



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

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Attorney General

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Mr. G. William Thomas  
Secretary, Electoral Board  
City of Richmond  
P.O. Box 61037  
Richmond, Virginia 23261-1037

Dear Mr. Thomas:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

## Issues Presented

You ask whether federal or state law requires that an officer of election be posted outside the polling place at all times that the polls are open in order to implement curbside voting. You also ask whether the legal requirements of curbside voting are satisfied if the voter who wishes to vote curbside is required either to i) go inside the polling place themselves to alert the officers of election that he wishes to vote curbside; ii) send another party inside the polling place to alert the officers of election that the voters wishes to vote curbside; or iii) call ahead to inform election officials of his preference. Finally, in the event that the answer to both your first and second questions is no, you ask whether there are other actions required by law to be taken regarding notice to officers of election that an individual wishes to vote curbside, and who must take such actions.

## Response

It is my opinion that neither Virginia nor federal law requires an officer of election to be posted outside a polling place at all times the polls are open on election day in order to assist elderly and disabled voters who prefer to vote outside the polling place pursuant to § 24.2-649, a procedure commonly known as "curbside voting." It further is my opinion that the legal requirement for officers of election to assist such voters with curbside voting is triggered upon the voter making a request for such service, either by (i) entering the polling place to alert the officers of election, (ii) sending another person inside the polling place to alert the officers of election, or (iii) communicating with election officials in advance of coming to the polling place.<sup>1</sup>

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<sup>1</sup> Given that my response to your second question is in the affirmative, a response to your third question is not necessary.

### Applicable Law and Discussion

Section 24.2-649 of the *Virginia Code* sets forth the circumstances in which assistance may be provided to certain voters in the election process. Section 24.2-649(A), which governs curbside voting procedures, provides:

*Any voter age 65 or older or physically disabled may request and then shall be handed a paper ballot or a mark sense ballot by an officer of election outside the polling place but within 150 feet of the entrance to the polling place. The voter shall mark the paper ballot in the officer's presence but in a secret manner and fold and return the ballot to the officer. The officer shall immediately return to the polling place and deposit the ballot in the ballot container in accordance with § 24.2-646. The voter shall mark the mark sense ballot in the officer's presence but in a secret manner and cover and return the ballot to the officer who shall immediately return to the polling place and deposit the ballot in the ballot counter in accordance with the instructions of the State Board.*

Any county or city that has acquired an electronic voting device that is so constructed as to be easily portable may use the voting device in lieu of a paper or mark sense ballot for the voter requiring assistance pursuant to this subsection. However, the electronic voting device may be used in lieu of a paper ballot only so long as: (i) the voting device remains in the plain view of two officers of election representing two political parties or, in a primary election, two officers of election representing the party conducting the primary, provided that if the use of two officers for this purpose would result in too few officers remaining in the polling place to meet legal requirements, the equipment shall remain in plain view of one officer who shall be either the chief officer or the assistant chief officer; and (ii) the voter casts his ballot in a secret manner unless the voter requests assistance pursuant to this section. After the voter has completed voting his ballot, the officer or officers shall immediately return the voting device to its assigned location inside the polling place. The machine number, the time that the machine was removed and the time that it was returned, the number on the machine's public counter before the machine was removed and the number on the same counter when it was returned, and the name or names of the officer or officers who accompanied the machine shall be recorded on the statement of results.<sup>2</sup>

Nowhere in this subsection has the General Assembly imposed a duty on an officer of election to remain outside the polling place to effectuate curbside voting. Generally, "[w]here the language of a statute is clear and unambiguous[,] rules of statutory construction are not required."<sup>3</sup> Here, the plain language of the statute places the responsibility on the voter to request curbside voting if he or she wishes to use that form of assistance. Under the section, the requirement of the election officer to provide a ballot outside of the polling place arises only after such a request is made.<sup>4</sup>

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<sup>2</sup> VA. CODE ANN. § 24.2-649(A) (Supp. 2010) (emphasis added).

<sup>3</sup> See *Ambrogio v. Koontz*, 224 Va. 381, 386, 297 S.E.2d 660, 662 (1982); 2007 Op.Va. Att'y Gen. 24, 25.

<sup>4</sup> Similarly, among the various provisions setting forth the duties and responsibilities of election officials, none mandates that officers of election remain outside in case a voter requires assistance. See VA. CODE ANN. Title 24.2, Chapter 6 (the part of the *Code* governing elections). Cf. §§ 24.2-604.1 (2006) (requiring polling places to have signs directing voters needing assistance to designated entrances); 24.2-604(H) (Supp. 2010) (permitting high school election pages to assist elderly and disabled voters); 24.2-606 (2006) (conferring power on officers on election to ensure order is preserved *inside and outside* of polling place).

Although election procedures are regulated principally by state law, Congress has enacted several laws imposing requirements on the conduct of federal elections. The Voting Accessibility for the Elderly and Handicapped Act (VAEH),<sup>5</sup> for instance, requires each political subdivision overseeing federal elections to assure that all polling places for those elections are accessible to handicapped and elderly voters.<sup>6</sup> For areas in which no polling place offers adequate accessibility, VAEH provides an exception, so long as the state's chief election officer

(B) assures that any handicapped or elderly voter assigned to an inaccessible polling place, *upon advance request of such voter* (pursuant to procedures established by the chief election officer of the State)—(i) will be assigned to an accessible polling place, or (ii) will be provided with an alternative means for casting a ballot on the day of the election.<sup>7</sup>

VAEH expressly provides that a voter must first make a request before election officials have an obligation in federal elections either to assign the voter to an accessible polling place or to provide him an alternative means to cast a ballot on election day. Curbside voting is one such alternative. The language of this statute, like that of Virginia's § 24.2-649, indicates that the voter first is to make request, and leaves no room for an interpretation that an officer of election must be stationed and remain outside the polling place in order to implement the curbside voting alternative. This interpretation also comports with the Americans with Disabilities Act (ADA) and Section 504 of the Rehabilitation Act of 1973,<sup>8</sup> federal anti-discrimination statutes that have been invoked in election contexts.

Virginia offers curbside voting to any qualified voter who is age 65 or older or physically disabled to provide that voter with a less burdensome alternative to casting his or her vote than what the voter might experience going into the polling place and waiting in line to vote. Virginia's requirement that the voter must take the initiative to request curbside voting furthers Virginia's important interest in ensuring a smooth, efficient election process. Election officers must fulfill many responsibilities over the course of a long election day. Given that oftentimes there are only a limited number of officers of election at any particular polling place, it may be infeasible to station an officer outside for the duration of the day without adversely impacting the election functions the remaining officers must perform.

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<sup>5</sup> See 42 U.S.C.A. §§ 1973ee, *et seq.*

<sup>6</sup> See 42 U.S.C.A. § 1973ee-1. The Help America Vote Act of 2002 (42 U.S.C.A. §§ 15301 *et seq.*) mandates that voting machines and systems also be accessible for persons with disabilities, but does not address curbside voting procedures.

<sup>7</sup> 42 U.S.C.A. § 1973ee-1(b)(2) (B) (emphasis added).

<sup>8</sup> 42 U.S.C.A. §§ 12101, *et seq.*; 29 U.S.C.A. § 794, respectively. See *Taylor v. Onorato*, 428 F. Supp. 2d 384, 388 (W.D. Pa. 2006) (the ADA and Rehabilitation Act "mandate only that disabled persons are given the opportunity to vote"). See also U. S. Dep't of Justice Letter of Findings, No. 21 (September 10, 1993), *available at* <http://www.justice.gov/crt/foia/lofc021.txt> (finding South Carolina's curbside voting procedures for impaired voters unable to enter a polling place meet the program accessibility requirements of Title II of the ADA). Similar to Virginia's curbside voting procedures, South Carolina law provides for curbside voting "[w]hen the managers [of election] are informed that a handicapped or elderly voter cannot enter the polling place or cannot stand in line to vote." S.C. CODE ANN. § 7-13-771 (emphasis added).

**Conclusion**

Accordingly, it is my opinion that neither Virginia nor federal law requires that an officer of election be posted outside a polling place at all times that the polls are open on election day in order to assist elderly and disabled voters who prefer to vote by "curbside voting." It is further my opinion that the legal requirement for officers of election to assist such voters is triggered upon the voter making a request for such service, either by (i) entering the polling place to alert the officers of election, (ii) sending another person inside the polling place to alert the officers of election, or (iii) communicating with election officials in advance of coming to the polling place.

With kindest regards, I am

Very truly yours,

A handwritten signature in blue ink that reads "Ken C II". The signature is stylized, with the first name "Ken" and the last name "C" being prominent, followed by "II" in a smaller font.

Kenneth T. Cuccinelli, II  
Attorney General