁷See *Turner v. Wexler*, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992) (citing *Tate v. Ogg*, 170 Va. 95, 103, 195 S.E. 496, 499 (1938)); 2A Norman J. Singer, *Sutherland Statutory Construction* § 47.23 (5th ed. 1992 & Supp. 1999) ("*Expressio unius est exclusio alterius.*").

⁸Although no penalty is specified for violating § 33.1-375, § 33.1-377 provides that a person "shall be guilty of a misdemeanor" for violating any provision of Article 1 for which no other penalty is prescribed by the article.

⁹The use of the term "may" in § 15.2-1627 indicates that the prosecution of Class 1, 2 and 3 misdemeanors by the Commonwealth's attorney is permissive and discretionary, rather than mandatory. See 1997 Op. Va. Att'y Gen. 10, 12, and opinions cited at 13 n.11.