



# COMMONWEALTH of VIRGINIA

Office of the Attorney General

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The Honorable Douglas W. Domenech  
Secretary of Natural Resources  
Post Office Box 1163  
Richmond, Virginia 23219

Dear Secretary Domenech:

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

## Issue Presented

You inquire about the constitutionality of land preservation programs in three particular situations and you ask whether these programs are constitutional in light of the prohibition found in the Constitution of Virginia on appropriations to charitable institutions that are not controlled by the Commonwealth.

## Response

It is my opinion that Article IV, § 16, which prohibits appropriations to charitable institutions not owned or controlled by the Commonwealth, applies to nonprofits that are devoted to land conservation. Furthermore, Article XI, §§ 1 and 2, which address land conservation, do not remove the specific bar on charitable appropriations. While the General Assembly cannot make appropriations in the nature of gifts to nonprofits engaged in land conservation, it can sign contracts or leases with such entities. A contract involves a bargained for exchange and mutual accountability. A grant that is in the nature of a gift does not satisfy constitutional requirements. Contracts with nonprofits that provide for land conservation and stewardship do not offend Article IV, § 16. Finally, it is impossible to answer your question regarding federal grants in the abstract.

## Background

You refer to a previous opinion of this Office, issued January 28, 2011, that addresses the constitutionality of certain proposed budget amendments.<sup>1</sup> In light of the opinion's conclusion that the suggested provisions ran afoul of the prohibition against charitable appropriations contained in Article IV, § 16, you request clarification regarding the application of the prohibition to programs and practices of the Natural Resources Secretariat. You specifically describe three separate scenarios for which you seek guidance.

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<sup>1</sup> 2011 Op. Va. Att'y Gen. No. 11-002, available at

<http://www.vaag.com/Opinions%20and%20Legal%20Resources/Opinions/2011opns/11-002-O'Bannon.pdf>.

1) **Activity 1:** The Virginia Land Conservation Foundation Board of Trustees, a Board staffed by the Virginia Department of Conservation and Recreation, was created in 1992 and reorganized in 1999 under Title 10.1, Chapter 10.2 of the *Code of Virginia*.<sup>2</sup> Since 1999, the Foundation has awarded millions of dollars of state appropriated funds to nonprofit land trusts across the Commonwealth for the purposes of conserving land. Pursuant to § 10.1-1020(A)(2),

[t]he Foundation shall establish and administer the [Virginia Land Conservation]Fund solely for the purposes of: . . . Providing grants to state agencies, including the Virginia Outdoors Foundation, and matching grants to other public bodies and holders for acquiring fee simple title or other rights, including the purchase of development rights, to interests or privileges in real property for the protection or preservation of ecological, cultural or historical resources, lands for recreational purposes, and lands for threatened or endangered species, fish and wildlife habitat, natural areas, agricultural and forestal lands and open space.

Section 10.1-1020(I) establishes that “[f]or the purposes of this section, ‘public body’ shall have the meaning ascribed to it in § 10.1-700, and ‘holder’ shall have the meaning ascribed to it in § 10.1-1009.” Section 10.1-1009 defines “holder” as

a charitable corporation, charitable association, or charitable trust which has been declared exempt from taxation pursuant to 26 U.S.C.A. § 501 (c) (3) and the primary purposes or powers of which include: (i) retaining or protecting the natural or open-space values of real property; (ii) assuring the availability of real property for agricultural, forestal, recreational, or open-space use; (iii) protecting natural resources; (iv) maintaining or enhancing air or water quality; or (v) preserving the historic, architectural or archaeological aspects of real property.<sup>[3]</sup>

Section 10.1-1020(B) further establishes that “[t]he Fund shall consist of general fund moneys and gifts, endowments or grants from the United States government, its agencies and instrumentalities, and funds from any other available sources, public or private.” The 2011 Appropriation Act authorizes the appropriation of funds for the grants: Item 352 D. 1. provides that, “[i]ncluded in the amount for Preservation of Open Space Lands is \$500,000 the first year and \$1,500,000 the second year from the general fund to be deposited into the Virginia Land Conservation Fund, § 10.1-1020, Code of Virginia.”<sup>4</sup>

You indicate that land conservation is not an activity that can be served through competitive bidding or easily run through public procurement processes. You note that the grant agreements with the land trusts could be seen as a form of contract by which a land trust, serving as a holder, is awarded matching funds, duly appropriated by the State, to conserve a specific parcel of property. Further, if the nonprofit is acting as a land agent, arranging a contract for the Commonwealth to purchase land from a third-party seller, the funds transferred to the nonprofit could be seen as a fee, paid by the Commonwealth pursuant to an arrangement with the nonprofit for its services that is contractual in nature.

In addition, you observe that it also can be argued that the function of the Foundation and the issuance of these grants is a means of achieving the purposes espoused in Article XI of the Virginia

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<sup>2</sup> VA. CODE ANN. §§ 10.1-1017 through 10.1-1026 (2006 & Supp. 2011).

<sup>3</sup> I note that a “holder” may acquire a conservation easement by gift, purchase, devise or bequest. Section 10.1-1010 (2006).

<sup>4</sup> 2011 Va. Acts ch. 890.

Constitution. In light of the constitutional policy to protect the Commonwealth's environment, you ask whether the constitutional prohibition against appropriations to charitable institutions applies to land conservation being furthered through grants to land trusts, where the direct benefit of these actions accrues to the Commonwealth through the conservation of its natural resources and open space in perpetuity and not to the land trust that is largely serving as the agent for the transaction.

You state that at its May 3, 2011 meeting, the Board of Trustees of the Virginia Land Conservation Foundation, following a lengthy discussion of this Office's January 28, 2011 Opinion, instructed staff to initiate a grant round under which land trusts will remain eligible for funding. As grant awards will not be made by the Board until its September meeting, the Board discussed the need for clarification of the Opinion from the Attorney General prior to the distribution of such awards.

You note that all Virginia Land Conservation Foundation grant funds are only paid at a real estate closing after all deliverables have been met and due diligence has been conducted. Additionally, all projects require a public body as a co-holder in order to provide greater long-term enforcement capabilities. Furthermore, grant reimbursement requirements exist should the holder not follow the acquisition conditions.

2) **Activity 2:** The Virginia Land Conservation Foundation is also responsible for distributing funds to land trusts for stewardship responsibilities. Section 58.1-513 C.2. of the *Code of Virginia*, which relates to the Virginia Land Preservation Tax Credit Program, provides that a

fee of two percent of the value of the donated interest shall be imposed upon any transfer arising from the sale by any taxpayer of credits under this article and upon the distribution of a portion of credits under this article to a member, manager, partner, shareholder or beneficiary pursuant to subsection B. Revenues generated by such fees first shall be used by the Department of Taxation and the Department of Conservation and Recreation for their costs in implementing this article but in no event shall such amount exceed 50 percent of the total revenue generated by the fee on an annual basis. The remainder of such revenues shall be transferred to the Virginia Land Conservation Fund for distribution to the public or private conservation agencies or organizations that are responsible for enforcing the conservation and preservation purposes of the donated interests. Distribution of such revenues shall be made annually by the Virginia Land Conservation Foundation proportionally based on a three-year average of the number of donated interests accepted by the public or private conservation agencies or organizations during the immediately preceding three-year period.

Additionally, Item 352 D.2. of the 2010 Appropriation Act<sup>5</sup> states that "[i]ncluded in the amounts for Preservation of Open Space Lands is \$2,000,000 the first year and \$2,000,000 the second year from nongeneral funds to be deposited into the Virginia Land Conservation Fund to be distributed by the Virginia Land Conservation Foundation pursuant to the provisions of § 58.1-513, Code of Virginia." The budget summary explanation for this item reads:

Virginia Land Conservation Fund. Provides \$2.0 million NGF each year for deposit into the Virginia Land Conservation Fund and subsequent distribution to those public and private organizations for monitoring and enforcing the easements for which Land Preservation Tax Credits have been provided. Chapters 229 (HB 447) and 248 (SB 264) of the 2010 Acts of Assembly removed the cap on the fee charged for transferring

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<sup>5</sup> 2010 Va. Acts ch. 874.

credits under the Land Preservation Tax Credits, and the legislation provides that the additional revenue from removing the cap may only be used for the monitoring and enforcing of these easements.

You indicate that, in accordance with the above-cited statutory authority, as well as a Memorandum of Understanding with the Department of Taxation and procedures adopted by the Board at its May 3, 2011 meeting, the Department of Conservation and Recreation intends to take to the Board for approval at its September meeting a list of eligible easement holders to which the Department will issue checks for stewardship responsibilities. Such distributions are to be made by November 1<sup>st</sup>. It is likely that as much as 40 percent of the funds deposited to the Foundation for this use might be distributed to nonprofit land trusts that are holders of easements for which a tax credit has been issued.

3) **Activity 3:** The Department of Conservation and Recreation as well as other agencies of the Secretariats of Natural Resources and Agriculture and Forestry often act as the nonfederal sponsors for federal grant funds and distribute these funds to conservation entities for land conservation purposes. For example, under the American Battlefield Protection Program administered by the National Park Service (“NPS”), the Department of Conservation and Recreation may serve as the nonfederal sponsor for a grant to the Virginia Civil War Preservation Trust, a nonprofit land trust. This is a reimbursable grant such that once the deliverables are met, the funds are transferred from NPS to the Department of Conservation and Recreation to the Civil War Preservation Trust. As part of the terms of the grant agreement, the Department must have sufficient appropriation on its books to consummate the financial transaction.

As the transaction requires a sufficient appropriation by the General Assembly, it is unclear whether transactions of this kind fall subject to the constitutional prohibition. Similar grant transactions are administered by the Department of Forestry under the Forest Legacy Program and other examples may exist under similar federal programs.

You indicate that it is unclear whether the activities noted above are affected by the constitutional prohibition against appropriations to charitable institutions. You note that nonprofits are the backbone of the delivery system for many of the Commonwealth’s important land conservation, historic preservation, and water quality enhancement programs. You also note that the inability to utilize these conduits without going through a lengthy procurement process, where it is even feasible, would be a fundamental problem.

### **Applicable Law and Discussion**

#### **I. SCOPE OF THE CONSTITUTIONAL PROHIBITION**

##### *A. Scope of the Prohibition on Appropriations to “Charitable Institutions”*

The Virginia Constitution forbids the General Assembly from making “any appropriation of public funds, personal property, or real estate . . . to any charitable institution which is not owned or controlled by the Commonwealth.”<sup>6</sup> The purpose of Article IV, § 16, as its plain language indicates, is “to prohibit the appropriation of public funds . . . for charitable purposes.”<sup>7</sup>

A threshold question is whether nonprofit groups devoted to land conservation constitute “charitable institutions” within the intendment of Article IV, § 16. If they do not, the General Assembly

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<sup>6</sup> VA. CONST. art. IV, § 16.

<sup>7</sup> Commonwealth v. Nat’l Fire Ins. Co. of Hartford, 161 Va. 737, 743-44, 172 S.E.2d 448, 451 (1934).

is free to appropriate funds to those organizations, or to authorize state agencies to appropriate funds to them. “The [Virginia] Constitution is not a grant of power, but only the restriction of powers otherwise practically unlimited, and except as far as restrained by the Constitution of this State and the Constitution of the United States, the legislature has plenary power.”<sup>8</sup>

There are no decisions on point from the Supreme Court of Virginia providing express guidance concerning what constitutes a “charity” for purposes of Article IV, § 16. Nevertheless, the cases and the historical record strongly point toward the conclusion that the term “charitable institution” was intended to have a broad meaning.

Dictionaries from the period broadly defined the term “charity.”<sup>9</sup> I also find instructive the discussion of charitable trusts in *Allaun v. First & Merchants National Bank of Richmond*:<sup>10</sup>

A charity, in a legal sense, may be described as a gift to be applied, consistently with existing laws, for the benefit of an indefinite number of persons, either by bringing their hearts under the influence of education or religion, by relieving their bodies from disease, suffering or constraint, by assisting them to establish themselves for life, or by erecting or maintaining public buildings or works, or otherwise lessening the burdens of government. It is immaterial whether the purpose is called charitable in the gift itself, if it is so described as to show that it is charitable. Generally speaking, any gift not inconsistent with existing laws which is promotive of science or tends to the education, enlightening, benefit or amelioration of the condition of mankind or the diffusion of useful knowledge, or is for the public convenience is a charity.<sup>11</sup>

These definitions suggest that nonprofits are charitable institutions within the scope of Article IV, § 16.

An additional source that sheds light on the meaning of the Constitution, and one the Supreme Court of Virginia has consulted, is the record of the debates of the Constitutional Convention.<sup>12</sup> This record supports the conclusion that the intent animating the prohibition was broad.<sup>13</sup> Proponents of the amendment wished, first, to obviate the need of the General Assembly to deal with pleas for charity and, second, pointed to the unfairness of transferring tax dollars from a citizen to a private entity. Significantly, the debate focused on giving money to private “institutions.” As Delegate Robert Turnbull argued:

[I]f you ever depart from the principle and do not have the State control the money that is wrung from the people of Virginia in the way of taxes you are going to start a state of things in Virginia to which there will be no stop, because if you appropriate one dollar of the money of the people to support one private institution any other private institution has exactly the same right to come and demand aid at the hands of the Legislature. What I

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<sup>8</sup> *City of Newport News v. Elizabeth City Cnty.*, 189 Va. 825, 831, 55 S.E.2d 56, 60 (1949).

<sup>9</sup> See *DICTIONARY OF THE LAW* 195 (West 1891) (defining “charity” as “alms-giving; acts of benevolence; relief, assistance, or services accorded to the needy without return. Also gifts for the promotion of philanthropic and humanitarian purposes.”); *A DICTIONARY OF THE LAW* (T.H. Flood and Co. 1891) (defining charity as “a gift for a public use; as a gift in aid of the poor, to learning, to religion, to a humane object.”).

<sup>10</sup> 190 Va. 104, 56 S.E.2d 83 (1949).

<sup>11</sup> *Id.* at 108, 56 S.E.2d at 85 (quotation marks omitted).

<sup>12</sup> *Almond v. Day*, 197 Va. 419, 425-26, 89 S.E.2d 851, 855 (1955).

<sup>13</sup> See I Report of the Proceedings & Debates of the Constitutional Convention, June 12, 1901 to June 26, 1902, at 783-818 (1906).

want to impress on the Convention is that if one has a right to demand it the other has a right to demand it; and they are demanding it every time the Legislature comes here. About half the time of the Legislature is taken up by appeals and applications to have appropriations made for the benefit of different institutions. So far as I am concerned, I want to cut it off.<sup>[14]</sup>

Thus, the idea at the heart of Article IV, § 16 was to prevent the transfer of tax dollars from one private party to another private party that is charitable in nature.

It is possible, but unlikely, that a court would construe the term “charitable institution” narrowly. The safest course of action, and the one most consistent with the historical record and the spirit of the provision, is to read the term “charitable institution” broadly. Therefore, I conclude that nonprofit organizations devoted to land conservation are charities for purposes of Article IV, § 16.

#### B. *Gifts versus Contracts*

I do not understand the prohibition on charitable appropriations in Article IV, § 16 to extend to *bona fide* contracts between the state and charitable institutions. One of the strongest proponents for adding the prohibition on appropriations to charitable institutions, Delegate Alexander Hamilton,<sup>15</sup> agreed that it would be acceptable “to contract with any of these charitable or educational institutions to do a certain portion of the work which devolves upon . . . the State . . . they may make such a contract and may make an appropriation to pay for the value of the services received.”<sup>16</sup> Delegate Hamilton further contended that “no gift of the money obtained by taxation should be made to any institution or any sectarian body. [The State has no] right to give away any money gotten from the people by taxation.”<sup>17</sup> He noted that he understood the word “appropriate” to signify “give.” The “use [of] money to purchase services from” charitable institutions was not forbidden.<sup>18</sup> So long as there was a “quid pro quo,” the appropriation would not infringe on the proposed constitution.<sup>19</sup> Similarly, Delegate Robert Walton Moore noted that courts would construe the provision now found in Article IV, § 16 as “prevent[ing] an appropriation to any institution not wholly owned and controlled by the State except there were a contract involving a valuable consideration.”<sup>20</sup> Delegate Wayland Fuller Dunaway echoed these sentiments, noting that “it is inherently wrong to donate public funds to private institutions. It is an act of injustice to the tax-payers of the State.”<sup>21</sup> Therefore, the historical records support the understanding that *bona fide* contracts with nonprofits are permitted by Article IV, § 16, whereas gifts of taxpayer dollars are not.

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<sup>14</sup> *Id.* at 815.

<sup>15</sup> I note that this is not the same Alexander Hamilton, our Founding Father, who served as one of New York’s delegates at the Philadelphia Convention that drafted the federal constitution in 1787 and who contributed greatly to the *Federalist Papers*.

<sup>16</sup> *Id.* at 790.

<sup>17</sup> *Id.* at 789.

<sup>18</sup> *Id.* at 790.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 791.

<sup>21</sup> *Id.* at 798.

C. *Interplay between the Prohibition on Charitable Appropriations and the Conservation Provisions*

Article XI, § 1 of the Virginia Constitution states that

[t]o the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings. Further, it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.

Article XI, § 2 of the Virginia Constitution further provides that

[i]n the furtherance of such policy, the General Assembly may undertake the conservation, development, or utilization of lands or natural resources of the Commonwealth, the acquisition and protection of historical sites and buildings, and the protection of its atmosphere, lands, and waters from pollution, impairment, or destruction, by agencies of the Commonwealth or by the creation of public authorities, or by leases or other contracts with agencies of the United States, with other states, with units of government in the Commonwealth, or with private persons or corporations. Notwithstanding the time limitations of the provisions of Article X, Section 7, of this Constitution, the Commonwealth may participate for any period of years in the cost of projects which shall be the subject of a joint undertaking between the Commonwealth and any agency of the United States or of other states.

Nothing in Article XI, §§ 1 and 2 suggests that these provisions suspend or repeal the prohibition on charitable appropriations in the context of land conservation.<sup>22</sup> Indeed, consistently with the understanding that Article IV, § 16 permits contractual arrangements with charities but not gifts, Article XI, § 2 permits the Commonwealth to enter into “leases or other contracts with . . . private persons or corporations.” Therefore, agencies of the Commonwealth are authorized to sign leases or other contracts with respect to land conservation. The General Assembly, and, by extension, state agencies, may not, however, make grants that are tantamount to *gifts* of taxpayer dollars to charitable institutions devoted to land conservation.

There is no denying that Virginians benefit from land conservation programs operated by nonprofit entities. The same is true of nonprofit educational institutions, hospitals, food banks and countless other nonprofits. The fact that Virginians can benefit, however, does not alter the constitutional prohibition. Moreover, the fact that the charitable entity may use some of its own funds to acquire the land does not salvage an appropriation of funds that is improper under Article IV, § 16. Seldom will an appropriation of funds by the state cover the entire cost of providing a charitable service. The Constitution forbids gifts to charities, irrespective of whether those gifts cover all or only part of the cost of a particular charitable endeavor.

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<sup>22</sup> It is worth noting that Article XI, § 2 expressly suspends the operation of the time period of Article X, § 7, which prohibits money to be paid out “more than two years and six months after the end of the session of the General Assembly at which the law is enacted authorizing the same.” There is no similar suspension of the prohibition on charitable appropriations found in Article IV, § 16, strongly suggesting that those who drafted and ratified Article XI, § 2 did not intend to affect Article IV, § 16.

## II. APPLICATION OF THOSE PRINCIPLES TO THE THREE PROPOSED ACTIVITIES

### A. *Activities 1 and 2: Giving versus Contracting with Nonprofits*

Applying these principles to your first scenario described above, Virginia and its agencies are free to enter into contractual and lease arrangements with entities such as the Virginia Outdoors Foundation for the purpose of conserving land. For example, the state can buy land and lease it to a non-profit upon certain terms and conditions. Article IV, § 16, however, would prohibit the state from making grants that are in the nature of gifts, with no bargained for exchange and no corresponding rights and remedies. The fact that the state is a co-holder with a nonprofit does not turn a gift of funds into a contract, if the nonprofit is not contractually obligated to perform any particular service.<sup>23</sup> I note that the law, which allows the state to enter into leases and contracts, affords the Commonwealth and nonprofits broad flexibility to achieve their joint goal of conserving land for future generations.

The second activity about which you inquire involves the distribution of funds to public or private conservation agencies for stewardship purposes. As noted above, what Article IV, § 16 prohibits are gifts to these non-profits with the expectation and the hope that the nonprofits will use the funds in accord with the state's wishes. To the extent the arrangements are contractual in nature, with a bargained-for exchange of funds for services and the provision of rights and remedies, they are permissible.

### B. *Activity 3: Federal Grant Programs*

The very nature of the federal grant process makes it impossible for me to answer your inquiry in the abstract. Federal grant programs distribute money in a multitude of ways. Under such programs, the role of the Commonwealth can vary from passively distributing funds as a "pass through" to being the entity that determines who receives the federal grant and how much they receive. Without knowing the specifics of a particular grant, I cannot opine with any certainty whether or not it would violate Article IV, § 16.

## III. PUBLIC PROCUREMENT AND THE VIRGINIA CONSTITUTION

You comment on the difficulty in the conservation area of relying on ordinary public procurement procedures. I note that the competitive process requirements of the Public Procurement Act apply when a public body enters into a contract with a nongovernmental contractor for the purchase or lease of goods, or for the purchase of services, insurance, or construction.<sup>24</sup> The requirements therefore do not apply to a purchase or lease of real estate. The scenarios you present appear to involve both real estate and "stewardship" elements. The applicability of the procurement law's requirements depends on an examination of the substance of the proposed contract or lease to determine its predominant purpose.<sup>25</sup> I lack sufficient information to determine whether any particular transaction the Secretariat may encounter implicates the Public Procurement Act. Nevertheless, I further note that public procurement laws are not constitutional in stature. The General Assembly, therefore, is free to carve out exceptions where necessary to ensure the smooth operations of government. Should the General Assembly see fit to modify public procurement in this area, it is free to do so.

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<sup>23</sup> From the facts provided, it does not appear that being a "co-holder" grants the Commonwealth control of the charitable entity, and therefore, such an arrangement would violate Article IV, § 16. If, however, an arrangement were entered into that did grant the Commonwealth control over the charity, such enterprise would be permissible.

<sup>24</sup> VA. CODE ANN. § 2.2-4303(A) (Supp. 2011).

<sup>25</sup> See, e.g., 1983-84 Op. Va. Att'y Gen. 290.

### Conclusion

Accordingly, it is my opinion that Article IV, § 16 of the Constitution of Virginia, which prohibits appropriations to charitable institutions not controlled by the Commonwealth, applies to nonprofits that are devoted to land conservation. Furthermore, Article XI, §§ 1 and 2, which address land conservation, do not remove the specific bar on charitable appropriations. While the General Assembly cannot make appropriations in the nature of gifts to nonprofits engaged in land conservation, the Commonwealth and its agencies can sign *bona fide* contracts or leases with such entities. A contract involves a bargained for exchange, and mutual accountability. A grant that is in the nature of a gift does not satisfy constitutional requirements. Contracts with nonprofits that provide for land conservation and stewardship do not offend Article IV, § 16. Finally, it is impossible to answer your question regarding federal grants in the abstract.

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".

Kenneth T. Cuccinelli, II  
Attorney General