



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

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The Honorable Jack Kennedy  
Clerk of the Circuit Court  
Wise County and City of Norton  
Wise, Virginia 24293-1248

Dear Mr. Kennedy:

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 inquire whether constitutional officers generally, and the Clerk of a circuit court specifically, have the authority to keep the office operational in the event there is no county budget adopted in accordance with the Virginia Constitution. You further ask whether a Clerk may continue to function by electronic filing procedures and agreements with the Virginia State Bar and state agencies.

## Response

It is my opinion that a Clerk of Court can close the office when a county has failed to adopt a budget and the Clerk cannot pay his employees. A Clerk, or the employees of the Clerk's office, can volunteer to continue serving until the budget impasse is resolved. To the extent particular functions, including electronic filing procedures, can continue in the absence of funding from the County and without staffing, or with volunteer staffing, the Clerk should continue to keep such systems operational.<sup>1</sup>

## Applicable Law and Discussion

Nothing in the Code addresses what Clerk's offices must do in the event a locality's governing body fails to adopt a budget. Although a provision in the *Code of Virginia* allows a court to declare a judicial emergency in the event of a natural disaster, and to take certain measures to ensure the continuity of operations, that provision does not cover a situation where a county fails to adopt a budget.<sup>2</sup> When a locality fails to adopt a budget, Clerks are in a very difficult position because they are subjected to conflicting statutory obligations.

By statute, Clerks of the circuit court are required to keep their offices open during weekdays.<sup>3</sup> At the same time, employees cannot be forced to work without pay. Without a County budget, Clerks cannot

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<sup>1</sup> I limit my answer to the Clerk of Court and offer no opinion with respect to other constitutional officers. By statute, the Attorney General "shall have no authority to render an official opinion [requested by a local government official] unless the question dealt with is directly related to the discharge of the duties of the official requesting the opinion." VA. CODE ANN. § 2.2-505(B).

<sup>2</sup> VA. CODE ANN. § 17.1-330 (2010).

<sup>3</sup> Section 17.1-207(A) (2010).

pay their employees or cover the expenses of running the office.<sup>4</sup> Furthermore, a County is forbidden from paying out any funds until they have been appropriated.<sup>5</sup> Clerks are also dependent on localities for their offices<sup>6</sup> and supplies.<sup>7</sup>

Because County appropriations are necessary for the Clerk's office to function and for the Clerk to pay his employees, the Clerk may close the office until a budget has been approved. The Clerk, and employees of the Clerk's office, may, of course, work as volunteers until the budget impasse has been resolved. To the extent particular functions, including electronic filing procedures, can operate without the appropriations from the County and without staffing, or with volunteer staffing, those should continue. If they cannot operate without county funding, they may be suspended.

An additional consideration is the safety of the employees of the Clerk's office. If, due to the budget impasse, the locality is unable to provide a secure environment for the Clerk's office to function, those considerations would support closing the office until the impasse is resolved.

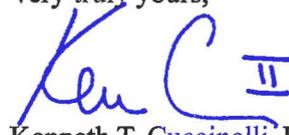
Finally, I note that the Clerk, or anyone with standing, may seek mandamus relief to require the County Board of Supervisors to adopt a budget. Although the details of the budget are primarily a matter of discretion for the governing body, the adoption of a budget is a non-discretionary duty that the Board must fulfill.<sup>8</sup> Failure to obey a court order can result in a finding of contempt.

#### Conclusion

Accordingly, it is my opinion that a Clerk of court can close the office when a county has failed to adopt a budget and the Clerk cannot pay his employees. A Clerk, or the employees of the Clerk's office, can serve on a volunteer basis until the budget impasse is resolved. To the extent particular functions, including electronic filing procedures, can continue in the absence of funding from the County and without staffing, or with volunteer staffing, the Clerk should continue to keep such systems operational.

With kindest regards, I am

Very truly yours,

A handwritten signature in blue ink that reads "Ken C II". The signature is stylized and written in a cursive-like font.

Kenneth T. Cuccinelli, II  
Attorney General

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<sup>4</sup> Under Item 67.70, paragraph A(5) of the budget bill, Clerks must "deposit all clerk's fees and state revenue with the state treasurer." Therefore, the option of retaining these funds to operate the office is not available. Furthermore, Clerks cannot spend local funds without an appropriation by the local body. *See* VA. CODE ANN. §§ 15.2-827 (2008) (providing that "[n]o money shall be drawn from the county treasury, nor shall any obligation for the expenditure of money be incurred, except in pursuance of a legally enacted appropriation resolution, or legally enacted supplement thereto passed by the board . . ."); 15.2-2507(B) (2008) (requiring the County to appropriate "as part of its annual budget . . . amounts for salaries, expenses and other allowances for its constitutional officers that are not less than those established for such offices in the locality by the Compensation Board . . .").

<sup>5</sup> Section 15.2-540 (2008).

<sup>6</sup> Section 15.2-1638 (2008).

<sup>7</sup> Section 15.2-1656 (2008).

<sup>8</sup> Section 15.2-2503 (2008) ("The governing body shall approve the budget and fix a tax rate for the budget year no later than the date on which the fiscal year begins."). *See also* 1978-79 Op. Va. Att'y Gen. 56, 58 (concluding that mandamus is appropriate where the adopted budget "appropriate[es] funds for the operation of a constitutional office which are less than the sums fixed by the State Compensation Board . . .").