Opinions

of the

Attorney General

and

Report

to the

Governor of Virginia

2009

Commonwealth of Virginia
Office of the Attorney General
at Richmond

THE 2009

REPORT OF THE ATTORNEY GENERAL

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Letter of Transmittal

May 1, 2010

The Honorable Robert F. McDonnell
Governor of Virginia

Dear Governor McDonnell:

I am pleased to present to you the *Report of the Attorney General* for 2009. The citizens of this Commonwealth may be proud of the dedicated public servants who work for the Office of the Attorney General. I look forward to working with you over the next four years to continue the success and accomplishments of my predecessors. Further, I will ensure that the Commonwealth has the finest lawyers and staff at the helm of the Department of Law. It is 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 is responsible for the Commonwealth's litigation in the Supreme Court of the United States, except capital cases, and all lower court appeals involving constitutional challenges to statutes or other high profile matters. In addition, the Solicitor assists all Divisions of the Office with constitutional issues.

The State Solicitor litigated *Briscoe v. Virginia*, which originated in 2008, addressing the propriety of Virginia's now repealed notice and demand statute. The Solicitor was involved in numerous lower court appeals and certain trial proceedings. Most significantly, the Section successfully defended the constitutionality of the Partial Birth Infanticide Act before an *en banc* panel of the United States Court of Appeals for the Fourth Circuit. The Section also prevailed in an important sovereign immunity case in the Fourth Circuit, sought certiorari from several adverse decisions of the Supreme Court of Virginia, and successfully defended the intermodal rail project in Montgomery County against a challenge under the Constitution of Virginia.

Civil Litigation Division

The Civil Litigation Division defends the interests of the Commonwealth, its agencies, institutions, and officials in civil law suits. These civil actions include tort, construction, employment, workers' compensation, and civil rights claims, as well as constitutional challenges to state statutes. In addition, the Division pursues civil enforcement actions pursuant to Virginia's consumer protection and antitrust

laws, represents the interests of the citizens of the Commonwealth with regard to the conduct of charities, and serves as Consumer Counsel in matters involving regulated utilities, including cases pending before the State Corporation Commission (SCC). Finally, the Division provides legal advice to the agencies and institutions of state government on risk management, employment, insurance, utilities, and construction issues and serves as counsel to Virginia's judiciary and the Virginia State Bar.

Trial Section

The Trial Section of this Division handles the majority of the civil litigation filed against the Commonwealth. The Section defended cases, including tort claims, civil rights issues, contract issues, denial of due process claims, defamation claims, employment law matters, election law issues, challenges to The Freedom of Information Act, contested workers' compensation claims, and constitutional challenges to state statutes. The Section consists of three Units: General Trial Unit; Employment Law Unit; and Workers' Compensation Unit.

General Trial Unit:

Among the 360 new lawsuits filed against the Commonwealth in 2009, 2 were wrongful death actions arising out of the tragic shootings at Virginia Tech. The Unit actively defended these cases. In addition, the Unit defended the Virginia Supreme Court Clerk against a subpoena seeking testimony about the Court's review of proportionality in death penalty cases. As a result, the testimony was limited to administrative duties and did not reach the deliberations of the Court.

In *Educational Media v. Swecker*, the Unit, in conjunction with the Solicitor Section, defended a constitutional challenge of Alcoholic Beverage Control (ABC) regulations limiting the advertisement of alcohol in college student publications. The Unit argued the case on appeal to the Fourth Circuit from a district court order that permanently enjoined enforcement of the challenged regulations. The Unit successfully settled a contract claim on behalf of Old Dominion University arising from an agreement for the construction and installation of a rolling road for race car wind resistance testing in a wind tunnel. As a result of the Unit's aggressive pursuit, the private contractor agreed to repair a damaged component at no cost to the University.

In addition to its defense of civil litigation, the Unit provided legal advice to state courts and judges, the Virginia State Bar, Board of Bar Examiners, and Department of Labor and Industry. It participated in the annual training of newly appointed district and circuit court judges, prosecuted unauthorized practice of law matters referred by the Virginia State Bar, and represented the State Bar in appeals of disciplinary actions.

Employment Law Unit:

In 2009, the Employment Law Unit handled significant cases that strengthened the Commonwealth's position that employees who challenge the termination of their employment in a grievance hearing pursuant to the statutory

grievance procedure are precluded from relitigating their claims again in federal court. In addition to a variety of employment claims, the Unit successfully defended a federal discrimination claim where the agency was not made aware of the charge of discrimination filed with the Equal Employment Opportunity Commission.

The Unit provided legal advice related to employment matters and employment law to numerous state agencies and institutions, including the Department of Human Resource Management, Human Rights Counsel, Virginia Indigent Defense Commission, Advisory Council for the Commonwealth of Virginia Campaign, and the Office of Commonwealth Preparedness. It provided training for Virginia's community colleges concerning the new legal standard for retaliation under Title VII; for investigators with the Human Rights Council on sexual harassment under Title VII and the Virginia Human Rights Act; and for the Southside Virginia Training Center on state and federal employment discrimination law. The Unit also trained a variety of state agencies on the federal Fair Labor Standards Act. Attorneys from the Unit sit on the pandemic flu committee for Virginia's court system and serve on a statewide committee working on e-mail management.

Workers' Compensation Unit:

The Workers' Compensation Unit defends compensation claims filed by employees of state agencies. Because the cases are filed throughout the Commonwealth, cases also are managed by attorneys in Abingdon, Fishersville, and Virginia Beach. In addition, the Unit works to prevent double recovery by injured employees. The Unit recovers funds for the Department of Human Resource Management Workers' Compensation Program where a claimant receives monies in litigation involving the accident in which he was injured and for which he was receiving benefits. Finally, the Unit provides advice to the Program concerning the handling of claims and compensability of various injuries.

Construction Litigation Section

The Construction Litigation Section is responsible for all litigation concerning construction of roads, bridges, and buildings for the Commonwealth's agencies and institutions. The Section defends, makes claims, or files lawsuits against construction and design professionals or surety companies in the context of construction disputes. Further, the Section provides regular advice to the Department of Transportation and other state agencies, colleges, and universities during the administration of more than $2 billion in building, road, and bridge contracts. These efforts support effective partnerships between the Commonwealth, general contractors, and road builders and facilitate timely and efficient completion of construction projects.

In 2009, the Section opened 20 new claim and litigation files that requested damages from the Commonwealth in excess of $280 million. In addition, 20 matters seeking nearly $37 million were resolved for a collective total payment of approximately $17 million.

Antitrust and Consumer Litigation Section

The Antitrust and Consumer Litigation Section enforces state and federal statutes that protect consumers from deception and misrepresentation. This Section also enforces usury and antitrust laws that protect businesses and consumers from behavior that defeats healthy competition. Further, the Section enforces the Virginia Antitrust Act, Virginia Consumer Protection Act, Consumer Finance Act, solicitation of contributions statute, and certain federal statutes, including the Telemarketing and Consumer Fraud and Abuse Prevention Act and its accompanying regulations, the Telemarketing Sales Rule. The Section advises the Office of Consumer Affairs within the Virginia Department of Agriculture and Consumer Services and provides antitrust advice to other state agencies.

During 2009, the Section obtained significant results in the consumer protection and antitrust areas. In the area of consumer protection, the Section resolved claims that were pending against Financing Alternatives, Incorporated (FAI) and its sole shareholder and director with the entry of a consent judgment. FAI and its owner violated the Virginia Consumer Protection Act (VCPA) in misrepresenting the time period during which computers sold on layaway would be delivered, receiving payments from consumers, and failing to deliver the computers. The judgment enjoined the unlawful conduct, entered judgment against FAI in excess of $30 million for consumer restitution and $6.1 million for civil penalties, entered judgment against FAI's owner in excess of $8 million for consumer restitution and $1.7 million for civil penalties, and entered judgment against FAI and its owner for $575,000 in attorney's fees and costs.

The Section initiated 8 civil enforcement actions under the Post-Disaster Anti-Price Gouging Act in response to dramatic increases in the price of gasoline in anticipation of Hurricane Ike. The actions resulted in assurances of voluntary compliance to provide customer restitution.

The Section filed a complaint against Virginia Employment Services, Inc., and its predecessor companies, Virginia Personnel, Inc., and New Beginnings, Inc., alleging violations of VCPA. These companies charged consumers hundreds of dollars in "membership" fees in exchange for "guaranteed" jobs and offered little or no assistance in finding employment. The companies made unauthorized charges to debit and credit cards. The Commonwealth obtained default judgments against all 3 companies that provide for consumer restitution, civil penalties exceeding $800,000, and reimbursement of the Commonwealth's attorney's fees, costs, and expenses.

In addition, the Section distributed $1 million to the Virginia Health Care Foundation. The money was recovered from 2 multistate consumer protection investigations involving pharmacy benefit managers. The Foundation planned to use the funds as a challenge grant to raise an additional $1 million for Virginia's health safety net providers. The grant will expand access to prescription medications, basic

mental health services, and primary medical care for low income individuals with mental illnesses. The new grant initiative is titled: "*A New Lease on Life: Health for Virginians with Mental Illness*."

The Section entered into multistate settlements that will provide significant benefits to Virginians. Most significantly, Virginia joined a nationwide settlement with Countrywide Financial Corporation, which provided several forms of relief to affected borrowers including loan modifications, foreclosure relief payments, and relocation assistance payments. Pursuant to the terms of the settlement Countrywide estimated it ultimately would make modification offers to over 8,900 Virginians.

In antitrust matters, the Section reviewed 3 hospital affiliation transactions for potential impact on competition. The transactions are expected to enhance competition in the relevant hospital markets. The Section worked to pass legislation related to 3 consumer protection initiatives. VCPA now provides that foreclosure prevention companies cannot charge or receive a fee before they have performed the services they agreed to perform. Further, under the Mortgage Lender and Broker Act, mortgage lenders operating in Virginia are subject to deceptive practice prohibitions enforceable by the Attorney General. Finally, VCPA prohibits the sale of any children's product that a supplier knows or has reason to know was recalled by the U.S. Consumer Product Safety Commission.

Insurance and Utilities Regulatory Section

The Insurance and Utilities Regulatory Section serves as the Division of Consumer Counsel of the Office of the Attorney General. In that role, the Section represents the interests of Virginia's consumers in the services and products of insurance companies and regulated electric, natural gas, water, and telecommunications companies. This requires active participation in proceedings before the SCC and federal regulatory agencies and in the legislative process to protect consumer interests in the regulation of public utilities and insurance companies. Electric utility rate proceedings dominated the Section's work in 2009.

Representing the interests of Dominion Virginia Power's customers, the Section successfully advocated for a significant decrease to the company's "fuel factor" rate in 2009. The SCC entered orders reducing Dominion's annual fuel revenues by $458 million. As a result, residential customers of Dominion that use 1,000 kilowatts of electricity will pay $9.66 a month less in January 2010, than in June 2009. The Section also challenged Dominion's proposed $594 million increase to nonfuel rates and negotiated a proposed settlement. The proposed settlement was joined by a number of large industrial and commercial customers and provides for no base rate increase, credits totaling at least $268 million through 2010, and an additional credit of $129 million to the company's fuel factor. That case and the proposed settlement were pending before the SCC at the end of 2009.

At the Federal Energy Regulatory Commission, the Section challenged a Dominion effort to recover from customers $153 million of regional transmission organization costs deferred during the capped rate period. The Commission approved Dominion's recovery, and the Attorney General and the SCC appealed to the Fourth Circuit. The Section continued its efforts to limit rate increases by Appalachian Power Company (APCO), and the SCC lowered APCO's requested $226 million fuel rate increase by $97 million. The SCC relied on the positions taken by Consumer Counsel pertaining to certain transmission financial derivatives retained by the company and the relatively high cost of purchased wind power. In APCO's pending base rate case, the Consumer Counsel advocated the elimination of $60 million of the proposed $154 million rate increase.

The Section worked with natural gas utilities to seek approval of conservation and decoupling plans authorized under 2008 legislation. In addition, the Section participated in SCC proceedings, including renewable portfolio programs and integrated resource planning. The Section provided input on behalf of consumers to minimize future rate impacts. The Section participated in and monitored rulemaking proceedings to ensure that the SCC's regulations protect the interests of consumers. Finally, the Section participated in an SCC proceeding regarding telephone service quality standards. Consistent with our position, the SCC found that protection of public health, safety, and economic well-being should be priorities in ensuring minimum levels of service quality.

Health, Education and Social Services Division

The attorneys in the Division of Health, Education and Social Services provide advice to the public colleges and universities of Virginia and to the agencies charged with providing essential services to the citizens least able to help themselves. The Division protects the rights of tax-paying Virginians by ensuring the proper use of state and federal funds in health and social services programs, by providing advice to members of the General Assembly on issues of health, education, social services, child support, and mental health, by representing the children of Virginia, and by vigorously enforcing child support payments.

Education Section

The Education Section provides guidance that ensures quality education for students from kindergarten through college. For K-12, this guidance often directly impacts local schools in implementing the Standards of Learning and Standards of Quality, providing access to technology for disadvantaged students, maintaining discipline and safety on school grounds, complying with federal education programs, and improving school facilities. Virginia's 14 colleges and 23 community colleges are self-contained communities with the full range of legal needs: campus safety

and security; admission and educational quality issues; personnel issues; the proper relationship between colleges and the Commonwealth; contracts; procurement; and financing.

The work by the Section's attorneys stemming from the tragic shootings at Virginia Tech and its aftermath continued in 2009, including issues related to Family Education Rights Privacy Act, mental health reform, disaster planning, and general campus safety.

Health Services Section

The attorneys in the Health Services Section worked closely with the State Health Commissioner in making preparations for distribution of the H1N1 vaccine, including drafting cooperative agreements with local school divisions for distribution of the vaccine, development of parental consent forms, and providing advice on emergency response issues. The Section worked with the Virginia Supreme Court and its pandemic flu advisory group to develop procedures and a bench book to ensure that the trial and appellate courts in the Commonwealth are able to respond quickly and effectively in the event of a health emergency.

In *The Arc of Virginia, Inc. v. Kaine*, the Virginia Office for Protection and Advocacy (VOPA) filed to enjoin the Commonwealth from building a 75-bed replacement facility for the Southeastern Virginia Training Center in Chesapeake. The complaint alleged that such construction violated the Americans with Disabilities Act and § 504 of the Rehabilitation Act. The United States Department of Justice filed an *amicus curiae* brief on behalf of the plaintiff. The case was appealed to the Fourth Circuit. The Section also assisted the State Solicitor General in defending *Virginia Office for Protection & Advocacy v. Reinhard*. This case involved access to privileged documents maintained by state-operated facilities for persons with mental illness and developmental disabilities. VOPA filed a petition for certiorari following the Fourth Circuit's decision that sovereign immunity precludes one state agency from suing another state agency in federal court.

Additionally, the Section devoted extensive time to the Commonwealth of Virginia Mental Health Law Reform Commission by drafting recommendations to address mental health system reform. Section attorneys chaired or participated in the work of several task forces and drafted legislation, recommendations, and reports. Further, the Section provided training on 2009 legislative changes, including legislation that permits a person or entity other than law-enforcement to transport a person who is subject to an emergency custody or temporary detention order. Attorneys in the Section also provided training on the legislation expanding Virginia's Health Care Decision Act that permits advance directives, other than end of life situations, for all forms of health and mental health care.

The Section represented the Department of Behavioral Health and Developmental Services in the federal investigation of the Central Virginia Training

Center in Lynchburg under the Civil Rights of Institutionalized Persons Act. Subject matter experts working for the Department of Justice and its attorneys have toured the Center to review psychiatry services, psychology services, quality assurance and risk management, and physical and nutritional management. The Justice Department's report was not finalized at the end of 2009.

Social Services Section

This Section provides guidance for the myriad of issues connected with Medicaid reimbursement and the protection of the children through the Department of Social Services. During the past year, this Section successfully defended a number of founded dispositions of child abuse, including several sex abuse cases. The latter cases resulted in the names of the abusers being placed on the Department's Central Registry, a statewide listing of persons who have abused or neglected a child.

Section attorneys defended a number of licensure revocation cases, including a number of daycare facilities. The cases were resolved by removing the problematic licensee from the facility through a change of ownership, imposing requirements to ensure future regulatory compliance, or closing the facility or program. The Section provided advice and defense on a number of public benefits matters (medical and financial), including Medicaid, Family Access to Medical Insurance Security, Temporary Assistance for Needy Families, Child Care Assistance, Food Stamps, and Energy Assistance. These programs are complex regulatory schemes involving federal and state laws and state plans approved by a federal agency. The Section provided advice on the challenging issues surrounding the Medicaid Management Information Systems, the computer system upon which the Commonwealth's Medicaid system is administered, and to the Medicaid Fraud Control Unit to protect the integrity and fiscal soundness of the Commonwealth's Medicaid program.

Child Support Enforcement Section

The Child Support Enforcement Section continued its efficient and vigorous prosecution of child support cases. Section attorneys handled 117,191 child support hearings, which resulted in collections in excess of $9 million and sentences totaling more than 600,000 days in jail. In 2009, the Section handled 57 appellate and trial cases and succeeded in obtaining dismissals of 29 claims or appeals, including a Virginia Supreme Court case, 8 cases in the Court of Appeals of Virginia, 11 circuit court cases, and 4 federal court cases.

In one significant case, the Division filed motions for show cause, and the father was found in civil contempt for failing to pay child support in 1998, 2003, 2007, and 2008. Numerous cases followed. In 2009, in 1 of the 21 cases involving this father, he filed a petition for a writ of mandamus to command the Commissioner to cease all attempted enforcement actions. The Virginia Supreme Court dismissed

the father's petition because mandamus does not lie to compel discretionary acts or to undo previously completed acts and denied the motions for craving oyer and for sanctions.

Another significant case handled by the Section arose from a 2009 appeal from a trial court dismissal of a § 1983 suit. The father filed a complaint under § 1983 in circuit court and requested damages and injunctive relief against the Division of Child Support Enforcement and others. He claimed the parties had acted under color of law to violate his civil and due process rights by wrongfully incarcerating him after being found in civil contempt for nonpayment of child support, revoking his passport, unlawfully seizing his property including federal tax refunds, and ruining his credit. He sued for $50,000 in compensatory and $5 million in punitive damages, plus attorneys' fees and costs. The case was appealed to the Virginia Court of Appeals, which transferred the case to the Virginia Supreme Court. The Virginia Supreme Court refused the father's petition for appeal. The Court opined there was no reversible error in the trial court's judgment.

Sexually Violent Predators, Tobacco, Alcohol, Gaming and Debt Collections Division

The Sexually Violent Predator, Tobacco, Alcohol, Gaming and Debt Collection Division is responsible for providing comprehensive legal services in a number of diverse areas. Attorneys in the Division provide counsel to: (1) all gaming agencies, including the Virginia Lottery, Racing Commission, and Department of Charitable Gaming; (2) the Workers' Compensation Commission; (3) the agencies funded by the proceeds from the Tobacco Master Settlement Agreement, Tobacco Indemnification and Community Revitalization Commission, and Virginia Foundation for Healthy Youth, and its two divisions, the Virginia Tobacco Settlement Foundation and Virginia Youth Obesity Prevention; (4) the Department of Alcoholic Beverage Control; (5) the Commonwealth Health Research Board; (6) the Virginia Birth-Related Neurological Injury Program; and (7) the Division of Debt Collection provides cost effective professional debt collection services on behalf of state agencies. The Division also represents the Commonwealth in the civil commitment of sexually violent predators.

Virginia Birth-Related Neurological Injury Compensation Representation:

In 2009, the Division handled 9 new eligibility petitions, concluding 5, and concluded 4 previously filed cases under the Virginia Birth-Related Neurological Injury Compensation Act. Under the Act, the Birth Injury Program was established as a no-fault program to stem the tide of rising malpractice insurance premiums and ensure the availability of obstetrical and gynecological healthcare for Virginians. The Division provides legal advice to the Board and its Executive Director and

represents the Program in appeals of the Virginia Birth-Related Neurological Injury Compensation Program Board decisions regarding specific benefit claims to the Workers' Compensation Commission. Further, the Division represents the Program in eligibility determination cases before the Workers' Compensation Commission and the appellate courts.

The Program recommended admission in 8 cases without requiring evidentiary hearings. The Workers' Compensation Commission initially dismissed 1 eligibility petition in accordance with the Program's responsive pleading; however, healthcare providers filed an appeal with the Virginia Court of Appeals. The Court of Appeals upheld the Program's position and remanded the case to the circuit court for further proceedings. The Court of Appeals also remanded a petition to the Commission, which was pending at year end along with 5 other eligibility petitions.

Four benefits appeals pending before deputy commissioners were concluded by agreed order. One benefits appeal was still pending at the end of the year. Eight concluded fee petitions were resolved by agreement. The Division provided general counsel assistance to the Program, including legal advice and research, monthly meetings, and outside correspondence on behalf of the Program.

Animal Rights:

The Division handled 30 requests for assistance from animal control, law-enforcement, and Commonwealth's attorneys regarding animal neglect or cruelty, dangerous dogs, and dog fighting cases. The Division assisted the Association of Prosecuting Attorneys in developing an animal cruelty/animal fighting curriculum and participated in the inaugural Prosecuting Animal Crime Conference in Washington, D.C. Prosecutor's offices from across the Nation participated in the event. The Division participated on the animal cruelty committee of the National Association of Attorneys General.

Tobacco Section

The Tobacco Section continued to administer and enforce the Master Settlement Agreement (MSA), an agreement between the states and leading cigarette manufacturers. Pursuant to the MSA, the Commonwealth received more than $145 million, which raised the total payments received by the Commonwealth to more than $1.3 billion. MSA settlement funds are used to fund medical treatment for low income Virginians, stimulate economic development in former tobacco growing areas, and establish programs to deter youth smoking and for obesity prevention.

During the past year, the Section enforced MSA's implementing legislation through review, analysis, investigation of manufacturer applications to sell cigarettes in the Commonwealth, investigation of alleged violations of law, representation of the Commonwealth in actions under the Virginia Tobacco Escrow Statute, audit of Tax Stamping Agents, conduct of retail inspections, and participation on law-

enforcement task forces. In 2009, the Section investigated 54 companies, certified 45 cigarette manufacturers as compliant with Virginia law, denied 3 applications, delisted 2 companies, and recovered more than $400,000 in penalties for violations of Virginia law. The Section's investigations and enforcement actions have been nationally recognized for quality and effectiveness.

In addition to actions under the Virginia Tobacco Escrow statute, the Section represented the Commonwealth in a multi-million dollar MSA payment dispute. Further, this Office recommended and the General Assembly enacted landmark amendments to the Virginia Tobacco statutes, including unique and effective enforcement tools that no other MSA state has adopted. The Section implemented the new laws and provided consultation to other states interested in modeling Virginia's laws and MSA enforcement.

Finally, the Section monitored administration of the National Tobacco Grower Settlement Trust (Phase II Agreement). This administration included federal legislation ending the tobacco quota program and establishing a 10-year transitional payment program funded through assessments of approximately $10 billion on domestic manufacturers of tobacco products and importers of foreign tobacco. The Section provided legal advice and representation to the Virginia Tobacco Indemnification and Community Revitalization Commission.

Sexually Violent Predator Civil Commitment Section

Since the effective date of the SVP Act, the Commitment Review Committee and courts have referred 614 cases. The Section has filed 363 petitions for civil commitment or conditional release. In 2009, the Section filed 85 petitions and reviewed 84 other cases that did not meet the statutory criteria. During the year, the Section made 356 court appearances and traveled nearly 65,000 miles. There are approximately 184 persons in commitment at the Virginia Center for Behavioral Rehabilitation (VCBR). Thirteen persons have been removed due to parole revocations and/or the commission of new crimes. Five have been released from the VCBR.

The Section filed notices of appeals in 3 circuit court cases on the grounds that the court ordered conditional releases when the statutory requirements were not met. One case was remanded to circuit court where the judge released the inmate who subsequently reoffended. The other 2 appeals were unsuccessful. In addition, the Section moved to revoke the conditional releases of 5 persons due to violations of the terms of such releases.

Gaming Section

The Gaming Section has 1 attorney who reports to the Division's Deputy Attorney General. For the majority of the year, the Section represented or assisted with representation of the Virginia Racing Commission, Virginia Division of

Charitable Gaming, Virginia Lottery, Virginia Worker's Compensation Commission, Commonwealth Health Research Board, and the Criminal Injuries Compensation Fund, which consisted of general legal advice as administered through the Workers' Compensation Commission.

In December 2009, the responsibilities of the Section were narrowed to focus specifically on representation of the state agencies with administrative and regulatory responsibility for legalized gambling in Virginia-the Virginia Racing Commission, Division of Charitable Gaming, and the Virginia Lottery. The Section serves as the Office's "expert" on gambling issues, including assistance with responses to citizens and press inquiries, researching and drafting opinions, and reviewing pending legislation regarding the gaming agencies and general gambling issues.

The Section serves as general counsel to the Virginia Racing Commission and the Division of Charitable Gaming and as deputy general counsel to the Virginia Lottery. The Virginia Racing Commission oversees and ensures the safety and health of Virginia's horse racing as well as monitoring pari-mutuel wagering. The Division of Charitable Gaming regulates charitable gaming, including bingo, instant bingo, and raffles.

Division of Debt Collection Section

The mission of the Division of Debt Collection Section (DDC) is to provide aggressive, professional, appropriate, and cost effective debt collection services on behalf of all Commonwealth agencies. DDC's attorneys and staff protect the taxpayers of Virginia by ensuring fiscal accountability for the Commonwealth's receivables. DDC provides advice regarding collection and bankruptcy issues to client agencies and to other Divisions within this Office. One of DDC's attorneys serves as general counsel to the Unclaimed Property Division of the Department of Treasury.

DDC is self-funded with the contingency fees earned from its recoveries. During fiscal year 2009, July 1, 2008 through June 30, 2009, gross recoveries for 38 state agencies totaled in excess of $11.5 million. During the 2009 fiscal year, the Division recognized fees of almost $2.1 million, which represents nearly $275,000 in excess of Division expenditures. DDC ultimately returns these excess fees to the General Fund.

DDC proposed significant statutory changes through an omnibus bill that was included in the 2009 legislative session. The Commonwealth will benefit from these successful legislative initiatives through streamlined collection procedures, enhanced fiscal transparency, and decreased redundancies.

Public Safety and Enforcement Division

The Public Safety and Enforcement Division is comprised of the Correctional Litigation, Criminal Litigation, Medicaid Fraud and Elder Abuse, and the Special

Prosecutions and Organized Crime Sections. This Division handles criminal appeals, prisoner cases, Medicaid fraud cases, health professions hearings, ABC enforcement hearings, and prosecutions relating to gangs, money laundering, fraud, patient abuse, and public corruption. Additionally, the Division provides counsel for all of the state agencies within the Public Safety Secretariat and for the Office of Commonwealth Preparedness. Finally, the Division is responsible for certain anticrime initiatives, including the Gang Reduction and Intervention Program, and serves as the statewide facilitator for the victims of domestic violence.

Correctional Litigation Section

The Correctional Litigation Section represents the Departments of Corrections, Juvenile Justice, and Correctional Education, as well as the Parole Board. Further, the Section represents the Secretary of Public Safety and the Governor on extradition matters, Commonwealth's attorneys on detainer matters, and Correctional Enterprises. During 2009, the Section was responsible for handling 75 new § 1983 cases, 7 employee grievances, 141 habeas corpus cases, 454 mandamus petitions, 54 inmate tort claims, 10 warrants in debt, and 307 advice matters. The Section handled several significant matters in the federal district courts, the Fourth Circuit, and in the Commonwealth's circuit courts, including 8 trials, 17 hearings, and 7 oral arguments.

In *Commonwealth v. Needham*, the Virginia Court of Appeals upheld the termination of a corrections officer at Wallens Ridge State Prison for unauthorized use of force on an inmate. In *Cheatham v. Johnson,* a former inmate brought suit in a United States District Court asserting an Eighth Amendment cruel and unusual punishment claim, a Fourteenth Amendment due process claim, and a state law claim of false imprisonment for allegedly holding him seven months beyond his release date. The matter was pending at the end of 2009. In *Johnson v. Phipps*, the Section successfully defended a claim in the United States District Court that corrections officers had beaten an inmate on several occasions without provocation. In *Torres v. O'Quinn*, the Fourth Circuit appointed an attorney for the prisoner to brief and argue the appropriate statutory construction of a provision in the Prison Litigation Reform Act concerning collection of filing fees from an inmate's prison account. The case was argued, but the Fourth Circuit had not issued its opinion. In *Huff v. Mahon*, the Fourth Circuit upheld a district court ruling dismissing the case on summary judgment and finding that prison officials have discretion to determine what words are inappropriate for inmates to use in a prison setting.

Criminal Litigation Section

The Criminal Litigation Section handles an array of post-conviction litigation filed by state prisoners challenging their convictions, including criminal

appeals, state and federal habeas corpus proceedings, petitions for writs of innocence, and other extraordinary writs. The Section's Capital Unit defends against appellate and collateral challenges to all cases in which a death sentence was imposed. In addition, Section attorneys review wiretap applications and provide informal advice and assistance to prosecutors statewide. Finally, the Section represents the Capitol Police, state magistrates, and the Commonwealth's Attorneys' Services Council.

In 2009, the Section defended against 1,017 petitions for writs of habeas corpus and represented the Commonwealth in 431 appeals in state and federal courts. The Section received 36 petitions for writs of actual innocence and handled several significant cases in the Virginia Supreme Court. One significant case, *In re: Haynesworth*, involved the first writ of actual innocence granted in Virginia on the basis of DNA evidence and the Court vacated, with our agreement, the petitioner's 1984 rape conviction.

The Section litigated numerous cases in the Virginia Court of Appeals. For example, in *Elem v. Commonwealth*, the Court upheld the trial court decision denying the defendant's motion to "bifurcate" the guilt phase of his trial. In *Simmons v. Commonwealth*, the Court upheld multiple convictions, including one of attempted murder, holding that the failure to arraign the defendant on that charge was not jurisdictional, and the conviction was not void. In *Johnson v. Commonwealth*, the Court of Appeals ruled that the defendant's prior convictions in North Carolina for aiding and abetting second degree rape and second degree sexual battery were under statutes sufficiently similar to Virginia counterparts and required him to register in Virginia as a sex offender. In *Brown v. Commonwealth*, the Court held that witnesses were properly allowed to testify to what they had observed on a videotape of Brown's larceny even though the actual tape was not presented at trial. Finally, in *Nolen v. Commonwealth*, the Court of Appeals declined to adopt the more restrictive definitions of "serious bodily injury" found elsewhere in the *Virginia Code* and determined that, under § 16.1-253.2 for felony violation of a protective order, "serious bodily injury" meant any bodily hurt that was fairly and reasonably "deemed not trifling, grave, giving rise to apprehension, giving rise to considerable care, and attended with danger."

The Section's Capital Unit defended the convictions of prisoners sentenced to death under Virginia law. There were 3 capital cases of particular significance. In *Muhammad v. Kelly*, the Fourth Circuit affirmed the "sniper killer's" death sentence, and the United States Supreme Court subsequently denied Muhammad's motion for stay and petition for certiorari. In *Elliott v. Kelly*, the Fourth Circuit denied an appeal of the capital murder death sentence received for the shooting and bludgeoning of two innocent victims. The Supreme Court subsequently denied motion for stay and petition for certiorari. In *Morva v. Commonwealth*, the Virginia Supreme Court affirmed the death sentences received for the capital murders of 2 law-enforcement officers in Montgomery County.

Health Care Fraud and Elder Abuse Section

The Health Care Fraud and Elder Abuse Section is comprised of investigators, auditors, attorneys, and support staff who are charged with investigating and prosecuting allegations of Medicaid fraud and elder abuse and neglect in health care facilities.

Medicaid Fraud Control Unit:

The Medicaid Fraud Control Unit (MFCU) had a very successful year. At the end of 2009, MFCU had 42 active criminal investigations. The Civil Investigations Squad opened 34 new civil cases, and 16 criminal cases were awaiting trial or sentencing in federal court. The Unit ended the fiscal year with 16 convictions, and the recoveries from criminal and civil investigations totaled more than $27 million. MFCU delivered restitution checks in excess of $13 million to the Department of Medical Assistance Services to be deposited into the Commonwealth's General Fund Health Care Account. Over the past 27 years, MFCU successfully prosecuted more than 250 providers in cases involving patient abuse and neglect or fraudulent acts committed against the Virginia Medicaid program. In addition to prosecuting those responsible for health care fraud or abuse, the Unit has recovered more than $755 million in court-ordered criminal restitution, asset forfeiture, fines, penalties, civil judgments, and settlements.

MFCU handled several significant cases in 2009. For example, in *United States v. Abdelshafi*, the owner and operator of Shafi Medical Transportation, LLC, contracted with Virginia Premier Health Plan, Inc., to provide nonemergency transportation for Medicaid recipients. The company submitted inflated reimbursement claims exceeding $300,000. A federal grand jury indicted the company's owner on 15 counts of health care fraud and 2 counts of aggravated identity theft. The owner appealed his aggravated identity theft convictions to the Fourth Circuit. In *Commonwealth v. Floyd*, the owners of Remedies, INC, billed Medicaid for adult diapers when pediatric diapers were supplied to Medicaid recipients. MFCU's investigation showed the company took deliberate steps to up-code the Medicaid billings resulting in a loss of more than $250,000. The owner pled guilty to 4 counts of Medicaid fraud. Pursuant to a plea agreement, he was sentenced to 12 years incarceration, with 11 years suspended and a supervised probation period. The owner was ordered to pay restitution to the Virginia Medicaid Program and is barred from participating as a health care provider. MFCU was instrumental in a settlement agreement with the United States, Virginia, and other states to resolve claims in several *qui tam* cases filed in the United States District Court for the Eastern District of Pennsylvania for a company that violated federal and state false claims statutes by fraudulently marketing the prescription drugs Gabitril, Provigil, and Actiq. The total amount of the settlement, civil and criminal, is $425 million, plus interest, of which more than $1 million will be paid to the Department of Medical Assistance Services (DMAS).

Another major settlement in which MFCU was involved was the Eli Lilly Settlement, a multi-state settlement, that resolved claims contained in 4 *qui tam* cases filed in the District Court for the Eastern District of Pennsylvania. The settlement covers false claims submitted by Eli Lilly from September 1999 through 2005 to state Medicaid programs for reimbursement of the atypical antipsychotic drug Zyprexa. The total state and federal recovery, civil and criminal, is approximately $1.415 billion, which represents the largest recovery in a health care fraud investigation in United States history. Virginia's total federal/state Medicaid damages exceeded $9 million with more than $4 million paid to the DMAS.

In the Virginia Hospital Center Arlington Health System Settlement, MFCU, DMAS, the Office of the United States Attorney for the Eastern District of Virginia, and the Office of Inspector General for the Department of Health and Human Services reached an agreement with Virginia Hospital Center Arlington Health System to settle allegations that the Hospital Center submitted false claims to the Medicaid program for reimbursement with respect to childbirth services provided at the hospital. The case was settled for more than $1.7 million in an agreement executed on February 5, 2009.

Special Prosecutions and Organized Crime Section

The Special Prosecutions and Organized Crime Section (SPOCS) is the primary prosecutorial division of the Public Safety and Enforcement Division. The Section is made up of 2 units: the Criminal Prosecutions and Enforcement Unit and the Health Professions Unit. The Section is responsible for prosecuting various crimes throughout the Commonwealth. This jurisdiction is derived from the *Virginia Code* or at the request of local Commonwealth's attorneys. In 2009, the Section engaged in multiple initiatives including prevention, intervention, and suppression of criminal street gang activity, prosecution and prevention of identity theft offenses, administrative prosecutions against medical professionals violating Virginia's Health Professions regulations, enforcement of Virginia's fair housing laws through mediation and civil actions, and targeting and indicting violators of the Virginia's Continuing Criminal Enterprise and Racketeering (RICO) statutes.

Criminal Prosecutions and Enforcement Unit:

The Criminal Prosecutions and Enforcement Unit (CPEU) is comprised of a Director who reports directly to the Chief of SPOCS, 6 Assistant Attorneys General, who are also Special Assistant United States Attorneys, and 1 administrative coordinator. One of the attorneys in the Unit serves as special counsel to the Shenandoah Valley Multijurisdictional Grand Jury investigating gang-related activity in that region. Two of the attorneys are funded by federal grants and exclusively assigned to prosecute federal Project Safe Neighborhood cases. The attorney assigned to the United States Attorney's office in Richmond prosecuted over 140 federal

court cases involving gangs, guns, and drugs. Through the systematic prosecution of 9 defendants, the attorney essentially dismantled a known Richmond street gang. The attorney working the United States Attorney's office in Alexandria represents the government in immigration cases and matters dealing with MS-13, a violent Hispanic gang. A similar grant-funded position recently was created in the United States Attorney's office in Norfolk.

CPEU serves as agency counsel to the Department of State Police, the Department of Criminal Justice Services, and the Department of Forensic Science. CPEU attorneys represent other state agencies such as the Board of Accountancy and the Department of Charitable Gaming in administrative prosecutions.

In addition, CPEU represents ABC's Bureau of Law Enforcement Operations at administrative hearings involving the revocation or suspension of ABC licenses and routinely consults with ABC enforcement agents about their investigations. In 2009, CPEU represented or advised the Bureau in more than 20 administrative hearings. One case involved a Lynchburg establishment where employees were selling marijuana and alcohol that was consumed after-hours, served alcohol to intoxicated persons, and permitted intoxicated persons to leave the licensed premises. CPEU was successful in revoking the establishment's ABC license.

The Section assists Commonwealth's attorneys in numerous prosecutions. In 2009, CPEU prosecuted cases in Appomattox, Newport News, Richmond, and the Shenandoah Valley. Prosecutions ranged from theft and embezzlement of state property to gang participation and solicitation to commit murder. One case of note concerned an employee of the Appomattox Department of Social Services who fraudulently bilked the Commonwealth out of $25,000 by submitting forged invoices and applications through the Energy Assistance Program. The employee was convicted on 30 felony counts, ordered to pay $25,000 in restitution, and sentenced to 1 year and 9 months in the penitentiary. The Office's commitment to the Richmond Community Violence Reduction Partnership afforded the opportunity to prosecute seven robberies assigned to a multi-agency task force. At the end of the year, the Unit was involved in the prosecution of a former employee of the Virginia Birth-Related Neurological Injury Compensation Fund who was indicted for embezzling more than $800,000 from the Fund.

Since the formation of the Anti-Gang Task Force, the Section has been significantly involved in the Office's anti-gang initiative. The Section drafted legislation, trained law-enforcement and prosecutors on the use of Virginia's gang statutes, and raised public awareness of the signs of gang membership and activity. In 2009, a CPEU attorney secured the first criminal conviction under new legislation that expanded the jurisdiction of this Office to prosecute gang cases occurring in Department of Corrections' facilities. An incarcerated gang member mailed a letter to another gang member urging him to burn down the residence of an individual who

testified against him in a criminal case. The gang member pled guilty to solicitation to commit murder and gang participation and was sentenced to an additional 19 years in prison.

In 2009, the gang video produced by the Section in 2008 won two awards: the Bronze Telly Award for Social Issues; and the Communicator Award of Distinction for Social Issues. So far, more than 540 copies of the video have been distributed to law-enforcement and public safety officials in Virginia and more than 60 copies have been sent to law-enforcement and public safety officials in other states. Additionally, to serve the Hispanic population in the Commonwealth, the video was translated and certain scenes were remade with bilingual participants speaking in Spanish, "*La Familia Equivocada*."

Several members of CPEU participate as prosecutors for the Metro Richmond Identity Theft Task Force. In addition to this Office, the task force is comprised of other government agencies, including the United States Postal Service, local police departments, and the United States Secret Service. During the past year, CPEU prosecuted approximately 15 identity theft cases in federal court, resulting in more than 544 months' imprisonment.

Members of CPEU worked with the task force to begin a Check Fraud Prevention Campaign, aimed at educating and warning the homeless population about the criminal liability and risks involved in cashing fraudulent checks. The campaign included educational presentations by task force members to local homeless shelters and a poster for display in area banks as a reminder that cashing fake or fraudulent checks is a crime.

Following increased legislation and penalties for counterfeit goods, the United States Department of Justice, Office of Justice Programs, and Bureau of Justice Assistance awarded this Office a grant in the amount of $17,575 to provide counterfeit goods training to law-enforcement personnel in Virginia.

Health Professions Unit:

The Health Professions Unit (HPU) provides focused and effective administrative prosecution of cases involving violations of health care-related licensing laws and regulations before the various health care regulatory boards under the Department of Health Professions, including the Boards of Medicine, Nursing, Pharmacy, and Dentistry. HPU attorneys also provide training to members and staff of the boards and investigators.

HPU handled several major cases in 2009. In *Board of Medicine v. Vuyyuru*, a gastroenterologist failed to act within the requisite standard of care in his selection of patients for surgery and his surgical care. The doctor requested the reinstatement of his license, which was denied. In *Board of Medicine v. Plotnick*, a physician permitted patients in his pain-management practice to determine their own levels of narcotics. The doctor entered into a consent order that suspended his license for an

additional 2 years. *In Board of Medicine v. Soori*, multiple reports of sexual contact with patients resulted in the doctor entering into a consent order that suspended his license for 3-year period beginning in January 2009.

HPU's Fair Housing component reviews investigative files compiled by the Virginia Fair Housing Office and prepares consultation opinions to the Virginia Real Estate and Fair Housing Boards. When either Board determines that housing discrimination has occurred, HPU prosecutes the civil lawsuits and appeals. For example, in *Fair Housing Board v. Wythe County*, the Board sought a permanent injunction barring Wythe County from enforcing an ordinance aimed at preventing the establishment of a group home for mentally disabled minors. The County entered a consent order that would publicly acknowledge wrongdoing regarding the ordinance, amended the ordinance, and obtained 3 hours of fair housing training annually for a period of no less than 5 years.

Financial Crime Intelligence Center

The Financial Crime Intelligence Center (FCIC) identifies, targets, and disrupts the financial aspects of crime in the Commonwealth. FCIC enables Commonwealth's attorneys and other law-enforcement officials to address and attack the financial aspects of crime by identifying targets for investigations, providing "on-site" financial investigative support, sharing timely intelligence on money laundering, serving as a platform for local and regional outreach programs, providing financial investigative training, providing prosecuting attorneys to assist Commonwealth's attorneys in their localities, and assisting in asset identification and forfeiture actions. Additionally, FCIC focuses on all aspects of financial crime, including money laundering and the conversion of profits to wealth. FCIC assists in attacking the collection, management, and storage of cash proceeds; the use of money service businesses to convert cash to money orders and wire transfers; the use of legitimate businesses to support and advance criminal activity; and the transportation of bulk cash shipments from the region through various means.

During 2009, FCIC opened 40 cases; 2 resulted from FCIC targeting, and 38 were generated by external requests from county and local agencies. These cases included 20 related to drug trafficking, 2 were gang-related, 5 involved money service businesses, 3 were linked to organized criminal activity, 38 were linked to money laundering, and 3 involved counterfeit products. FCIC participated in 23 surveillances and 2 undercover encounters, provided on-site investigative support in 32 cases, and participated in 14 search warrants and 7 interrogations. Further, FCIC coordinated cases with 7 High Intensity Drug Trafficking Area regions, 12 out-of-state agencies, 18 major city police departments, 9 U.S. Attorneys' offices, 42 county and local police agencies, 21 federal agencies, and 5 foreign police agencies, including INTERPOL, the Royal Canadian Mounted Police, the Ukrainian National Police, the Canadian Criminal Intelligence Service, and the London Metropolitan

Police. FCIC also provided training sessions to over 150 federal, local, and county police and prosecutors. During this reporting period, FCIC received state and federal asset shares totaling more than $87,000.

In 2009, the FCIC directed a multi-agency state, local, and federal investigation of a drug trafficking organization responsible for importing and selling more than 200 kilograms of cocaine during a 2-year period. The organization's leader was arrested, and the investigation seized more than $185,000 in drug proceeds. Subsequent investigation led to the identification of over 15 associates, dealers, and support personnel. Based on document analysis and field investigations, local police and prosecutors identified a large inter-state drug conspiracy, which resulted in charges for violations under Virginia's RICO statutes. Further, FCIC assisted the Loudon County Sheriff's Office with the investigation of fraudulent mortgage loan applications and real estate purchases. The offender was indicted for 12 felony offenses, including violations of RICO and the Virginia Comprehensive Money Laundering statute. The offender fled the United States and was subsequently apprehended. At the end of 2009, the offender was in custody in Turkey pending extradition. If convicted of all charges, he could receive a prison sentence of 180 years and $2.5 million in fines.

Commonwealth Preparedness

One member of SPOCS is tasked with overseeing emergency management and preparedness events in the Commonwealth, including attendance at meetings of the Secure Commonwealth Panel and the Virginia Military Advisory Council. The SPOCS attorney also works with groups such as the Commonwealth Preparedness Working Group and the Department of Emergency Management. The Commonwealth Preparedness representative teamed with the Office's Chief Information Officer to develop and present to this Office a Continuity of Operations training module based on the Office's Emergency Action Plan. The plan outlines how the Office will provide legal representation and advice to state agencies during an emergency. Members of the Section participated in numerous national conference calls related to the H1N1 virus.

GRIP

The Gang Reduction and Intervention Program (GRIP) began in 2003 with a federal grant from the Office of Juvenile Justice and Delinquency Prevention. This Office, the Richmond Police Department, the Richmond Commonwealth's Attorney's Office, and other federal, state, and local entities partnered with local agencies and organizations to provide programs and services to gang members who wished to leave gangs, as well as at-risk youth and their families. In 2009, GRIP won the Motorola Webber Seavey Award for Quality in Law Enforcement. The International Association of Chiefs of Police presents this annual award to agencies and departments worldwide in recognition of standards of excellence that

exemplify law-enforcement's contribution and dedication to the quality of life in local communities.

During the year, GRIP sponsored or cosponsored many community events in Richmond. GRIP members joined over 100 children volunteers to clean up Southwood park and help plant a community garden. The children were fingerprinted, learned about the Richmond Police Department's forensic lab, and met McGruff, the crime dog. GRIP joined forces with law-enforcement agencies and community groups to participate in National Night Out. More than 1,500 people attended the Imagine Festival, a citywide community event created to bring together the various ethnic groups in a festive and nonthreatening way. Although Richmond pays for the Festival, GRIP participated in coordinating and staffing the event. GRIP also coordinated the Holiday Project for the Needy, which provides gifts of toys, clothing, and food for children, families, and homeless adults. For the past 2 years, GRIP has partnered with the Police Department, which provides information on the children and families needing assistance and helps deliver gifts. Last year, this Office provided over 200 gifts to 13 families.

GEAP

Funded by the Grant to Encourage Arrest Policies and Enforcement of Protection Orders (GEAP), the Office coordinator is responsible for developing, implementing, and facilitating training for Commonwealth's attorneys and law-enforcement officers on domestic and sexual violence issues. Further, the GEAP coordinator provides technical assistance on domestic violence related issues to prosecutors in the designated localities - the Counties of Lee, Scott, Wise, Russell, Dickenson, Washington, Fairfax, Henry, and Albemarle; the Cities of Charlottesville, Roanoke, Martinsville, and Norfolk; and the University of Virginia. In October 2009, the coordinator received a community impact award from the Tri Cities Regional Domestic Violence Task Force.

Through the GEAP partnership, this Office cosponsored a multidisciplinary training conference, "Policy, Practice, Partnership: Building Safer Communities through a Coordinated Response to Domestic Violence." The training included breakout sessions for court personnel, prosecutors, law-enforcement officers, advocates, and fatality review team members. More than 225 professionals and presenters participated in the conference. Through the GEAP grant, the Office and the Virginia Center on Aging conducted a training program on elder abuse for prosecutors and law-enforcement officers. The Office hosted a "Brown Bag Lunch Lecture Series" that focused on domestic and sexual violence issues. A total of 158 allied professionals attended the 4 lectures.

In addition to the domestic violence training, the Office recognizes localities who display innovation in their practices to respond to domestic violence through the Attorney General's Community Recognition Program for Promising

Practices in Domestic Violence Response. In 2009, GEAP recognized the Counties of Chesterfield, Fairfax, King George, Loudoun, and Tazewell and the City of Richmond. Each locality received a monetary award of $1,000 from the Verizon Wireless HopeLine Program.

Technology, Real Estate, Environmental and Transportation Division

The Technology, Real Estate, Environmental and Transportation Division is comprised of 5 Sections. The Technology and Procurement Section represents the Virginia Information Technologies Agency (VITA) and other communications agencies and boards that provide information technology resources, oversight, and guidance necessary for government operations and programs. This Section provides advice to the Commonwealth's central procurement agencies. The Computer Crime Section is a specially trained and equipped group of prosecutors and investigators skilled in computer, communications, and Internet technologies. The Computer Crime Section vigorously investigates and prosecutes illegal activities, including transmission of Spam and identity theft, with an emphasis on the protection of children who may be targeted by Internet predators. The Transportation Section represents the Departments of Transportation, Rail and Public Transportation, Aviation, and Motor Vehicles, as well as the Virginia Port Authority and Motor Vehicle Dealer Board. The Transportation Section provides agency advice on all matters related to transportation. The Environmental Section represents the agencies of the Secretary of Natural Resources as well as certain other agencies. The Real Estate and Land Use Section (RELUS) is responsible for the majority of the transactional real estate for the Commonwealth, including sales of surplus property, purchases, easements, including all forms of conservation easements, leases, and licenses. In addition, RELUS is responsible for construction claims and litigation for both buildings and highways. RELUS provides construction procurement and contract administration advice for non-higher education vertical construction projects of the Commonwealth and for projects undertaken pursuant to the Public-Private Education Facilities and Infrastructure Act of 2002.

Technology and Procurement Law Section

The Technology and Procurement Law Section provides the legal support and representation needed by the Commonwealth's technology and central procurement agencies and boards to implement their technology agendas, perform their procurement and contracting functions, and address legal claims and compliance issues in all areas.

This includes advice to assist VITA and the Information Technology Investment Board (ITIB) with their management of the Commonwealth's Comprehensive Infrastructure Agreement with Northrop Grumman Information

Technology, Inc. Further, the Section assists the efforts of VITA and ITIB in protecting the interests affected by breach and underperformance of that Agreement, assists the Virginia Enterprise Applications Project Office and the Commonwealth Chief Applications Officer in their efforts to achieve enterprise-wide efficiencies and merge into VITA. Finally, the Section assists the Department of General Services (DGS) with implementation of the federal funding requirements under the American Recovery and Reinvestment Act of 2009.

The Section assists numerous Commonwealth agencies, institutions, and boards with contract performance problems, technology acquisitions, trademark applications, licensing of Commonwealth data and software to other parties, intellectual property claims and agreements, Internet issues, electronic contracting, settlement of claims, structuring of procurements, response to protests, and representation in procurement appeals and other litigation. In 2009, the Section provided training sessions on government procurement and contracting and e-discovery obligations to government officials and employees at various events, including DGS' annual Public Procurement Forum.

Computer Crime Section

The Computer Crime Section spearheads Virginia's computer-related criminal law-enforcement. The Office has concurrent and original jurisdiction to investigate and prosecute crimes within Virginia's Computer Crimes Act such crimes that implicate the exploitation of children and crimes involving identity theft. During 2009, the Section traveled the Commonwealth to investigate and prosecute such crimes. The Section handled cases in the counties of Chesterfield, Gloucester, Loudoun, Montgomery, Washington, and Wise, and the cities of Charlottesville, Colonial Heights, Harrisonburg, Lexington, Newport News, Richmond, Roanoke, and Staunton. Section attorneys are cross-designated as Special Assistant United States Attorneys and prosecute cases in both federal and state courts.

The Section is an active member of the Richmond-based Virginia Cyber Crime Strike Force, dedicating a part-time investigator and providing 3 prosecutors to pursue the resulting cases. The Strike Force handles crimes committed via computer systems, including computer intrusion/hacking, Internet crimes against children, Internet fraud, computer and Internet-related extortion, cyber-stalking, phishing, and identity theft.

The Section actively participates in the Peninsula Innocent Images Task Force based at the United States Attorney's Office in Newport News. The Task Force is comprised of federal, state, and local law-enforcement personnel from the Richmond and Tidewater areas and investigates and prosecutes Internet crimes against children. The Section provides its part-time investigator and 3 prosecutors, on an "as needed" basis, to pursue the Task Force's cases in the court systems. The Section's team of prosecutors and investigators provide statewide education and training to

prosecutors and law-enforcement. In March, the Section presented updates and pertinent information on prosecuting computer crimes to the Virginia Association of Commonwealth's Attorneys at their annual Spring Institute. In conjunction with Microsoft, the Section coordinated and presented extensive law-enforcement training at academies in Abingdon, Richmond, and in Northern Virginia.

In addition, the Section is a clearinghouse for information concerning criminal and civil misuses of computers and the Internet. In 2009, the Section processed more than 1,000 leads funneled through the Internet Crime Complaint Center, the national clearinghouse for computer crime complaints. The Section reviewed over 200 notifications issued by companies experiencing database breaches to ensure compliance with the database breach notification law. Given these responsibilities, the Section often gives presentations and appears on television and radio to inform the public about identity theft and the use of the computers and the Internet by sexual predators.

During 2009, the Section traveled to speak to students and deliver the Office's *Faux Paw's* and "Safety Net" presentations, which discuss the dangers of chatting online, how to be safe on the Internet, and the issues of "cyber-bullying" and "sexting." The presentations demonstrate how easy it is for a predator to track down a child victim over the Internet.

In conjunction with the Department of Education, the Section launched the Garfield Learning Lab for use in elementary schools across Virginia. The program is an online tutorial utilizing the characters from the *Garfield* comic strip and consists of interactive modules to teach online safety. The project received partial funding from the Attorney General's Youth Internet Safety Fund as well as from private donations to be used for youth Internet education. Jim Davis, creator of *Garfield*, traveled to Richmond to launch the program at the Department of Education's annual, statewide Technology Educator's Conference. Further, through faith-based organizations, the Section initiated a statewide distribution of an Internet safety program, *Internet 101: Empowering Parents*. The packet consists of a workbook and instructional DVD designed to teach parents how to protect their children who use the Internet. The Internet safety organization, *Enough-is-Enough*, produced the program, and the kits were purchased using funds from the Youth Internet Safety Fund. The Office utilized the Virginia Family Foundation and the Virginia Interfaith Center to distribute the packets to Virginia's churches, synagogues, and mosques.

Transportation Section

The Transportation Section represents and advises the state agencies and boards that report or are assigned to the Secretary of Transportation. These agencies and boards include: the Virginia Department of Transportation (VDOT), Commonwealth Transportation Board, Department of Motor Vehicles (DMV),

Commission on the Virginia Alcohol Safety Action Program (VASAP), Department of Rail and Public Transportation, Virginia Port Authority, Virginia Port Authority Board of Commissioners, Virginia Department of Aviation, Virginia Aviation Board, Motor Vehicle Dealer Board, Board of Towing and Recovery Operators, and most recently, the Virginia Commercial Space Flight Authority. The Section advises and represents the Secretary of Transportation.

Section attorneys advise and represent these agencies in a wide variety of matters, including contract negotiation, drafting, and disputes; eminent domain/condemnation issues and litigation; various project stages of the Public-Private Transportation Act of 1995 (PPTA), both pre- and post-comprehensive agreements; land use issues; and outdoor advertising and signage issues relating to rights-of-way. The Section handles personnel issues, environmental issues, procurement disputes, titling and registration of automobiles, licensure and regulation of drivers, and motor fuels tax collection and enforcement. The Section assists with the administration of VASAP, conducts review of legislation related to transportation matters, reviews rail and grant agreements, and interprets and applies laws, and represents the various agencies at administrative hearings.

Section attorneys appear at all levels of the Commonwealth's court system and in federal courts. Section attorneys also may represent its client agencies before other agency or adjudicatory bodies, such as the Virginia Employment Commission.

The Section handled several cases involving VDOT. In *Virginians for Appropriate Roads v. Capka* and *Shenandoah Valley Network v. Capka*, the Section defended challenges under the National Environmental Policy Act (NEPA) to the I-73 and I-81 projects. In *County Board v. United States Department of Transportation*, the Section defended alleged violations of NEPA regarding the I-95/395 HOT Lanes project. *Parkridge 6 v. United States Department of Transportation* was initiated to invalidate the transfer of the operation and maintenance of the Dulles Toll Road and construction of the Dulles Metrorail project. In *Geoff Livingston v. County of Fairfax*, approximately 100 residents filed an inverse condemnation lawsuit seeking $8.95 million in damages from VDOT and Fairfax County for losses purportedly suffered due to flooding during a 2005 storm.

The Section is responsible for defending claims against the Motor Vehicle Transaction Recovery Fund administered by the Dealer Board. The Section worked with and provided advice to VDOT for numerous PPTA projects, including the 495 HOT Lanes project, the Pocahontas Parkway and Airport Connector Road, the 95/395 HOT Lanes project, the Midtown Tunnel/Downtown Tunnel/MLK Extension Project, the Route 460 project, and the Coalfields Expressway. The Section provided advice to the Port Authority on a PPTA project initiated by an unsolicited proposal for private sector operation of the Virginia Port. Competing proposals have been submitted and

appointment of an Internal Review Panel by the Secretary of Transportation was pending at year end.

The Section assisted in developing a Memorandum of Agreement between VDOT and Hampton Roads Transit concerning the location of portions of the Light Rail project in the VDOT right-of-way under and along I-264. The Section reviewed a document for VDOT and the Secretary of Transportation relating to $20 million in Transportation Partnership Opportunity Funds to Virginia Beach to fund purchase of the Norfolk Southern right-of-way.

The Section worked to develop a pilot project to hire 2 or 3 assistant attorneys general to represent VDOT in eminent domain proceedings. The purpose of the project was to determine the feasibility of, and potential cost savings associated with this Office providing eminent domain work. At year end, DMV was seeking an extension for material compliance under the REAL ID Act and regulations from the Department of Homeland Security (DHS). DHS announced an extension of its deadline for material compliance, but did not identify a new deadline. Section attorneys represent DMV in cases appealing decisions of the Commissioner involving franchise dealer/manufacturer disputes and hearings. One case, pending at year end, involved warranty reimbursement.

Finally, the Section has been involved in the successful negotiation and execution of several comprehensive agreements providing a framework for future rail development and the launching of state funded passenger rail service. Framework agreements outlining agreed terms, under which passenger rail service will be developed with the state's two major railroads, Norfolk Southern and CSX Transportation, were executed last year. Further, the Section successfully negotiated an agreement with Amtrak for Virginia's first state-funded passenger rail service.

Environmental Section

The Environmental Section primarily represents the agencies under the Secretary of Natural Resources and provides legal advice, including litigation, regulation and legislation review, transactional work, personnel issues, and related matters. The Public Safety and Enforcement Division's environmental prosecutor assists local Commonwealth's attorneys with the occasional criminal cases under the environmental statutes.

Mirant Potomac River LLC, which operates a power plant in Alexandria, appealed a State Air Pollution Control Board regulation capping emissions of air pollutants in nonattainment areas to the amount of allowances allocated under EPA's Clean Air Interstate Rule. The circuit court upheld the regulation. The Virginia Court of Appeals reversed the decision. Mirant also appealed EPA's approval of Virginia's State Implementation Plan under the Clean Air Interstate Rule to the Fourth Circuit. The Section intervened in support of EPA's approval, and the Fourth Circuit dismissed the appeal.

At the end of 2009, the Section was involved in defending the State Air Pollution Control Board's issuance of permits to Dominion Virginia Power for a new coal-fired plant in Wise County. The circuit court upheld the Board's issuance of a permit for criteria pollutants and remanded the permit for hazardous pollutants to the Board to delete a provision. The decision was appealed to the Virginia Court of Appeals. The Section also handled several litigation matters for the Department of Environmental Quality (DEQ) and the Virginia Marine Resources Commission. On behalf of DEQ, the Section defended the State Water Control Board's reissuance of a permit to Dominion for its North Anna Nuclear Power Station. While the circuit court found that the agency record supported the permit, it ruled that the facility's cooling lagoon should be subject to regulation. Such ruling was contrary to long-standing precedent, EPA approval, and an official opinion of this Office. The case was appealed.

Further, the Section joined an EPA and multi-state action in federal court in Ohio with respect to settlement of alleged violations of air pollution regulations at facilities owned by Aleris International, Inc., in 11 states, including Virginia. Early in 2009, Aleris filed for reorganization in the Delaware bankruptcy court. The Ohio court approved and entered a consent decree that provided injunctive relief and civil penalties. The final civil penalties will be determined by the bankruptcy court.

At year end, several administrative appeals were pending from the Divisions of Mined Land Reclamation, Mines, and Gas and Oil within Department of Mines, Minerals and Energy. The Division of Gas and Oil continues to have the most need for legal services with its increasing applications for well permits. The effect of the development of the Marcellus Shale field, which extends slightly into Virginia, is not yet determined.

Real Estate and Land Use Section

RELUS handles open space and historic easements, as well as all real estate acquisitions by the Department of Conservation and Recreation. RELUS manages several specialized areas of legal practice. Real estate questions and transactions affect every state agency to some degree, but the law of real estate is outside the realm of expertise needed by general agency counsel. Therefore, RELUS oversees the majority of these transactions directly or provides support and assistance to the agency's primary counsel. The Section does not handle VDOT rights-of-way acquisitions.

Significant real estate matters handled for the Commonwealth include sales, purchases, leases, and easements of state lands. RELUS provides daily advice on real estate issues to DGS and handles the sale and exchange of state surplus property. The Section handles all lease and real property matters for the Department of Military Affairs, the Department of Veterans' Services and the ABC Board. In addition, the

Section provides significant real estate support to the Commonwealth's institutions of higher education and support to state agencies seeking to lease state property for the placement of communications towers. Real estate litigation includes boundary line disputes, landlord/tenant litigation, title disputes, federal condemnation actions, and miscellaneous real estate related matters. RELUS represents the Department of Conservation and Recreation on its real estate matters, including conservation easements. The acquisition of property to serve as state parks or function as natural area preserves requires knowledge of conservation law in addition to the principles of real estate law. The Section advises the Virginia Outdoors Foundation on open space easements and general legal matters. Further, the Section serves as agency counsel for the Department of Historic Resources, including its historic preservation easement programs and the renovation and restoration incentive programs administered by the Department. These functions require the review of diverse federal and state laws as well as the ability to work with very active and energetic groups rallied in support of or opposition to various projects.

The Section provides advice to agencies and the Construction Litigation Section on construction procurement, contract management, and dispute resolution matters. This representation includes review of construction bid documents, advice regarding the appropriate public procurement measures, representation and advice during bid protests, advice on contract interpretation during construction, and participation in negotiations to resolve disputes during performance. RELUS also advises the Division of Engineering and Buildings of DGS regarding policies, procedures, and other issues arising from the role of that Division as the statewide construction manager and building official. In addition, RELUS staffs the Design Build/Construction Management Review Board, created to authorize local governments to use those methods of construction procurement, and the Procurement Appeals Board, designed to serve as an administrative appeal mechanism for procurements of goods and services.

During 2009, RELUS opened 233 new matters and closed 216 matters, including 110 from the prior year. At year end, the Section had 333 active cases with a declared value in excess of $1.5 billion.

Financial Law and Government Support Division

The Financial Law and Government Support Division is comprised of the Financial Law and Commerce Sections. The Division assists local government officers and agencies with questions related to local government matters.

Commerce Section

Section attorneys provide advice to agencies and boards reporting to the Secretaries of Commerce and Agriculture and Forestry. These agencies and boards include the Virginia Economic Development Partnership, Virginia Employment Commission, Virginia Port Authority, State Board of Elections, and the Departments of Veterans Services, Agriculture and Consumer Services, and Professional and

Occupational Regulation. The Section represents numerous other state agencies and boards charged with administrative and regulatory responsibility for the Commonwealth's economic policies. This Section works with constitutional officers and local government attorneys to assist in the resolution of issues of local concern as they arise. In 2009, the Section provided legal advice and guidance in the conduct of several major elections in the Commonwealth, including the election for the statewide offices of Governor, Lieutenant Governor, and Attorney General. A majority of the official opinion requests received by this Office involve questions of law arising from the areas for which this Section is responsible. Consequently, the attorneys in this Section draft the vast majority of the official opinions of this Office, especially those related to tax issues.

Financial Law Section

The Financial Law Section provides advice to the agencies and boards reporting to the Secretaries of Finance and Public Safety, including the Departments of Taxation, Treasury, Accounts, Planning and Budget, and Veterans Services and the Virginia Retirement System. The Section provides representation to the Department of Taxation and defends applications for corrections of state tax assessments in the circuit courts of the Commonwealth. The cases primarily involve assessments issued by the Department of Taxation pursuant to individual and corporate income tax statutes or the Virginia Retail Sales and Use Tax Act.

Opinions Department

The Opinions Department is comprised of the Senior Counsel to the Attorney General and the Publications Coordinator. The Senior Counsel oversees the Department, which manages the official opinions issued by the Attorney General as well as conflict of interest opinions for state and local government officers and employees and members of the General Assembly. The Department also oversees the informal opinion process. Deputy Attorneys General and the Senior Counsel issue the informal opinions for this Office. Opinions are assigned to attorneys within all the Divisions of this Office depending upon the subject matter of the opinion request. Division attorneys are responsible for researching and drafting the assigned opinions. Several Divisions may be involved in the opinions process when the subject matter covers more than one area of law. The Publications Coordinator maintains a database to monitor the status of opinions received and issued. In 2009, the Department processed 155 requests for opinions, including requests that did not meet statutory requirements or were answered by previously issued opinions. During the calendar year, the Office issued 116 official, informal, and conflict opinions, which included the 58 official opinions contained in this report.

As mandated by § 2.2-516, the Department publishes the Annual Report of the Attorney General and presents it to the Governor of Virginia on May 1st. The Annual Report includes the official opinions issued by the Attorney General in

addition to a list of office personnel and a summary of the important matters and cases handled by this Office during the preceding calendar year.

Prior to publication of the Annual Report, official opinions are published on the website of the Attorney General (www.vaag.com) and are available to the public within 24-48 hours of issuance. Beginning in 2008, the Annual Report was published as a PDF© document and available for download from the Attorney General's website. The Department also made available PDF© documents of prior Annual Reports for 2004 through 2007. The Publications Coordinator, in conjunction with the IT Department and its Chief Information Officer, determined that publication of the Annual Report as a PDF© document would result in an average, annual savings to the Commonwealth of more than $7,000.

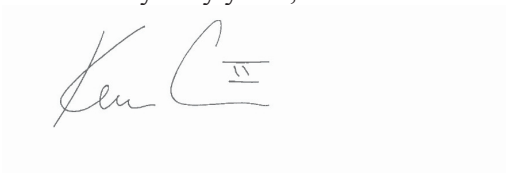
The Department developed and maintains the Conflict of Interest and Ethics in Public Contracting orientation course for certain state officers and employees as required by § 2.2-3128. A link for the conflict of interest training is available from our Knowledge Center for "EXTERNAL ENTITIES" (https://covkc.virginia.gov/kc/login/login.asp?kc_ident=kc0001&strUrl=https://covkc.virginia.gov/oag/external/Default.asp) as well as from Knowledge Centers hosted by other Commonwealth agencies. The course is offered as 5 separate modules and may be taken as 1 session or in individual sessions to accommodate the trainees' work schedules. The course is suitable for the visually impaired and the hearing impaired as the course contains an audio script that may be viewed as text and includes visual slides.

Conclusion

It is an honor for me to assume the role of Attorney General and to serve the citizens of this great Commonwealth. Although the accomplishments listed in this report are those of my predecessors in office, I recognize the valuable service that the attorneys and staff have provided to the Commonwealth. While it is impossible to list all of the Office's accomplishments, I am pleased to report on those of major significance. The names of the dedicated professionals who served this Office during the past year are listed on the following pages. I look forward to working with them during the next year to continue the distinguished service of this Office.

With kindest regards, I am

Very truly yours,



Kenneth T. Cuccinelli, II
Attorney General

PERSONNEL OF THE OFFICE[1]

NAME	TITLE
Robert F. McDonnell	Attorney General
William C. Mims	Attorney General
Martin L. Kent	Chief Deputy Attorney General
Stephanie L. Hamlett	Senior Counsel to the Attorney General
J. Jasen Eige	Chief of Staff and Counsel
Marla G. Decker	Deputy Attorney General
Francis S. Ferguson	Deputy Attorney General
Lisa M. Hicks-Thomas	Deputy Attorney General
David E. Johnson	Deputy Attorney General
Maureen R. Matsen	Deputy Attorney General
James W. Hopper	Interim Deputy Attorney General
Stephen R. McCullough	State Solicitor General
C. Meade Browder Jr.	Sr. Assistant Attorney General/Chief
Craig M. Burshem	Sr. Assistant Attorney General/Chief
Roger L. Chaffe	Sr. Assistant Attorney General/Chief
Gary L. Conover	Sr. Assistant Attorney General/Chief
G. Michael Favale	Sr. Assistant Attorney General/Chief
Samuel E. Fishel IV	Sr. Assistant Attorney General/Chief
Ronald C. Forehand	Sr. Assistant Attorney General/Chief
Christy E. Harris-Lipford	Sr. Assistant Attorney General/Chief
Jane D. Hickey	Sr. Assistant Attorney General/Chief
David B. Irvin	Sr. Assistant Attorney General/Chief
Alan Katz	Sr. Assistant Attorney General/Chief
JoAnne P. Maxwell	Sr. Assistant Attorney General/Chief
Richard T. McGrath	Sr. Assistant Attorney General/Chief
Peter R. Messitt	Sr. Assistant Attorney General/Chief
Steven O. Owens	Sr. Assistant Attorney General/Chief
Kim F. Piner	Sr. Assistant Attorney General/Chief
Pamela A. Sargent	Sr. Assistant Attorney General/Chief
Jerry P. Slonaker	Sr. Assistant Attorney General/Chief
John S. Westrick	Sr. Assistant Attorney General/Chief
Steven T. Buck	Chief Counsel for MFCU/Section Chief

[1]This list includes all persons employed and compensated by the Office of the Attorney General during calendar year 2009, as provided by the Office's Division of Administration. The most recent title is used for each employee whose position changed during the year.

NAME	TITLE
Robert H. Anderson III	Senior Assistant Attorney General
Nancy C. Auth	Senior Assistant Attorney General
Howard M. Casway	Senior Assistant Attorney General
George W. Chabalewski	Senior Assistant Attorney General
Ellen E. Coates	Senior Assistant Attorney General
Leah A. Darron	Senior Assistant Attorney General
Mark R. Davis	Senior Assistant Attorney General
Matthew P. Dullaghan	Senior Assistant Attorney General
Christopher D. Eib	Senior Assistant Attorney General
Suzanne T. Ellison	Senior Assistant Attorney General
Donald R. Ferguson	Senior Assistant Attorney General
Eric K.G. Fiske	Senior Assistant Attorney General
Gregory C. Fleming	Senior Assistant Attorney General
Kenneth C. Grigg	Senior Assistant Attorney General
Catherina F. Hutchins	Senior Assistant Attorney General
James V. Ingold	Senior Assistant Attorney General
Donald E. Jeffrey III	Senior Assistant Attorney General
Carl Josephson	Senior Assistant Attorney General
Frederick R. Kozak	Senior Assistant Attorney General
Donald A. Lahy	Senior Assistant Attorney General
Alison P. Landry	Senior Assistant Attorney General
J. Christopher Lemons	Senior Assistant Attorney General
Deborah A. Love	Senior Assistant Attorney General
Richard A. Mahevich II	Senior Assistant Attorney General
Amy L. Marschean	Senior Assistant Attorney General
Kathleen B. Martin	Senior Assistant Attorney General
John H. McLees Jr.	Senior Assistant Attorney General
Teri C. Miles	Senior Assistant Attorney General
Eugene P. Murphy	Senior Assistant Attorney General
William W. Muse	Senior Assistant Attorney General
Richard E. Nance	Senior Assistant Attorney General
Francis W. Pedrotty	Senior Assistant Attorney General
Sharon M.B. Pigeon	Senior Assistant Attorney General
Donald G. Powers	Senior Assistant Attorney General
Ann R. Purdue	Senior Assistant Attorney General
Sydney E. Rab	Senior Assistant Attorney General
Richard S. Schweiker Jr.	Senior Assistant Attorney General

NAME	TITLE
Deanis L. Simmons	Senior Assistant Attorney General
Jeffrey A. Spencer	Senior Assistant Attorney General
Virginia B. Theisen	Senior Assistant Attorney General
Allyson K. Tysinger	Senior Assistant Attorney General
Richard C. Vorhis	Senior Assistant Attorney General
Cheryl A. Wilkerson	Senior Assistant Attorney General
Steven A. Witmer	Senior Assistant Attorney General
Katherine B. Burnett	Sr. Asst. Att'y Gen./Dir., Capital Litigation Unit
Scott J. Fitzgerald	Senior Assistant Attorney General/Unit Manager
Ronald N. Regnery	Senior Assistant Attorney General/Unit Manager
Alfred B. Albiston	Assistant Attorney General
Jeffrey R. Allen	Assistant Attorney General
Sarah O. Allen	Assistant Attorney General
Elizabeth A. Andrews	Assistant Attorney General
Alice T. Armstrong	Assistant Attorney General
Karri B. Atwood	Assistant Attorney General
Angela B. Axselle	Assistant Attorney General
Susan F. Barr	Assistant Attorney General
Jacob L. Belue	Assistant Attorney General
Angela Benjamin-Daniels	Assistant Attorney General
John W. Blanton	Assistant Attorney General
Rosemary V. Bourne	Assistant Attorney General
Vivian F. Brown	Assistant Attorney General
J. Robert Bryden II	Assistant Attorney General
Matthew M. Cobb	Assistant Attorney General
Carla R. Collins	Assistant Attorney General
Susan B. Curwood	Assistant Attorney General
Joshua M. Didlake	Assistant Attorney General
Amy K. Dilworth	Assistant Attorney General
Shannon Y. Dion	Assistant Attorney General
James A. Fiorelli	Assistant Attorney General
Gregory W. Franklin	Assistant Attorney General
Joanne V. Frye	Assistant Attorney General
W. Clay Garrett	Assistant Attorney General
C. Nicole Gilliam	Assistant Attorney General
Brett C. Glymph	Assistant Attorney General
David C. Grandis	Assistant Attorney General

NAME	TITLE
Eric A. Gregory	Assistant Attorney General
Wayne T. Halbleib	Assistant Attorney General
Stephen M. Hall	Assistant Attorney General
Susan M. Harris	Assistant Attorney General
Mary Hendricks Hawkins	Assistant Attorney General
Flora Townes Hezel	Assistant Attorney General
Candice D. Hooper	Assistant Attorney General
Steven P. Jack	Assistant Attorney General
Michael A. Jagels	Assistant Attorney General
Benjamin H. Katz	Assistant Attorney General
Ami Kim	Assistant Attorney General
Usha Koduru	Assistant Attorney General
Mark S. Kubiak	Assistant Attorney General
Paul Kugelman Jr.	Assistant Attorney General
Erin M. Kulpa	Assistant Attorney General
Jonathan M. Larcomb	Assistant Attorney General
Ashley B. Macko	Assistant Attorney General
Mikie F. Melis	Assistant Attorney General
Christy W. Monolo	Assistant Attorney General
Ishneila G. Moore	Assistant Attorney General
Lawrence L. Muir Jr.	Assistant Attorney General
Sean J. Murphy	Assistant Attorney General
Valerie L. Myers	Assistant Attorney General
Carrie S. Nee	Assistant Attorney General
Thomas W. Nesbitt	Assistant Attorney General
Kerri L. Nicholas	Assistant Attorney General
Cynthia H. Norwood	Assistant Attorney General
Patrick O. O'Leary	Assistant Attorney General
J. Michael Parsons	Assistant Attorney General
R. Thomas Payne II	Assistant Attorney General
Elizabeth B. Peay	Assistant Attorney General
Kiva Bland Pierce	Assistant Attorney General
Lori L. Pound	Assistant Attorney General
Charles A. Quagliato	Assistant Attorney General
Geoffrey B. Rossi	Assistant Attorney General
D. Mathias Roussy Jr.	Assistant Attorney General
Jill M. Ryan	Assistant Attorney General

NAME	TITLE
Tracey D.S. Sanders	Assistant Attorney General
Greer D. Saunders	Assistant Attorney General
James E. Schliessmann	Assistant Attorney General
Noelle L. Shaw-Bell	Assistant Attorney General
Susan H. Siegfried	Assistant Attorney General
Kara C. Smith	Assistant Attorney General
Craig W. Stallard	Assistant Attorney General
J. David Taranto	Assistant Attorney General
Banci E. Tewolde	Assistant Attorney General
Richard H. Traylor	Assistant Attorney General
Crystal Y. Twitty	Assistant Attorney General
Samantha D. Vanterpool	Assistant Attorney General
K. Michelle Welch	Assistant Attorney General
Josephine F. Whalen	Assistant Attorney General
Erin Dugan Whealton	Assistant Attorney General
Julie M. Whitlock	Assistant Attorney General
Jennifer C. Williamson	Assistant Attorney General
Randall H. Wintory	Assistant Attorney General
Corie Tillman Wolf	Assistant Attorney General
Daniel S. Wolf	Assistant Attorney General
Patrick W. Dorgan	Assistant Attorney General/Chief Prosecutor
Phillip O. Figura	Assistant Attorney General/Gang Prosecutor
Michelle B. Brooks	Assistant Attorney General/Prosecutor
Vaso Tahim Doubles	Assistant Attorney General/Prosecutor
Steven W. Grist	Assistant Attorney General/Prosecutor
Karen G. Misbach	Assistant Attorney General/Prosecutor
Catherine Crooks Hill	Assistant Attorney General/Unit Manager
David W. Tooker	Chief Prosecutor
Erica J. Bailey	Chief of Civil Investigations
Michael T. Judge	Deputy Director, Prosecutions & Litigation
Joseph E.H. Atkinson	Lead Attorney/Assistant Attorney General
Lelia P. Beck	Lead Attorney/Assistant Attorney General
Courtney M. Malveaux	Special Counsel Manager/Asst. Att'y Gen.
Thomas D. Bagwell	Special Assistant Attorney General
John R. Butcher	Special Assistant Attorney General
Frederick S. Fisher	Special Assistant Attorney General
Guy W. Horsley Jr.	Special Assistant Attorney General

NAME	TITLE
Megan Boyle Larkin	Special Assistant Attorney General
Todd E. LePage	Special Assistant Attorney General
Richard B. Smith	Special Assistant Attorney General
George Z. Terwilliger	Special Assistant Attorney General
Cornell T. Adams	Senior Criminal Investigator
Crystal V. Adams	Legal Secretary Senior
Matthew B. Addison	Claims Representative
Jasma B. Adkins	Paralegal
J. Hunter Allen Jr.	Procurement Officer
S. Elizabeth Allen	Legal Secretary Senior Expert
Esther Welch Anderson	MFCU Administrative Manager
Paul N. Anderson	Deputy Director, Investigations & Audits
Kristine E. Asgian	Chief Auditor
Jennifer B. Aulgur	Director, TRIAD & Citizen Outreach
Juanita Balenger	Community Outreach Coordinator
Delilah Beaner	Administrative Legal Secretary Senior
Mary H. Blackburn	Auditor
Heather K. Blanchard	Paralegal Senior
Carolyn R. Blaylock	Legal Secretary Senior
Dorothy S. Boland	GRIP Project Assistant
Charles D. Branson	Senior Criminal Investigator
Larin M. Brink	Paralegal
Linda F. Browning	Employee Relations Manager
Heather K. Brunner	Legal Secretary Senior
Michele J. Bruno	Senior Criminal Investigator
John B. Buckovich	MFCU Investigative Supervisor
Charles R. Calton	Claims Representative
Daniel W. Carlson	Criminal Investigator
Addison L. Cheeseman	MFCU Computer Forensic-IT Supervisor
Gloria A. Clark	Legal Secretary Senior
David E. Clementson	Director of Communications
Heather A. Clouse	Office Services Floater
Randall L. Clouse	Director, Medicaid Fraud Control Unit
Betty S. Coble	Legal Secretary Senior Expert
Christina I. Coen	Legal Secretary Senior
Jeanne E. Cole-Amos	Director of Human Resources
Deborah P. Cook	Claims Specialist Senior

NAME	TITLE
John K. Cook Jr.	Office Technician
Jill S. Costen	Senior Criminal Examiner
Donna D. Creekmore	Legal Secretary Senior
Horace T. Croxton	Senior Criminal Investigator
Charles E. Crute Jr.	Senior Criminal Investigator
Holly T. Cuellar	Community Outreach Coordinator
Brandon T. de Graaf	Deputy Scheduler
Beverly B. Darby	Criminal Analyst
Jennifer S. Dauzier	Criminal Analyst Senior
Diane W. Davis	Legal Secretary
J. Randall Davis	Evidence Manager/Analyst
Robert A. DeGroot	Senior Criminal Investigator
Linda A. Dickerson	Consumer Specialist Senior
Polly B. Dowdy	Paralegal Senior Expert
Edward J. Doyle	Director, FCIC
Marlene I. Ebert	Administrative Office Manager
Kelly Ford Ecimovic	Senior Expert Claims Representative
Stephanie A. Edwards	Criminal Investigator
Harrell E. Erwin	Senior Criminal Investigator
Mark S. Fero	Grants Manager
Vivian B. Ferry	Legal Secretary Senior Expert
Cheryl D. Fleming	Legal Secretary
Judith B. Frazier	Legal Secretary Senior
Julia L. Fuller-Wilson	Program Assist. Sr., Victim Notification Program
Ellen Gardner	Special Counsel Administrator/Consumer Specialist
Thomas A. Gelozin	Director of Finance
William W. Gentry	Criminal Investigator
Vickie B. George	Administrative Legal Secretary Senior
Montrue H. Goldfarb	Paralegal Senior
Mary P. Goodman	Legal Secretary Senior
David C. Graham	Crime Analyst
Karl E. Grotos	Financial Specialist
Carolyn Halbert	MFCU Computer Programmer
Lynda S. Hamm	Nurse Investigator
Lyn J. Hammack	Administrative Legal Secretary Senior
Mary Anne Harper	Claims Representative
Rebecca L. Hensby	Legal Secretary Senior Expert

NAME	TITLE
Sandra W. Hott	Legal Secretary Senior
Elizabeth E. Hudnall	Nurse Investigator
Audrey D. Jackson	Legislative Assistant
Jewel J. Jefferson	Human Resources Assistant
Laura T. Jennings	Legal Secretary Senior
Terri C. Jernigan	Legal Secretary
Judith G. Jesse	Paralegal Senior Expert
Douglas A. Johnson	Chief Investigator
Genea C.P. Johnson	Paralegal
Kevin M. Johnson	Senior Criminal Investigator
Tierra G. Johnson	Legal Secretary Senior
Tyrone Johnson Jr.	Legal Secretary
Jon M. Johnston	Senior Criminal Investigator
Scott D. Jones	Senior Criminal Investigator
Tammy P. Kagey	Paralegal Senior Expert
Hyo J. Kang	Senior Database Administrator/Developer
Debra M. Kilpatrick	Claims Representative
William W. Kincaid	Director, Class Action Program
Chrystal L. Knighton	MFCU Computer Programmer
Jacqueline A. Kotvas	Special Assistant, Community Relations
Amy Wight Kube	Special Projects Coordinator/GRIP Director
Mary Anne Lange	Paralegal
Laureen S. Lester	Chief of Elder Abuse
Patricia M. Lewis	Unit Program Coordinator
Robert T. Lewis	Deputy Director of Finance
Deborrah W. Mahone	Paralegal Sr. Expert/Legislative Specialist
Sharon Y. Mangrum	Executive Assistant to Solicitor General
J. Tucker Martin	Director of Communications
Jason A. Martin	IT Support Specialist I
Sara I. Martin	Human Resources Analyst
Tomisha R. Martin	Claims Specialist
Aaron M. Mathes	Chief Information Officer
Melinda R. Matzell	Senior Criminal Investigator
Judy O. McGuire	Claims Representative
George T. McLaughlin	Investigator/Forensic Examiner
Angela P. Millender	GRIP Project Assistant

Cheryl F. Miller ..... Nurse Investigator
Lynice D. Mitchell ..... Office Services Specialist Senior
Eda M. Montgomery ..... Senior Auditor
Howard M. Mulholland ..... FCIC Financial Investigator
Janice M. Myer ..... Legal Secretary Senior
Connie J. Newcomb ..... Director of Office Operations
Carol G. Nixon ..... Auditor
Morgan L. O'Quinn ..... Community Outreach Coordinator
Ellett A. Ohree ..... Office Technician
Trudy A. Oliver-Cuoghi ..... Paralegal
Jennifer L. Onusconich ..... Paralegal
Sheila B. Overton ..... Internet Services Administrator
Wayne J. Ozmore Jr. ..... Senior Criminal Investigator
Janice R. Pace ..... Payroll Manager
Sharon P. Pannell ..... Legal Secretary Senior
John W. Peirce ..... Senior Criminal Investigator
Jane A. Perkins ..... Paralegal Senior Expert
Barbara B. Peschke ..... Criminal Investigator
Bruce W. Popp ..... Computer Systems Engineer
Bobby N. Powell ..... Civil Investigator
Jacquelin T. Powell ..... Legal Secretary Senior Expert
Jennifer L. Powell ..... Administrative Legal Secretary Senior
Sandra L. Powell ..... Legal Secretary Senior
N. Jean Redford ..... Legal Secretary Senior Expert
Luvenia C. Richards ..... Legal Secretary
Melissa A. Roberson ..... Program Coordinator/Domestic Violence
Linda M. Roberts ..... Senior Receptionist
Noah B. Rogers ..... Scheduler
April D. Rogers-Crawford ..... Gang Awareness Coordinator
Hamilton J. Roye ..... Administrative Coordinator
Joseph M. Rusek ..... MFCU Investigative Supervisor
Patrice J. Sandridge ..... Criminal Investigator
Lisa W. Seaborn ..... Publications Coordinator
Pamela A. Sekulich ..... Financial Services Specialist II
Bernard J. Shamblin ..... Senior Criminal Investigator
Terry L. Sivert ..... Criminal Investigator
Debra L. Smith ..... Administrative Legal Secretary Senior

Faye H. Smith ..... Human Resource Manager I
Jameen C. Smith ..... Claims Specialist Senior
Jessica C. Smith ..... Administrative Coordinator
Cheryl L. Snyder ..... Legal Secretary
Michele A. Stanley .....Paralegal
Kimberly F. Steinhoff ..... Executive Assistant to the Attorney General
Victoria G. Stewart..... Legal Secretary
Mary Sullivan..... Criminal Investigator
Gregory G. Taylor ..... Claims Representative
Katherine E. Terry..... Community Outreach Coordinator
Meredith W. Trible .....Scheduler
James M. Trussell .....Regional Support Systems Engineer
Lynda Turrieta-McLeod .....Legal Secretary Senior
Latarsha Y. Tyler ..... Legal Secretary
Patricia L. Tyler..... Paralegal Senior Expert/Manager
Corrine Vaughan .....Program Director, Victim Notification
Cassidy F. Vestal .....Administrative Secretary Senior
Kathleen B. Walker ..... Program Assistant, Victim Witness Program
Pamelia D. Watts..... Executive Assistant to the Chief Deputy
Nanora W. Westbrook .....Receptionist
Kimberly Wilborn .....Paralegal
M. Donette Williams .....Paralegal
Brenda K. Wright ..... Legal Secretary Senior Expert
Michael J. Wyatt ..... Investigator
Abigail T. Yawn .....Legal Secretary Senior

Attorneys General of Virginia from 1776 to 2010

Edmund Randolph 1776–1786
James Innes 1786–1796
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.[1] 1918–1918
John R. Saunders.....1918–1934
Abram P. Staples[2] 1934–1947
Harvey B. Apperson[3] 1947–1948
J. Lindsay Almond Jr.[4] 1948–1957
Kenneth C. Patty[5] 1957–1958

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[1]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.

[2]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.

[3]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.

[4]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.

[5]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[6] 1961–1962
Robert Y. Button 1962–1970
Andrew P. Miller 1970–1977
Anthony F. Troy[7] 1977–1978
John Marshall Coleman 1978–1982
Gerald L. Baliles 1982–1985
William G. Broaddus[8] 1985–1986
Mary Sue Terry 1986–1993
Stephen D. Rosenthal[9] 1993–1994
James S. Gilmore III 1994–1997
Richard Cullen[10] 1997–1998
Mark L. Earley 1998–2001
Randolph A. Beales[11] 2001–2002
Jerry W. Kilgore 2002–2005
Judith Williams Jagdmann[12] 2005–2006
Robert F. McDonnell 2006–2009
William C. Mims[13] 2009–2010
Kenneth T. Cuccinelli II 2010–

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[6]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.

[7]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.

[8]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.

[9]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.

[10]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.

[11]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.

[12]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.

[13]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

The complete listing of all cases handled by the Office of the Attorney General is not reprinted in this report. 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*.

Cases Decided in the Supreme Court of Virginia

Abofreka v. Va. Bd. of Med. Denying petition for appeal from Court of Appeals ruling upholding suspension of appellant's medical license for performing illegal abortion and providing inadequate prenatal care and diagnostic testing to two patients.

Adams v. Commonwealth. Affirming Court of Appeals decision and holding that police acted with good faith in executing search warrant at defendant's residence.

Baker v. Comptroller. Affirming trial court decision that sheriff's deputy receive statutory presumption that death from heart disease was employment-related (despite preemployment diagnosis of hypertension); reversing trial court decision relating to line-of-duty death payments and holding that death by heart disease was not direct or proximate result of defendant's employment.

Bishop v. Commonwealth. Reversing Court of Appeals decision and finding evidence adduced at trial was insufficient to establish defendant had notice of his habitual offender status. Commonwealth was required to confess error regarding defendant's conviction for felony obstruction of justice under § 18.2-460(C).

Bolden v. Commonwealth. Affirming Court of Appeals decision and finding that evidence was sufficient to prove possession of firearm by convicted felon.

Booker v. Commonwealth. Reversing Court of Appeals decision and holding that trial court erred in telling jury that court could reduce, but not increase, sentence set by jury.

Brailey v. Dep't of Taxation. Denying grievance procedure appeal of termination for improperly accessing taxpayer's records for personal reasons.

Brickhouse v. Commonwealth. Reversing Court of Appeals decision and finding no evidence that defendant procured, encouraged, countenanced, or approved distribution and sale of cocaine.

Briscoe v. Commonwealth. Affirming Court of Appeals ruling that Confrontation Clause violation was waived because defendant did not request that technician testify.

Britt v. Commonwealth. Reversing Court of Appeals decision affirming conviction for grand larceny and holding that evidence was insufficient to prove value of goods taken was $200 or more.

Buhrman v. Commonwealth. Reversing Court of Appeals holding that arrest was permissible under Fourth Amendment.

Commonwealth v. Robertson. Affirming Court of Appeals decision reversing trial court's denial of motion to suppress firearm discovered inside defendant's house. Court held that exigent circumstances' exception to warrant requirement did not apply and rendered entry into defendant's house illegal when defendant was arrested outside.

Cost v. Commonwealth. Reversing Court of Appeals decision and holding pat down was unreasonable search.

Cypress v. Commonwealth. Affirming Court of Appeals decision and holding that failure to use statutorily-prescribed mechanism to secure presence of preparer of certificates of analysis in drug possession cases waived Confrontation Clause challenge.

Dodge v. Randolph-Macon Woman's Coll. Affirming Court of Appeals decision (Commonwealth filed amicus curiae brief) regarding challenge to College's decision to sell certain donated property and College's decision to educate men as well as women.

Doe v. Va. Bd. of Dentistry. Denying petition for appeal from Court of Appeals *en banc* ruling that appellant procedurally defaulted in accordance with Rule 5A:18 for failure to preserve objections directly to Board during administrative hearing.

Elliott v. Warden, Sussex I State Prison. Dismissing habeas corpus case challenging conviction for capital murder and sentence of death from Prince William County Circuit Court.

Garnett v. Commonwealth. Affirming Court of Appeals holding that Commonwealth satisfied *Brady* obligation by providing defense with accurate summaries of tape-recorded interview.

George v. Commonwealth. Affirming Court of Appeals decision affirming medical doctor's four embezzlement convictions where defendant withheld funds from employees' paychecks for state withholding taxes, but failed to remit money to state.

Gibson v. Commonwealth. Affirming Court of Appeals decision and holding that defendant had defaulted claims that defendant was not properly convicted of withholding tax violations and that trial court had power to defer adjudication of guilt.

Gilman v. Commonwealth. Affirming Court of Appeals decision and holding that Confrontation Clause did not apply to appeal of summary contempt conviction.

Glenn v. Commonwealth. Affirming Court of Appeals *en banc* holding that search by police of defendant's unmarked, unlocked backpack, located in room he used in his grandfather's house, did not violate Fourth Amendment when officer relied on consent from grandfather to search home. Officer reasonably concluded, based on available facts, that consent extended to backpack.

Gray v. Va. Sect'y of Transp. Reversing trial court and holding that sovereign immunity did not bar constitutional challenge based on self-executing provisions of Virginia Constitution; remanded to circuit court, which affirmed constitutionality of Dulles Toll Road agreement.

Green v. Va. State Bar. Denying appeal of order denying petition for writ of mandamus and prohibition against the Bar.

Green v. Va. State Bar. Denying motion to dismiss summary order and correct record or issue stay of sanction pending appeal in attorney disciplinary matter.

Green v. Va. State Bar. Denying writ of prohibition and mandamus requesting stay of disciplinary proceedings and prohibiting Bar and Disciplinary Board from prosecuting any further allegations of misconduct.

Harris v. Commonwealth. Reversing Court of Appeals decision and holding that stop of defendant based on anonymous tip was not supported by reasonable suspicion.

Hughes v. Director. Affirming circuit court decision rejecting defendant's multiple claims of ineffective assistance of counsel.

In re American Academy Holdings, LLC. Denying petition for writ of mandamus to direct judge to order breach of contract action referred to arbitration.

In re BNP Paribas, S.A. Denying petition for writ of prohibition to prevent circuit court judge from ordering petitioner, as garnishee, to answer garnishment summons.

In re Christian. Denying petition for writ of mandamus to direct circuit court to hold hearing on Freedom of Information Act claim.

In re Emmett. Denying petition for writ of prohibition regarding conviction of capital murder and sentence of death from Danville Circuit Court.

In re Emmitt. Denying petition for writ of prohibition seeking to prevent court from holding hearing to set execution date.

In re Frison. Denying petition for writ of mandamus to direct circuit court to void general district court judgment.

In re Fromal. Denying petition for writ of prohibition contending circuit court improperly awarded injunctive relief against petitioners for willful termination of tenant's electric services.

In re Hill. Denying petition for writ of mandamus to direct public defender to allow petitioner to review his entire criminal file.

In re Johnson. Dismissing, as moot, petition for writ of prohibition to prevent circuit court judge's entry of order barring individual from serving in elected office until resolution of election challenge.

In re King. Denying petition for writ of mandamus and prohibition to circumvent juvenile court's initial custody determination under Uniform Child Custody Jurisdiction and Enforcement Act.

In re Martha Jefferson Hosp. Denying petition for writ of prohibition to prevent court from exercising jurisdiction over petitioner.

In re Morris. Denying petition for writ of mandamus to direct judge to overturn decision to deny motion to nonsuit.

In re O'Connor. Denying petition for writ of mandamus, prohibition, or error to direct circuit court judge's decision in estate administration matter.

In re Russell. Denying petition for writ of mandamus to direct circuit court judge to rule on certain matters in custody case.

In re Scott. Denying petition for writ of prohibition and writ of mandamus to prevent exercise of jurisdiction by circuit court entering prefiling injunction and holding show cause proceedings as result of violation of that injunction.

In re Switzer. Denying petition for writ of mandamus or prohibition in custody matter.

Jay v. Commonwealth. Reversing Court of Appeals decision dismissing one of defendant's appellate issues for failure to cite authority in support of argument.

Jaynes v. Commonwealth. Reversing Court of Appeals decision holding that ground that anti-spam statute is unconstitutionally overbroad.

Johnson v. Tice. Appealing grant of habeas relief to Tice, one of "Norfolk Four"; unanimously reversed.

Jones v. Commonwealth. Reversing Court of Appeals decision and reversing conviction for maintaining or operating fortified drug house in violation of § 18.2-258.02 and holding that evidence was not sufficient to sustain conviction because statutory phrase, "substantially altered from its original status," was not satisfied by proof of stove and 2 x 4 used to barricade door from police.

Lennon v. Va. Bd. of Dentistry. Denying petition for appeal from Court of Appeals ruling upholding revocation of appellant's dental license based upon findings of substandard care and violations of prior Board orders were supported by substantial evidence.

Logan v. Commonwealth. Reversing and remanding Court of Appeals decision finding that exclusionary rule does not apply in probation revocation proceeding and reaffirming earlier case law stating that rule does not apply absent bad faith on part of police.

Magruder v. Commonwealth. Upholding Court of Appeals decision and holding that statute authorizing certificate of analysis of drugs to be offered into evidence without presence of forensic analyst who conducted testing was constitutional under Confrontation Clause.

Malbrough v. Commonwealth. Affirming Court of Appeals decision finding that police had not violated defendant's Fourth Amendment rights during traffic stop when defendant gave consent for search.

Marshall v. N. Va. Transp. Auth. Reversing trial court judgment and holding that that taxes and fees imposed by unelected regional transportation authorities violate Virginia Constitution.

Maxwell v. Commonwealth. Reversing Court of Appeals decision and holding that no rational fact finder could have found defendant guilty of possession with intent to distribute upon evidence adduced at trial.

McCain v. Commonwealth. Reversing Court of Appeals decision and holding pat down was unconstitutional because circumstances did not create suspicion of criminal activity or that defendant was armed and dangerous.

Milazzo v. Commonwealth. Affirming Court of Appeals ruling that term "accident," as used in § 46.2-894 (hit and run statute), is not limited to unintentional collisions; thus, evidence was sufficient to support conviction.

Miller-Jenkins v. Miller-Jenkins. Dismissing birth mother's appeal of child custody determination predicated on same sex Vermont civil union (Commonwealth filed amicus curiae brief in support of birth mother).

Moore v. Commonwealth. Reversing Court of Appeals *en banc* decision and finding that peeling, valid inspection sticker, without more, did not create reasonable, articulable suspicion.

Ortiz v. Commonwealth. Affirming Court of Appeals decision and holding that rape shield statute barred impeachment evidence against seven-year-old victim.

Phelps v. Commonwealth. Affirming Court of Appeals decision and holding that defendant is "person" within intendment of felony eluding statute.

Porter v. Commonwealth. Affirming conviction for capital murder and sentence of death from Norfolk Circuit Court.

Potomac Edison Co. v. State Corp. Comm'n. Affirming decision of Commission that 2004 amendments to Restructuring Act did not terminate 2000 rate agreement voluntarily entered into by Company.

Potomac Edison Co. v. State Corp. Comm'n. Upholding Commission's interpretation of Company's 2000 rate agreement.

Pryor v. Commonwealth. Reversing Court of Appeals decision and holding that trial court erred in allowing certain evidence submitted to jury after court granted defendant's motion to strike charge related to such evidence.

Robertson v. Va. State Bar. Denying appeal from suspension from practicing law in Virginia imposed because Robertson was suspended from practicing law in Maryland.

Sadler v. Commonwealth. Affirming Court of Appeals decision and holding evidence sufficient to convict defendant of taking indecent liberties with child in his custody.

Shaikh v. Johnson. Affirming trial court ruling that defendant was not entitled to evidentiary hearing and was not entitled to habeas relief on claims that counsel was ineffective for failure to ensure that refused jury instruction was made part of record on appeal and to call codefendant to testify.

Stone v. Va. State Bar. Dismissing appeal of revocation of license to practice law.

Thompson v. Va. State Police. Denying appeal from Court of Appeals decision reversing trial court decision to void disciplinary action taken against state trooper.

Turman v. Commonwealth. Reversing Court of Appeals decision and holding that instruction to jury regarding flight was improperly given and prejudiced defendant.

Velasquez v. Commonwealth. Affirming Court of Appeals decision and holding that error in instructing on inference of intent to rape from unlawful presence on premises was harmless.

Vincent v. Commonwealth. Reversing Court of Appeals decision and holding that in prosecution for burglary with intent to commit larceny, specific intent with which unlawful entry is made "may be inferred from the surrounding facts and circumstances," not from absence of other evidence alone.

White v. Commonwealth. Reversing Court of Appeals decision that affirmed trial court decision revoking defendant's "first offender" status as drug offender and finding that defendant's period of supervised probation had ended; trial court erred in revoking probation based on subsequent actions.

Young v. Commonwealth. Reversing Court of Appeals decision affirming defendant's conviction for possession of controlled substance because evidence did not prove defendant was aware of "nature and character" of drugs she possessed.

Cases Pending in the Supreme Court of Virginia

Barrett v. Va. State Bar. Appealing revocation of license to practice law in Virginia.

Chesapeake Bay Found., Inc. v. Commonwealth ex. rel. State Water Control Bd. Appealing Court of Appeals decision reversing trial court ruling that dismissed appeal of permit extension on standing grounds.

Cooper v. Commonwealth. Appealing Court of Appeals ruling that defendant was not entitled to jury instruction regarding alibi in his trial for possession of cocaine with intent to distribute.

Finney v. Commonwealth. Appealing Court of Appeals judgment which held that evidence was sufficient to sustain defendant's convictions for burglary and grand larceny.

Frederick County Business Park v. Va. Dep't of Envtl. Quality. Appealing Court of Appeals decision affirming trial court ruling upholding determination of agency that applicant required permit.

Gray v. Warden, Sussex I State Prison. Habeas corpus case challenging conviction for capital murder and sentence of death from Richmond City Circuit Court.

Green v. Va. State Bar. Appealing suspension of license to practice law in Virginia.

Greene v. Commonwealth. Appealing Court of Appeals decision holding that failure to comply with Virginia Department of Charitable Gaming subpoena is criminal violation.

Hasan v. Commonwealth. Appealing Court of Appeals decision holding that trial court properly denied defendant's motion to suppress statement made to police officers.

In re Worthington. Petitioning for writ of prohibition and/or mandamus to prevent enforcement of order requiring clerk to add name to list of those authorized to perform marriages in jurisdiction.

Juniper v. Warden, Sussex I State Prison. Habeas corpus case challenging conviction for capital murder and sentence of death from Norfolk Circuit Court.

Payne v. Commonwealth. Appealing Court of Appeals ruling that evidence was sufficient to sustain defendant's convictions for felony homicide, aggravated vehicular involuntary manslaughter, and hit and run; Commonwealth was not required to elect between two homicide offenses; conviction for both homicide offenses did not violate double jeopardy; defendant was not entitled to mistrial based on claim of suppression of exculpatory evidence; and testimony of expert witness was properly admitted.

Riley v. Commonwealth. Appealing Court of Appeals ruling that defendant's sleepwalking defense to charge of maiming while driving under influence was not supported by evidence.

Seis v. Commonwealth. Appealing Court of Appeals decision finding no error in prosecution's introduction during its case-in-chief of defendant's notice of alibi.

Teleguz v. Warden, Sussex I State Prison. Habeas corpus petition challenging conviction for capital murder and sentence of death from Rockingham County Circuit Court.

Va. Dep't of Health v. NRV Real Estate, LLC. Appealing Court of Appeals decision that Department acted arbitrarily and capriciously in rejecting defendant's certificate of public need application.

Wells v. Harris. Appealing dismissal of defamation action and raising issues of sovereign immunity and statute of limitations.

Cases Refused By the Supreme Court of Virginia

Captain's Cove Utility Co. v. State Water Control Bd. Refusing to hear appeal of Court of Appeals reversal of circuit court ruling setting aside permit issued by Water Control Board.

Harrison v. Boone. Refusing to hear appeal of Court of Appeals reversal of circuit court ruling setting aside permit issued by Virginia Marine Resources Commission.

Laurels of Bon Air, LLC v. Med. Facilities of Am. LIV Ltd. P'ship. Refusing to hear petition for appeal challenging constitutionality and Health Department's interpretation.

Loudoun Hosp. Ctr. v. State Health Comm'r. Refusing to hear petition for appeal and petition for rehearing *en banc* filed by plaintiff challenging Court of Appeals decision that affirmed State Health Commissioner decision, which awarded certificate of public need to Northern Virginia Community Hospital, LLC.

Nathaniel Greene Dev. Corp v. Commonwealth. Refusing to hear motion seeking review of denial of motion to reinstate after dismissal pursuant to § 8.01-335(B).

Cases in the Supreme Court of the United States

Alabama v. Pope. Filing amicus curiae brief in support of Alabama in seeking review of award of attorneys' fees against state from aligned party, denied.

Albert v. Johnson. Petition for certiorari, attacking requirement of certificate of appeal in certain habeas cases, denied.

Anderson v. Virginia. Petition for certiorari, challenging statute allowing sample of DNA to be taken following arrest for certain offenses, denied.

Bell v. Warden, Sussex I State Prison. Petition for certiorari, seeking review of decision denying habeas corpus petition that challenged conviction for capital murder and sentence of death, granted, then dismissed.

Bethea v. Virginia. Petition for certiorari, seeking review of decision upholding convictions for bank robbery, denied.

Blount v. Director. Petition for certiorari, seeking review of denial of habeas corpus relief, denied.

Bolden v. Virginia. Petition for certiorari, seeking review of decision affirming conviction for possession of a firearm, denied.

Brailey v. Dep't of Taxation. Petition for certiorari seeking review of decision upholding termination for misconduct litigated to finality in state courts, denied.

Briscoe v. Virginia. Petition for certiorari, regarding admissibility of certificate of analysis of drugs under *Crawford v. Washington*, pending.

Colosi v. Director. Petition for certiorari, appealing denial of habeas corpus relief and claiming split in federal circuits on issue of "aggregate prejudice" from trial counsel's deficiencies, denied.

Ellis v. Virginia. Petition for certiorari, seeking review of decision upholding convictions for distribution and possession of cocaine, denied.

Emmett v. Warden, Sussex I State Prison. Motion to vacate stay of execution regarding conviction of capital murder and sentence of death, granted.

Equity in Athletics, Inc. v. Dep't of Educ. Petition for certiorari, regarding validity of action to cut certain sports teams by James Madison University under Title IX, pending.

Evans v. Virginia. Petition for certiorari, challenging conviction on basis that juror received allegedly prejudicial communication from third party about case, denied.

Garnett v. Virginia. Petition for certiorari, seeking review of denial of *Brady* claim, denied.

Gray v. Virginia. Petition for certiorari, seeking review of decision affirming conviction for capital murder and sentence of death, denied.

Green v. Director. Petition for certiorari, seeking review of decision denying habeas corpus petition that challenged conviction for capital murder and application for stay from sentence of death, denied.

Hamlett v. Director. Petition for certiorari, seeking review of decision denying federal habeas relief, denied.

In re Farshidi. Petition for writ of mandamus directed to Governor of Virginia to pay for damages for unsuccessful claim of discrimination filed in Court of Appeals of Virginia, denied.

Jackson v. Warden, Sussex I State Prison. Petition for certiorari, seeking review of decision denying habeas corpus petition that challenged conviction for capital murder and application for stay from sentence of death, denied.

Jaynes v. Virginia. Petition for certiorari, seeking reversal of facial invalidation of Virginia's anti-spam statute, pending.

Jenkins v. Director. Petition for certiorari, seeking constitutional review of habeas corpus claims found to be procedurally defaulted because petitioner failed to comply with state procedural rule in appeal of state habeas petition, pending.

Locke v. Karass. Filing amicus curiae brief urging Court to clarify its jurisprudence with respect to what expenses labor union can charge to certain nonunion members, pending.

Lynch v. Director. Petition for certiorari, seeking review of decision denying federal habeas relief, denied.

Lyon v. Virginia. Petition for certiorari, appealing state court's holding that evidence was sufficient to sustain conviction, denied.

Medellin v. Texas. Filing amicus curiae brief in support of Texas and urging Court to uphold sovereign authority of states to refuse to reopen concluded proceeding based on order from President of the United States.

Muhammad v. Warden, Sussex I State Prison. Petition for certiorari, seeking review of decision denying habeas corpus petition that challenged conviction for capital murder and sentence of death, denied.

Pacific Bell v. Linkline. Filing amicus curiae brief on merits in support of petitioner seeking review of antitrust laws, pending.

Patrick v. Virginia. Petition for certiorari, seeking review of jury instruction on recent possession of stolen property, denied.

Pleasant Grove v. Summum. Filing amicus curiae brief on merits in support of petitioner seeking review of Tenth Circuit decision restricting government's ability to use donated property for government expression, pending.

Rodriguez v. Hassell. Petition for certiorari, seeking review of Supreme Court of Virginia decision that demurred on issues of conspiracy and temporary restraining orders against Justices of Virginia Supreme Court, denied.

Rodriguez v. Legal Times. Petition for certiorari, seeking reversal of dismissal of petitioner's suit arising out of petitioner's 2006 disbarment proceedings, denied.

Savage v. Director. Petition for certiorari, seeking review of dismissal of state habeas petition as procedurally barred, denied.

Smith v. Virginia. Petition for certiorari, appealing claim that someone altered general district court order of *nolle prosequi* when defendant appealed to circuit court, denied.

Teleguz v. Virginia. Petition for certiorari, seeking review of decision affirming conviction for capital murder and sentence of death, denied.

Virginia v. Moore. Reversing judgment of Virginia Supreme Court upon grant of certiorari on issue of whether U.S. Constitution requires suppression of evidence for violation of state law.

Yarbrough v. Warden, Sussex I State Prison. Petition for certiorari, seeking review of decision denying habeas corpus petition that challenged conviction for capital murder and application for stay from sentence of death, denied.

Official Opinions

of

Attorneys General

Robert F. McDonnell

and

William C. Mims

Section 2.2-505 of the *Code of Virginia* authorizes the Attorney General to render official written advisory opinions only when requested in writing to do so by the Governor; members of the General Assembly; judges and clerks of courts of record, and judges of courts not of record; the State Corporation Commission; Commonwealth's, county, city or town attorneys; city or county sheriffs and treasurers; commissioners of the revenue; electoral board chairmen or secretaries; and state agency heads.

Each opinion in this report is preceded by 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: 2009 Op. Va. Att'y Gen. ___.

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OP. NO. 09-062

ADMINISTRATION OF GOVERNMENT: ADMINISTRATIVE PROCESS ACT – REGULATIONS.

Adoption by Board of Health of emergency regulations required by enactment language of 2009 amendments to § 32.1-163.6 will trigger applicability § 15.2-2157(C)-(D) upon effective date of such regulations.

THE HONORABLE EDWARD T. SCOTT
MEMBER, HOUSE OF DELEGATES
NOVEMBER 9, 2009

ISSUE PRESENTED

Assuming that the Board of Health (the "Board") adopts emergency regulations pursuant to §§ 2.2-4011 and 2.2-4012 and the regulations become final, you ask whether these regulations will trigger the applicability of § 15.2-2157(C)-(D) and meet the requirements of § 32.1-163.6. If not, you ask what the Board must do to meet such requirements.

RESPONSE

It is my opinion that adoption by the Board of Health of the emergency regulations required by the enactment language of the 2009 amendments to § 32.1-163.6 will trigger the applicability § 15.2-2157(C)-(D) upon the effective date of such regulations.[1]

APPLICABLE LAW AND DISCUSSION

The 2009 Session of the General Assembly made significant changes to the laws regarding both traditional and alternative onsite sewage treatment systems and specifically amended § 32.1-163.6 ("2009 Amendment 1") to require that engineered onsite sewage systems "*comply with operation, maintenance, and monitoring requirements as set forth in regulations implementing* [Chapter 6]."[2] The second enactment clause of 2009 Amendment 1 required the Board to adopt regulations within 280 days to establish performance requirements and horizontal setbacks for alternative systems permitted by the Board's regulations implementing Chapter 6.[3] The General Assembly also required that the regulations contain operation and maintenance requirements consistent with the requirements for alternative onsite sewage systems in § 32.1-164.[4]

Additionally, the 2009 Session of the General Assembly amended § 15.2-2157 ("2009 Amendment 2") to prohibit localities from banning "*the use of alternative onsite sewage systems that have been approved by the Virginia Department of Health*" in areas where sewers or sewerage disposal facilities are not available.[5] The amendments to § 15.2-2157 further provide that localities "*shall not require maintenance standards and requirement for alternative onsite sewage systems that exceed those allowed under or established by the State Board of Health pursuant to § 32.1-164*."[6] The second enactment clause of 2009 Amendment 2 provides that "**the provisions contained in subsections C and D of § 15.2-2157 of the Code of Virginia shall become effective 30 days following final promulgation by the Board of Health of regulations governing the operation and maintenance of alternative onsite sewage systems**[.]"[7]

The Board is tasked with the "supervision and control over the safe and sanitary collection, conveyance, transportation, treatment, and disposal of sewage by onsite sewage systems and alternative discharging sewage systems, and treatment works as they affect the public health and welfare."[8] Further, regulations adopted by the Board "shall govern the collection, conveyance, transportation, treatment and disposal of sewage by onsite sewage systems and alternative discharging sewage systems."[9]

The Virginia Administrative Process Act[10] (the "APA") governs the adoption of regulations by agencies of the Commonwealth. Section 2.2-4011 of APA permits agencies to "adopt emergency regulations in situations in which Virginia statutory law … requires that a regulation be effective in 280 days or less from its enactment." Emergency regulations are limited to twelve months in duration.[11] The inclusion of the 280-day requirement for regulations in an enactment clause of 2009 Amendment 1 demonstrates the General Assembly's intention that such regulations be promulgated as emergency regulations pursuant to § 2.2-4011.

Section 2.2-4012(B) of APA mandates that an emergency regulation "shall become effective upon its adoption and filing with the Registrar of Regulations, unless a later date is specified." APA provides several methods for the promulgation and adoption of regulations[12] and distinguishes between regulations with respect to proposed and final stages.[13] I find no indication that emergency regulations may not be adopted as final regulations by the agency. However, § 2.2-4011 describes the steps an agency must take "[i]f the agency wishes to continue regulating the subject matter governed by the emergency regulation beyond the twelve-month limitation."[14]

CONCLUSION

Accordingly, it is my opinion that adoption by the Board of Health of the emergency regulations required by the enactment language of the 2009 amendments to § 32.1-163.6 will trigger the applicability § 15.2-2157(C)-(D) upon the effective date of such regulations.[15]

[1]Because I answer your first inquiry in the affirmative, there is no need to address your second question.

[2]2009 Va. Acts ch. 220, at 361, 361 (adding subsection I to § 32.1-163.6).

[3]*Id.*, cl. 2.

[4]*Id.*

[5]*See* 2009 Va. Acts ch. 786, at 2276, 2277 (adding subsection C to § 15.2-2157).

[6]*Id.* (adding subsection D to § 15.2-2157).

[7]*Id.*, cl. 2. I note that enactment clause 2 refers to promulgation by the Board of regulations governing the operation and maintenance of alternative onsite sewage systems as required by the 2007 Session of the General Assembly in its amendments to § 32.1-164. *See* 2007 Va. Acts chs. 892, 924, at 2426, 2429, 2543, 2547, respectively (adding subsection H to § 32.1-164). It appears that the Board has not adopted such regulations.

[8]VA. CODE ANN. § 32.1-164(A) (2009).

[9]Section 32.1-164(B).

[10] *See* VA. CODE ANN. §§ 2.2-4000 to 2.2-4031 (2008 & Supp. 2009).

[11] Section 2.2-4011(C) (2008). If an agency wishes to continue regulating the subject matter beyond the 12-month effective period for emergency regulations, it is to promulgate a permanent regulation to replace the emergency regulation in accordance with the procedures set out in Article 2 of the APA. *See* 1999 Op. Va. Att'y Gen. 36, 39 n.11 (interpreting § 9-6.14:4.1(C)(5), predecessor to § 2.2-4011).

[12] *See, e.g.*, § 2.2-4007(A) (2008 (providing that any person may petition agency to request development of new regulation or amendment of existing one).

[13] *See* § 2.2-4007.06 (2008).

[14] *See also supra* note 11.

[15] *See supra* note 1.

OP. NO. 09-053

ADMINISTRATION OF GOVERNMENT: BOARDS – INFORMATION TECHNOLOGY INVESTMENT BOARD — VIRGINIA INFORMATION TECHNOLOGIES AGENCY – GENERAL PROVISIONS.

Individual may not serve simultaneously as Secretary of Technology and Chief Information Officer. Authority for Virginia Information Technologies Agency, rather than Information Technology Investment Board, to enter into or modify contracts for purchase of information technology goods and services.

THE HONORABLE SAMUEL A. NIXON JR.
MEMBER, HOUSE OF DELEGATES
AUGUST 14, 2009

ISSUES PRESENTED

You ask whether the Information Technology Investment Board may appoint one of its members, the Secretary of Technology, to serve as Chief Information Officer. Further, you ask whether the Secretary could participate in the Board's vote concerning the appointment as CIO.[1] Finally, you inquire about the authority of the Chairman or other members of the Board to act individually, or as a whole, to negotiate or approve changes to an existing contract of the Virginia Information Technologies Agency.

RESPONSE

It is my opinion that an individual may not serve simultaneously as the Secretary of Technology and the Chief Information Officer. Further, it is my opinion that the General Assembly has authorized the Virginia Information Technologies Agency, rather than the Information Technology Investment Board, to enter into or modify contracts for the purchase of information technology goods and services.

BACKGROUND

The Information Technology Investment Board ("Board") is "a supervisory board … in the executive branch of state government" and "is responsible for the planning, budgeting, acquiring, using, disposing, managing, and administering of information technology in the Commonwealth."[2] The Secretary of Technology ("Secretary") is an ex officio member of the Board with full voting privileges.[3] The Board is required to appoint a Chief Information Officer ("CIO") to "be employed under a special

contract for a term not to exceed five years."[4] The CIO oversees the operation of the Virginia Information Technologies Agency ("VITA") "under the direction and control of the Board."[5]

You relate that you were the chief patron of legislation in 2003 that created the CIO position[6] (the "2003 Act"). Further, you note this legislation was intended to implement the recommendations of a 2002 Study of the Joint Legislative Audit and Review Commission.[7] The study noted that the Secretary at that time served also as the state's CIO,[8] found that a part-time CIO who was not insulated from the political process was a limiting factor,[9] and recommended that "the role of State CIO should be transferred to a separate position."[10] You relate that the Board recently named the Secretary to serve as CIO on an interim basis, which you view as violating the legislative intent and possibly the letter of the 2003 Act.

You state that VITA currently has a Comprehensive Infrastructure Agreement with Northrop Grumman Information Technology, Inc. ("Northrop Grumman"), which VITA entered into in 2005 pursuant to the Public-Private Education Facilities and Infrastructure Act of 2002.[11] Thus, you inquire regarding the authority to negotiate or approve contract modifications related to the Agreement.

APPLICABLE LAW AND DISCUSSION

Prior to 2003, § 2.2-226(A) directed the Secretary to function as the CIO of the Commonwealth.[12] The 2003 Act creating the Board repealed § 2.2-226(A)[13] and provided that

> the Secretary of Technology shall continue to serve as the Chief Information Officer of the Commonwealth for six months after the effective date of this act or until such time as the Information Technology Investment Board has hired the Chief Information Officer as provided by the first enactment of this act.[14]

When a statute creates a specific grant of authority, the authority is deemed to exist only to the extent granted in the statute.[15] Accordingly, it is my opinion that the authority for the Secretary to serve also as CIO was limited to the brief period following the enactment of the 2003 Act to allow the Board time to fill the CIO position.

This conclusion is reinforced when one considers that the Secretary is an ex officio member of the Board. Should the Secretary also serve as CIO, this dual service would require the Board to have a contractual relationship with one of its members.[16] The Conflict Act[17] prohibits board members, who are state officers,[18] from having a personal interest in a contract with their own board.[19]

Similarly, the tension between the Board's duty to supervise the CIO,[20] the Secretary's duty to serve as a Board member,[21] and a state officer's duty to disqualify himself from participating in matters in which he has a personal interest[22] underscores that a single individual is unable to perform fully the regular duties of all these positions.[23]

Thus, such dual service cannot be seen as consistent with the legislative intent for the CIO position.[24]

While it is my opinion that the offices of Secretary and CIO legally are incompatible, it does not mean that the Board is unable to hire as CIO an individual then serving as Secretary. However, that individual may not serve in both offices simultaneously. When two governmental offices are incompatible and "[i]n the absence of a statutory provision to the contrary, acceptance of a second incompatible office operates to vacate or surrender the first office."[25]

You also inquire whether the Secretary could participate in the Board's vote concerning his appointment as CIO. The Conflict Act requires governmental officers and employees to disqualify themselves from participating in certain matters in which they have a personal interest.[26] The Conflict Act authorizes the Attorney General to render advisory opinions to certain state and local officials based upon a full disclosure of the facts by such officer or employee.[27] The Conflict Act is very specific in providing that only the officer or employee with a potential conflict may seek an opinion.[28]

Finally, you inquire about the authority of the Chairman or other members of the Board, individually or as a whole, to negotiate or approve changes to VITA's Comprehensive Infrastructure Agreement with Northrop Grumman. The General Assembly has assigned the authority to procure information technology goods and services for the Commonwealth to VITA.[29] Such authority includes the power of the CIO to "direct the modification or suspension of any major information technology project" when he deems such action appropriate.[30] While the Board is "responsible for the … acquiring … of information technology in the Commonwealth,"[31] the fact that the direct control of procurement is assigned to VITA makes clear that the Board's duties and powers in this area are supervisory and do not include the duty and power directly to procure information technology goods and services for the Commonwealth.[32] Therefore, it is my opinion that pursuant to its supervisory power, the Board may instruct VITA to modify an existing contract in accordance with any required procedures or approvals; however, the Board is not itself authorized to modify the Comprehensive Infrastructure Agreement.[33]

CONCLUSION

Accordingly, it is my opinion that an individual may not serve simultaneously as the Secretary of Technology and the Chief Information Officer. Further, it is my opinion that the General Assembly has authorized the Virginia Information Technologies Agency, rather than the Information Technology Investment Board, to enter into or modify contracts for the purchase of information technology goods and services.

[1] I decline to render or express an opinion regarding whether the facts you present concerning a vote would constitute a violation of the State and Local Government Conflict of Interests Act ("Conflict Act"). *See* VA. CODE ANN. §§ 2.2-3100 through 2.2-3131 (2008 & Supp. 2009). However, I offer general comments concerning the Act governing the participation of supervisory board members in matters in which they have a personal interest.

[2]Section 2.2-2457(A) (Supp. 2009).

[3]*See* § 2.2-2457(B).

[4]Section 2.2-2005(B) (Supp. 2009).

[5]*Id.*

[6]*See* 2003 H.B. 1926, *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?ses=031&typ=bil&val=hb1926 ("HB 1926"); *see also* 2003 Va. Acts chs. 981, 1021, at 1536, 1536-53, 1654, 1654-71, respectively (enacting provisions of HB 1926; adding Chapter 20 to Title 2.2, codified as Chapter 20.1; and adding Article 18 of Chapter 24 to Title 2.2, codified as Article 20).

[7]*See* J. Legis. Audit & Review Comm'n, Review of Information Technology Systems Development, *67 (Feb. 6, 2003), *available at* http://jlarc.state.va.us/reports/Rpt289.pdf.

[8]*Id.*

[9]*Id.* at *67-68.

[10]*Id*. at *67.

[11]*See* Va. Code Ann. §§ 56-575.1 to 56-575.18 (2007 & Supp. 2009).

[12]*See* § 2.2-226(A) (Supp. 2002); *see also* 2003 Va. Acts, *supra* note 6, cl. 2, at 1552, 1670, respectively (repealing § 2.2-226).

[13]*Id.*

[14]*Id.*, cl. 5, at 1552, 1670, respectively.

[15]*See, e.g.*, 2008 Op. Va. Att'y Gen. 126, 127 (citation omitted) (explaining rule of statutory construction known as *"expressio unius est exclusio alterius"*).

[16]*See* § 2.2-2005(B) (requiring Board to employ CIO pursuant to contract for term not to exceed five years); § 2.2-2457(B) (making Secretary ex-officio member of Board). You do not indicate whether the Board has entered into a contract with the recently-named CIO.

[17]*See supra* note 1.

[18]*See* § 2.2-3101 (2008) (defining "officer" as "any person appointed or elected to any governmental or advisory agency").

[19]Section 2.2-3106(A) (2008) ("No officer or employee of any governmental agency of state government … shall have a personal interest in a contract with the government agency of which is an officer or employee, other than his own contract of employment."). This allows a board member to have a personal interest in the contract, if any, by which he serves as a board member but generally prohibits any additional contract of employment.

[20]*See* § 2.2-2005(B).

[21]*See* § 2.2-2457(B).

[22]*See* § 2.2-3112(A)(1) (2009); *see also infra* note 26.

[23]*See* Amory v. Justices of Gloucester, 4 Va. (2 Va. Cas.) 523, 525, 1826 Va. LEXIS 99, *5 (1826) (decreeing that two offices, one of which is subject to control of other, are "incompatible"; suggesting there is legal incapacity to execute duties of the two offices at same time). In this case, the Secretary does not directly supervise the CIO, but has a duty to serve on the board that does supervise the CIO.

[24]*See* 2001 Op. Va. Att'y Gen. 192, 193 (citations omitted) (noting that *Virginia Code* constitutes single body of law; legislature is presumed to have intended each enactment to have meaning that is consistent with other provisions of law and that is not superfluous).

[25]*See* Op. Va. Att'y Gen.: 1980-1981 at 279, 280; *see also* 1974-1975 at 251, 251 ("The acceptance of an incompatible office operates as a surrender of the former office."). You do not indicate whether the contract contemplated by § 2.2-2005(B) has been signed. I express no opinion on whether the appointment of the Secretary as CIO for purposes of the above rule can precede signing of the contract.

[26]*See* § 2.2-3112(A)(1) (providing that each state officer of any governmental or advisory agency having personal interest in transaction "[s]hall disqualify himself from participating in the transaction if (i) the transaction has application solely to … a business or governmental agency in which he has a personal interest … or (ii) he is unable to participate pursuant to subdivision 2, 3 or 4"); *see also* § 2.2-3101 (defining "business," "personal interest in a transaction," and "personal interest"); 2009 Va. Acts ch. 781, § 4-6.01(a), (c)(6)(b), at 1675, 2242, 2244 (stating minimum CIO salary is $136,806).

[27]*See* § 2.2-3126(A)(3) (2008) (directing Attorney General to render advisory opinions to state officer seeking advice); *see also* § 2.2-3121(A) (2008) (providing that state officer may not be prosecuted for knowing violation of Conflict Act if such violation results from good faith reliance on written opinion of Attorney General made in response to written request and based on full disclosure of facts).

[28]*See id.* This is particularly important given the enforcement responsibilities of the Attorney General.

[29]*See, e.g.*, § 2.2-2012(A) (2008); § 56-575.16 (2008); *see also* 2009 Va. Acts, *supra* note 26, § 4-5.04(b)(1)(a), at 2238. This authority is subject to any required procedures or approvals. *See, e.g.*, § 2.2-4309(A) (2008).

[30]*See* § 2.2-2015 (2008); *see also* § 2.2-2006 (2008) (defining "major information technology project").

[31]Section 2.2-2457(A).

[32]*See* § 2.2-2005(B) (providing that CIO exercises his powers under direction and control of Board); § 2.2-2012(A) (providing that information technology may be purchased by other agencies "to the extent authorized by VITA"); § 2.2-2458 (Supp. 2009) (listing powers and duties of Board).

[33]Further, I note that such supervisory power is a power of the Board and not that of its individual members. Unless specifically provided by law, public bodies may authorize the transaction of public business only through motions duly adopted at public meetings conducted in accordance with The Freedom of Information Act. *See* §§ 2.2-3710(A), 2.2-3712(G) (2008). It is possible for a public body to adopt a motion authorizing certain officers or employees to act on its behalf. *See, e.g.*, § 2.2-604 (2008). However, the Board cannot "delegate any duties or responsibilities to the chairman other than to preside over meetings or act as the spokesperson for the Board in public meetings." Section 2.2-2457(C).

OP. NO. 08-078; OP. NO. 08-114

ADMINISTRATION OF GOVERNMENT: VIRGINIA FREEDOM OF INFORMATION ACT.

COUNTIES, CITIES AND TOWNS: GENERAL POWERS OF LOCAL GOVERNMENT.

Failure to give notice of meeting invalidates city council's appointment of nominee to school board.

THE HONORABLE ROSLYN C. TYLER
MEMBER, HOUSE OF DELEGATES

H. TAYLOR WILLIAMS IV
CITY ATTORNEY FOR FRANKLIN
JANUARY 6, 2009

ISSUE PRESENTED

You ask whether the failure of the City Council of the City of Franklin to give the notice of meeting required by § 2.2-3707(C) invalidates the selection and appointment of a nominee to the school board.

RESPONSE

It is my opinion the failure of the City Council of the City of Franklin to give the notice of meeting required by § 2.2-3707(C) invalidates the appointment of a nominee to the school board.

BACKGROUND

You advise that the Charter for the City of Franklin ("Charter") creates a separate school district. The school board ("Board") consists of seven members who are qualified voters of the City of Franklin ("City") and not members of the City Council of the City of Franklin ("City Council"). One member of the Board is to be selected from each ward of the City and one member is selected from the City at large. The City Council fills any vacancy on the Board for the unexpired term.

You advise that the at-large member of the Board resigned. Pursuant to proper notice posted in the local newspaper, a public hearing was held by the City Council on March 24, 2008, to receive nominations from the public to fill this vacancy. At the public hearing, three citizens were considered to fill the unexpired term. The City Council in open session discussed a date for interviewing the three nominees and agreed upon April 1, 2008.

You advise that no other notice was given regarding the City Council meeting scheduled for April 1, 2008. You state that City Council met on April 1, 2008, and voted for one of the three citizens to fill the unexpired term. At the City Council meeting held on July 14, 2008, a citizen noted that the April 1, 2008 Council meeting was conducted without the notice required by § 2.2-3707(C).

You state there is no authority to invalidate the actions taken by the City Council due to the failure to give notice. Therefore, you conclude the actions taken by the City Council on April 1, 2008, including the appointment to the Board, are valid.[1]

APPLICABLE LAW AND DISCUSSION

The power of a local governing body, unlike that of the General Assembly, "must be exercised pursuant to an express grant"[2] because the powers of a county "are limited to those conferred expressly or by necessary implication."[3] "If the power cannot be found, the inquiry is at an end."[4] The Dillon Rule requires a narrow interpretation of all powers conferred on local governments since they are since they are delegated powers.[5] Therefore, any doubt as to the existence of power must be resolved against the locality.[6]

Section 2.2-3700(B) of The Virginia Freedom of Information Act[7] ("Act") expresses the public policy that the citizens of the Commonwealth are to have "free entry to meetings of public bodies wherein the business of the people is being conducted." Furthermore, "[a]ny ordinance adopted by a local governing body that conflicts with the provisions of [Chapter 37] shall be void."[8] Section 2.2-3707(C) of the Act provides, in part, that:

> Every public body shall give notice of the date, time, and location of its meetings by placing the notice in a prominent public location at which notices are regularly posted and in the office of the clerk of the public body, or in the case of a public body that has no clerk, in the office of the chief administrator.

The Supreme Court of Virginia repeatedly has held that "the use of 'shall,' in a statute requiring action by a public official[, such as in § 2.2-3707(C),] is directory and not mandatory unless the statute manifests a contrary intent."[9] However, statutory construction dictates that statutes on a particular subject should not be read in isolation, but must be construed as parts of a coordinated whole.[10] Section 2.2-3710(A) of the Act provides, in part, that:

> Unless otherwise specifically provided by law, no vote of any kind of the membership, or any part thereof, of any public body shall be taken to authorize the transaction of any public business, other than a vote taken at a meeting conducted in accordance with the provisions of [Chapter 37].

When a statute is clear and unambiguous, its plain meaning must be accepted without resort to extrinsic evidence or to the rules of construction.[11] Legislative intent is determined from the plain meaning of the words used.[12] Furthermore, when legislative intent is plain, I am required to respect it and give it effect.[13] It is clear that the use of the word "shall" by the General Assembly in § 2.2-3707(C) is intended to make its requirements mandatory.

It also is clear, with respect to meetings of public bodies such as the City Council, that no vote of any kind is authorized "other than a vote taken at a meeting conducted in accordance"[14] with the Act. The City Council may only exercise powers expressly granted, and in the manner granted, by the General Assembly. The General Assembly clearly and unequivocally requires the City Council to "give notice of the date, time, and location of its meetings" in a prominent public location "at which notices are regularly posted," and in the office of its clerk or the administrator's office if there is no clerk.[15]

You have advised that the City Council did not give notice of the meeting held on April 1, 2008. Section 2.2-3710(A) specifically forbids any vote by the City Council on any public business unless the vote is taken "at a meeting conducted in accordance with the provisions" of the Act. Since proper notice of the April 1, 2008 meeting was not given, I must conclude that the vote of the City Council was not taken "at a meeting conducted in accordance" with the Act.[16] Therefore, the City Council's vote selecting a person to fill the unexpired term of the at-large school board member is null and void.[17]

CONCLUSION

Accordingly, it is my opinion the failure of the City Council of the City of Franklin to give the notice of meeting required by § 2.2-3707(C) invalidates the appointment of a nominee to the school board.

[1]Section 2.2-505(B) requires that an opinion request from a city attorney "shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions."

[2]Nat'l Realty Corp. v. Va. Beach, 209 Va. 172, 175, 163 S.E.2d 154, 156 (1968).

[3]Bd. of Supvrs. v. Horne, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975) (noting Dillon Rule).

[4]Commonwealth v. County Bd., 217 Va. 558, 575, 232 S.E.2d 30, 41 (1977).

[5]*See* Bd. of Supvrs. v. Countryside Invest. Co., 258 Va. 497, 504-05, 522 S.E.2d 610, 613-14 (1999) (holding that county board of supervisors does not have unfettered authority to decide what matters to include in subdivision ordinance; must include requirements mandated by Land Subdivision and Development Act and may include optional provisions contained in act); Op. Va. Att'y Gen: 2002 at 77, 78; 1974-1975 at 403, 405.

[6]2A EUGENE MCQUILLEN, THE LAW OF MUNICIPAL CORPORATIONS § 10.19, at 369 (3d ed. 1996); *see also* Op. Va. Att'y Gen.: 2002 at 83, 84; 2000 at 75, 76.

[7]*See* VA. CODE ANN. tit. 2.2, ch. 37, §§ 2.2-3700 to 2.2-3714 (2008) (codified in scattered sections).

[8]Section 2.2-3700(B).

[9]Jamborsky v. Baskins, 247 Va. 506, 511, 442 S.E.2d 636, 638 (1994).

[10]*See* Prillaman v. Commonwealth, 199 Va. 401, 405-06, 100 S.E.2d 4, 7-8 (1957); Op. Va. Att'y Gen.: 2002 at 331, 333; 1993 at 177, 187; 1992 at 108, 112.

[11]Marsh v. City of Richmond, 234 Va. 4, 11, 360 S.E.2d 163, 167 (1987); Va. Dep't of Labor & Indus. v. Westmoreland Coal Co., 233 Va. 97, 99, 353 S.E.2d 758, 760-61 (1987); Ambrogi v. Koontz, 224 Va. 381, 386, 297 S.E.2d 660, 662 (1982).

[12]*Marsh*, 234 Va. at 11, 360 S.E.2d at 167.

[13]*Arlington County Board*, 217 Va. at 579, 232 S.E.2d at 43.

[14]Section 2.2-3710(A).

[15]Section 2.2-3707(C).

[16]*See* Glazebrook v. Spotsylvania County, 266 Va. 550, 554, 587 S.E.2d 589, 591 (2003) (holding that if notice published by board of supervisors did not meet requirements of *Code*, board acted outside authority granted by General Assembly and amendments are void *ab initio*); City Council v. Potomac Greens Associates P'ship, 245 Va. 371, 378, 429 S.E.2d 225, 228 (1993) (concluding that where *Code* required two notices for hearing before planning commission and city failed to give requisite notices, ordinance was void *ab initio*). "*Ab initio*" means "from the beginning." BLACK'S LAW DICTIONARY 5 (8th ed. 2004).

[17]*Id.*

OP. NO. 09-086

AVIATION: MUNICIPAL AND COUNTY AIRPORTS AND OTHER AIR NAVIGATION FACILITIES – ACQUISITION, ESTABLISHMENT AND OPERATION GENERALLY; OUTSIDE EASEMENTS.

EMINENT DOMAIN: GENERAL PROVISIONS.

Authority for Virginia Highlands Airport Authority to exercise power of eminent domain to condemn trees in private cemetery to provide unobstructed airspace for purposes of air safety.

LUCY E. PHILLIPS
WASHINGTON COUNTY ATTORNEY
DECEMBER 11, 2009

ISSUE PRESENTED

You ask whether the Virginia Highlands Airport Authority is authorized to use its power of eminent domain pursuant to § 5.1-34 to condemn trees in a private cemetery for the purpose of providing unobstructed airspace for air safety.

RESPONSE

It is my opinion that the Virginia Highlands Airport Authority is authorized to exercise its power of eminent domain to condemn trees in a private cemetery to provide unobstructed airspace for purposes of air safety.

BACKGROUND

You relate that the Virginia Highlands Airport Authority (the "Authority") operates the Virginia Highlands Airport in Washington County, Virginia. One of the two runways at the airport is classified as a non-precision instrument runway whereby a constant signal to incoming aircraft provides an approach path to the airport. However, you note that at a certain distance from the airport, the signal's limited precision will require a pilot to complete the landing by line-of-sight navigation.

The Federal Aviation Administration ("FAA") requires all airports to maintain a safety zone above the land surface and below the flight path into and out of the airport. Further, such safety zone may not contain vegetation or buildings.[1] You state that the safety zone is determined by a geometric plane in space and often referred to by the FAA as an imaginary line which angles upward from the end of the runway. You explain that this imaginary line is know as an "approach surface"; however, it is not the approach path by which the pilot lands. The approach surface merely is additional clear airspace under the flight path which might be analogized to paved shoulders along the pavement of highways. For commercial airports with large passenger planes, the approach surface must be a ratio of 50:1, that is, for every 50 feet of distance in a straight line from a fixed point at the end of the runway, the surface rises 1 foot. For general aviation airports without any instrumentation, the safety zone is 20:1. For example, at 500 feet, the approach surface must rise to 25 feet. For a non-precision instrument runway, such as Virginia Highlands Airport, the approach surface rises at a rate of 34:1.

You relate that the federal safety regulations have been adopted as the law of the Commonwealth and set forth in § 15.2-2294. Every Virginia locality which has an airport or a flight path within its boundaries is required to adopt in its zoning ordinance an "Airport Safety Overlay Zone Ordinance." Such an ordinance adopts the FAA standards by incorporation or reference. You advise that Washington County and the Town of Abingdon have adopted such ordinances.

You also relate that a private, commercial cemetery near the Virginia Highlands Airport has a few trees penetrating into the approach surface, which penetration predated adoption of the ordinances. Both the FAA and the Virginia Department of Aviation require that the Authority remove the obstructing trees. Your question is whether the Authority may exercise its statutory power of eminent domain to obtain an easement to remove the obstructing trees from the cemetery property.

You observe that a question arises regarding whether § 25.1-105 would prevent the Authority from condemning trees that intrude into the federally-mandated

approach surface or "safety zone." You conclude that § 25.1-105 does not apply to condemnations made by the Authority pursuant to § 5.1-34.[2]

APPLICABLE LAW AND DISCUSSION

Section 25.1-105, a portion of Virginia's general laws concerning "Eminent Domain"[3] (hereinafter the "Condemnation Act"), provides that:

> Nothing in [Title 25.1] shall be construed to authorize the condemnation of property of any cemetery or burial ground, or any part thereof. The authority to condemn any cemetery or burial ground shall be specifically as provided by law.

The Supreme Court of Virginia has defined "eminent domain" as "'the right on the part of the state to take or control the use of private property for the public benefit when public necessity demands it, is inherent in every sovereignty, and is inseparable from sovereignty, unless denied to it by its fundamental law.'"[4] The Court also has stated that "[t]he only constitutional limitations imposed upon the power of eminent domain are contained in the just compensation clause."[5] "[T]here is no constitutional right to a hearing on the issue of necessity [for such a taking]."[6] When a public purpose is established, the necessity or expediency of a condemnor's project is a legislative question and is not reviewable by the courts.[7]

The Supreme Court of Virginia has commented that "[a]s sovereign, the State has the right of jurisdiction and dominion for governmental purposes over all the lands … within its territorial limits," which right is sometimes termed *jus publicum*.[8] "The *jus publicum* and all rights of the people, which are by their nature inherent or inseparable incidents thereof, are incidents of the sovereignty of the State."[9] The Virginia Constitution "impliedly denies to the legislature the power to relinquish, surrender or destroy, or substantially impair the *jus publicum*."[10]

The General Assembly may delegate its power of eminent domain to political subdivisions and governmental bodies.[11] However, the delegated right of eminent domain must be exercised on such terms, and in such manner, and for such public uses as the General Assembly may direct.[12]

Under §§ 5.1-31 and 5.1-34, the General Assembly has delegated to counties, cities, and towns the authority to condemn land reasonably necessary for the purpose of operating and maintaining an airport. Pursuant to § 5.1-32, the power of eminent domain is extended to the acquisition of easements and privileges outside the boundaries of an airport to ensure safe approaches to the airport or landing fields. Sections 5.1-35 and 5.1-36 provide that these powers may be exercised jointly by two or more political subdivisions in an airport authority.

In the situation you present, the Authority is the governmental entity that operates the Virginia Highlands Airport. As such, the General Assembly has granted the power of eminent domain to the Authority by virtue of Title 5.1. The need to acquire clear zone

easements for the protection and safety of the public clearly is a public necessity as described in § 5.1-32. "Where [it is] necessary to provide unobstructed airspace for the landing and taking off of aircraft," § 5.1-32 authorizes an authority to acquire, by condemnation, "easements through or other interests or privileges with respect to lands … outside the boundaries of such airports or landing fields which are necessary to ensure safe approaches to such airports or landing fields and the safe and efficient operation thereof."

An accepted principle of statutory construction is that, when it is not clear which of two statutes applies, the more specific statute prevails over the general.[13] Also, when statutes provide different procedures on the same subject matter, "the general must give way to the specific."[14]

Section 25.1-105 is part of the Condemnation Act.[15] "Ordinary" condemnation proceedings are undertaken pursuant to the Condemnation Act, which is an act of general application. Section § 5.1-32 is a specific grant of the power of eminent domain which would prevail over the general statute, § 25.1-105.[16] Further, § 5.1-32 extends the power of eminent domain to the acquisition of easements and privileges outside the boundaries of an airport, which would include condemnation of trees in a private cemetery for the purpose of providing unobstructed airspace for air safety. Since the Authority is the governmental entity that operates the Virginia Highlands Airport, it is statutorily authorized to exercise the power of eminent domain for the purpose of operating and maintaining the airport.

CONCLUSION

Accordingly, it is my opinion that the Virginia Highlands Airport Authority is authorized to exercise its power of eminent domain to condemn trees in a private cemetery to provide unobstructed airspace for purposes of air safety.

[1] 14 C.F.R. § 77.1 to § 77.75 (2009) (codified in scattered sections) (providing standards for determining obstructions in navigable airspace and governing objects affecting navigable airspace).

[2] Section 2.2-505(B) requires that an opinion request from a county attorney "shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions."

[3] Va. Code Ann. tit. 25.1, ch. 1, §§ 25.1-100 to 25.1-109 (2006 & Supp. 2009).

[4] Talbot v. Mass. Mut. Life Ins. Co., 177 Va. 443, 448-49, 14 S.E.2d 335, 336 (1941) (citation omitted).

[5] Hamer v. Sch. Bd., 240 Va. 66, 70, 393 S.E.2d 623, 626 (1990) (citing Va. Const. art. I, § 4).

[6] *Id.*; *see also* Richmond Fairfield Ry. Co. v. Llewellyn, 156 Va. 258, 278-79, 157 S.E. 809, 815-16, *amended on other grounds*, 156 Va. 258, 162 S.E. 601 (1931) (noting that hearing for necessity of condemnation is not required to protect due process; necessity of taking property for public use is political matter and not subject to judicial inquiry).

[7] *Hamer*, 240 Va. at 70, 393 S.E.2d at 625; Stewart v. Fugate, 212 Va. 689, 692, 187 S.E.2d 156, 159 (1972).

[8] Commonwealth v. Newport News, 158 Va. 521, 546, 164 S.E. 689, 696 (1932).

[9] *Id.* at 546, 164 S.E. at 696-97.

[10] *Id.* at 546, 164 S.E. at 697.

[11]The Alexandria & Fredericksburg Ry. Co. v. Alexandria & Wash. R.R. Co., 75 Va. 780, 784 (1881); *see also* Light v. Danville, 168 Va. 181, 196, 190 S.E. 276, 281 (1937) (noting that state may delegate power of eminent domain to subordinate agencies to be exercised in interest of public welfare).

[12]Blondell v. Guntner, 118 Va. 11, 12, 86 S.E. 897, 897 (1915).

[13]*See* Va. Nat'l Bank v. Harris, 220 Va. 336, 340, 257 S.E.2d 867, 870 (1979); Scott v. Lichford, 164 Va. 419, 180 S.E. 393 (1935); Roanoke v. Land, 137 Va. 89, 119 S.E. 59 (1923); Op. Va. Att'y Gen.: 2001 at 17, 19; 1990 at 227, 228; 1987-1988 at 276, 277.

[14]Davis v. Davis, 206 Va. 381, 386, 143 S.E.2d 835, 839 (1965); *see also* Op. Va. Att'y Gen.: 2001, *supra* note 13, at 19; 1976-1977 at 93, 94.

[15]*See supra* note 3.

[16]*See supra* notes 13 and 14 and accompanying text.

OP. NO. 08-096

CHARTER: CITY OF BRISTOL.

COUNTIES, CITIES AND TOWNS: CHARTER OF CITY OF BRISTOL.

Charter authorizes participation in airport authority located in Tennessee pursuant to Tennessee law and transfer of ownership in Tri-Cities Regional Airport, located in Tennessee, to such authority without further action by General Assembly.

PETER CURCIO
BRISTOL CITY ATTORNEY
FEBRUARY 2, 2009

ISSUE PRESENTED

You ask whether the City of Bristol may participate in the creation of an airport authority located in Tennessee, pursuant to Tennessee law, and transfer its ownership in Tri-Cities Regional Airport, located in Tennessee, to that authority without further action by the General Assembly.

RESPONSE

It is my opinion that the Charter of the City of Bristol authorizes the City to participate in the creation of an airport authority, located in Tennessee, pursuant to Tennessee law and transfer its ownership in Tri-Cities Regional Airport, located in Tennessee, to such authority without further action by the General Assembly.

BACKGROUND

You advise that the Tri-Cities Airport was created by a contract dated October 24, 1935, entered into by the Cities of Bristol, Tennessee, Johnson City, Tennessee, Kingsport, Tennessee, and Sullivan County, Tennessee. The contract called for the creation of a commission to control and administer the airport consisting of twelve members, six from Johnson City, Tennessee, and two each from Kingsport in Sullivan County and Bristol, Tennessee. Thereafter, you relate that Johnson City conveyed one-half of its interest to Washington County in Tennessee. In 1964, the City of Bristol, Tennessee, sold one-half of its interest in the airport to the City of Bristol, Virginia (the "City"). You state that the 1964 agreement sets forth the following ownership interest in the airport: Washington County, Tennessee – 20%; Johnson

City, Tennessee – 20%; Sullivan County, Tennessee – 20%; Kingsport, Tennessee – 20%; Bristol, Tennessee – 10%; and, City of Bristol, Virginia – 10%. You note that the City has one member on the Airport Commission.

You conclude that the Charter of the City of Bristol (the "Charter") is sufficiently broad to permit the City to continue its ownership and operation of the airport through the establishment of an authority, rather than in its individual capacity as in the past.[1]

APPLICABLE LAW AND DISCUSSION

The Supreme Court of Virginia has stated the specific rule to be followed when considering the scope of a municipal corporation's extraterritorial powers:

> A municipal corporation is a mere local agency of the State and has no powers beyond the corporate limits except such as are clearly and unmistakably delegated by the legislature.[2]

Therefore, to the extent a statutory provision may have extraterritorial effect, the rule of statutory construction is that

> "unless the intention to have a statute operate beyond the limits of the state or country is clearly expressed or indicated by its language, purpose, subject matter, or history, no legislation is presumed to be intended to operate outside the territorial jurisdiction of the state or country enacting it. To the contrary, the presumption is that the statute is intended to have no extraterritorial effect, but to apply only within the territorial jurisdiction of the state or country enacting it. Thus, an extraterritorial effect is not to be given statutes by implication."[3]

As enacted by the General Assembly, § 2.04 of the Charter provides, in pertinent part, that:

> The city shall have the power to acquire, construct, own, maintain, regulate, operate, hold, improve, manage, sell, encumber, donate or otherwise dispose of any property, real or personal, or any estate or interest therein, and any structure or improvement thereon, within or without the city and within or without the Commonwealth of Virginia for:
>
> ….
>
> *5. An airport, and to join with other political subdivisions within and without the Commonwealth for the purpose of jointly owning, operating and maintaining such property for airport purposes*[.][4]

Where a statutory provision "is unambiguous, the plain meaning is to be accepted without resort to the rules of statutory interpretation."[5] "'The manifest intention of

the legislature, clearly disclosed by its language, must be applied.'"[6] '''''[T]ake the words as written'" … and give them their plain meaning."[7] The clear provisions of the Charter permit the City to "join with other political subdivision within and without the Commonwealth for the purpose of jointly owning … property for airport purposes."[8]

CONCLUSION

Accordingly, it is my opinion that the Charter of the City of Bristol authorizes the City to participate in the creation of an airport authority, located in Tennessee, pursuant to Tennessee law and transfer its ownership in Tri-Cities Regional Airport, located in Tennessee, to such authority without further action by the General Assembly.

[1]Section 2.2-505(B) requires that an opinion request from a county attorney "shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions."

[2]City of Richmond v. Bd. of Supvrs., 199 Va. 679, 684, 101 S.E.2d 641, 645 (1958) (citations omitted).

[3]2004 Op. Va. Att'y Gen. 82, 84 (quoting 73 Am. Jur. 2d *Statutes* § 250, at 431 (2001)).

[4]1990 Va. Acts ch. 542, at 796, 799, 800.

[5]Last v. Va. State Bd. of Med., 14 Va. App. 906, 910, 421 S.E.2d 201, 205 (1992).

[6]Barr v. Town & Country Props., Inc., 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990) (quoting Anderson v. Commonwealth, 182 Va. 560, 566, 29 S.E.2d 838, 841 (1944)).

[7]Adkins v. Commonwealth, 27 Va. App. 166, 169, 497 S.E.2d 896, 897 (1998) (quoting Birdsong Peanut Co. v. Cowling, 8 Va. App. 274, 277, 381 S.E.2d 24, 26 (1989) (quoting Brown v. Lukhard, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985))).

[8]1990 Va. Acts, *supra* note 4, at 800.

OP. NO. 08-100

CIVIL REMEDIES AND PROCEDURE: ACTIONS – ACTIONS ON CONTRACTS GENERALLY.

Plaintiff's attorney in debt collection case is agent; may sign and file affidavit stating plaintiff's claim amount.

KAREN A. GOULD
EXECUTIVE DIRECTOR AND CHIEF OPERATING OFFICER
VIRGINIA STATE BAR
FEBRUARY 25, 2009

ISSUES PRESENTED

You ask whether the term "agent," as used in § 8.01-28, would include a plaintiff's attorney in a debt collection case and whether, as plaintiff's agent, he may sign and file an affidavit stating plaintiff's claim amount.

RESPONSE

It is my opinion that the plaintiff's attorney in a debt collection case is an agent as that term is used in § 8.01-28, and he may sign and file an affidavit stating plaintiff's claim amount.

APPLICABLE LAW AND DISCUSSION

Section 8.01-28 provides, in pertinent part, that:

> In any action at law on a note or contract, express or implied, for the payment of money, … if (i) the plaintiff files with his motion for judgment or civil warrant an affidavit made by himself or his agent, stating therein to the best of the affiant's belief the amount of the plaintiff's claim, that such amount is justly due, and the time from which plaintiff claims interest, and (ii) a copy of the affidavit together with a copy of any account filed with the motion for judgment or warrant …, the plaintiff shall be entitled to a judgment on the affidavit and statement of account without further evidence[.]

Section 8.01-28 does not include a reference to an "attorney" and is silent regarding whether an attorney may serve as an agent. Although § 8.01-28 does not expressly authorize an attorney to serve as plaintiff's agent, it does not prohibit it.

Absent a statutory definition, the plain and ordinary meaning of the term is controlling.[1] "Agent" means "[o]ne who is authorized to act for or in place of another; a representative."[2] Further, "attorney" means "one who is designated to transact business for another; a legal agent."[3] Thus, as a general rule, "an attorney is the agent of his client, and has authority to take all lawful steps for the protection of his client's interest."[4]

Although § 8.01-28 does not specifically provide that an attorney may serve as the agent of a plaintiff, the ordinary meanings of the terms "agent" and "attorney"[5] do not prohibit application of the general principle that an attorney is the agent of his client and may be given authority by his client to file certain documents on the client's behalf.[6]

CONCLUSION

Accordingly, it is my opinion that the plaintiff's attorney in a debt collection case is an agent as that term is used in § 8.01-28, and he may sign and file an affidavit stating plaintiff's claim amount.

[1] *See* 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); Op. Va. Att'y Gen.: 2006 at 128, 132; 2003 at 137, 138; *id.* at 104, 106.

[2] Black's Law Dictionary 68 (8th ed. 2004).

[3] *Id.* at 138.

[4] Va. Elec. & Power Co. v. Bowers, 181 Va. 542, 547, 25 S.E.2d 361, 363 (1943).

[5] *See supra* notes 2 and 3 and accompanying text.

[6] Of course, the particular attorney-client relationship and the attorney's knowledge concerning the amount owed are relevant to determine whether an affidavit filed by a plaintiff's attorney would be acceptable to a court.

OP. NO. 09-032

CIVIL REMEDIES AND PROCEDURES: MEDICAL MALPRACTICE – MISCELLANEOUS PROVISIONS.

Medical malpractice review panel or fact finder must apply standard of care based on that degree of skill and diligence practiced by comparable health care providers throughout Commonwealth, as well as expert witness testimony regarding such standard; Virginia law permits proof of local customs to determine appropriate standard. General Assembly has not adopted national standard or particular organization's standard of care.

THE HONORABLE LINDA T. PULLER
MEMBER, SENATE OF VIRGINIA
JULY 27, 2009

ISSUES PRESENTED

You seek guidance regarding the standard of care that must be applied by medical malpractice review panels or finders of fact to determine whether health care providers[1] have delivered quality medical care. Specifically, your concern is about the standard of care to be applied to serious emergency health problems such as strokes and heart problems. Further, you ask what organization's standards of care must be recognized as the official standards by the Commonwealth.

RESPONSE

It is my opinion that a medical malpractice review panel or a finder of fact must apply the standard of care for health care providers based on that degree of skill and diligence practiced by comparable health care providers throughout the Commonwealth, as well as the testimony of expert witnesses regarding such standard of care. However, Virginia law permits proof of local customs to determine the appropriate standard. Further, the General Assembly has not adopted either a national standard or a particular organization's standard of care.

APPLICABLE LAW AND DISCUSSION

The General Assembly has established the standard of care to be applied to health care providers in proceedings before medical malpractice review panels or finders of fact in § 8.01-581.20(A), which provides that:

> the standard of care by which the acts or omissions are to be judged shall be that degree of skill and diligence practiced by a reasonably prudent practitioner in the field of practice or specialty in this Commonwealth and the testimony of an expert witness, otherwise qualified, as to such standard of care, shall be admitted; provided, however, that the standard of care in the locality or in similar localities in which the alleged act or omission occurred shall be applied if any party shall prove by a preponderance of the evidence that the health care services and health care facilities available in the locality and the customary practices in such locality or similar localities give rise to a standard of care which is more appropriate than a statewide standard.

Section 8.01-581.20(A) establishes a standard of care according to a statewide standard.[2] The standard of care for physicians is that degree of skill practiced by physicians in the entire state. However, § 8.01-581.20(A) permits proof of local customs to determine the appropriate standard.[3] The General Assembly has not adopted a national standard or a particular organization's standard of care.[4] In Virginia, a plaintiff asserting medical malpractice must establish that the act or omission of the accused physician fell below the community standard of care.[5] Typically, this is accomplished through expert testimony.

To establish a prima facie case of medical malpractice, a plaintiff must produce evidence: (1) to establish the applicable standard of care; (2) to demonstrate a deviation from the standard; and (3) that develops a causal relationship between the deviation and the injury sustained.[6] In a typical medical malpractice case, the plaintiff presents expert testimony that the physician departed from the customary standard of care and that such departure is the factual and proximate cause of the plaintiff's injuries.[7] For example, in one case a plaintiff alleged that her physician negligently performed a gynecological laparoscopic cystectomy in which her colon was perforated.[8] The plaintiff's expert witness, who was not licensed in the Commonwealth, testified he was aware of the standard of care applicable to basic laparoscopic and abdominal surgical procedures in Virginia through discussion with physicians licensed in the Commonwealth.[9] The witness stated there were no great differences between one state and another concerning the standard of care for these particular procedures.[10] The Supreme Court of Virginia reversed the trial court's decision denying the doctor's qualification as an expert witness stating that "[t]he clear implication of his testimony as a whole was that he was familiar with the Virginia standard of care applicable to the surgical procedure performed by [the defendant], which coincidentally was the national standard of care."[11] Further, "'[no] provision of law prohibits Virginia physicians from practicing according to a national standard of care if one exists for a particular specialty, even though neither the General Assembly nor this Court has adopted such a standard.'"[12]

Medical malpractice law dictates that physicians "possess and exercise that reasonable degree of skill" and diligence "possessed and exercised by members of their profession under similar circumstances."[13] The law does not demand "the utmost degree of care and skill attainable or known to the profession."[14] Section 8.01-581.20(B) provides that "[i]n any action for damages resulting from medical malpractice, any issue as to the standard of care to be applied shall be determined by the jury, or the court trying the case without a jury." Thus, the question for the fact finder becomes not whether a defendant-physician was reasonable in his provision of medical care, but whether he adhered to the customs employed by other physicians in treating similar patients.[15] This reliance on custom to determine the standard of care for physicians is based on the fact that the specialized and complex nature of medical care makes it difficult for a fact finder to have the knowledge or experience to determine what is objectively reasonable.[16]

Section 8.01-581.20(A) provides, in part, that:

> Any physician … who is licensed in Virginia shall be presumed to know the statewide standard of care in the specialty or field of medicine in which he is qualified and certified…. A witness shall be qualified to testify as an expert on the standard of care if he demonstrates expert knowledge of the standards of the defendant's specialty and of what conduct conforms or fails to conform to those standards and if he has had active clinical practice in either the defendant's specialty or a related field of medicine within one year of the date of the alleged act or omission forming the basis of the action.

The Virginia Supreme Court in clarifying the expert witness requirement has held that to qualify as an expert witness the expert must meet both a "knowledge requirement" and an "active clinical practice requirement."[17] The active clinical practice requirement must be defined in terms of "the relevant medical procedure at issue" and "in the context of the actions by which the defendants [are] alleged to have deviated from the standard of care."[18] To qualify as an expert witness on the standard of care, the witness must have expert knowledge of such standard in the defendant's specialty plus an active clinical practice in either that specialty or a related field of medicine within one year of the alleged malpractice.[19] Thus, the standard of care applied in an emergency department of a hospital necessarily would be evaluated based on the procedure at issue.[20] Unless the emergency room setting requires that the procedure be performed in a different manner, any physician proffered as an expert witness could meet the "related field of medicine" test for purposes of § 8.01-581.20(A) if he performs the procedure and the standard of care for performing the procedure is the same.[21] An expert's lack of knowledge regarding certain emergency medicine procedures might disqualify him from rendering expert testimony on those procedures, but would not preclude his testimony on procedures that are common to emergency medicine and his field of expertise assuming the procedures are performed according to the same standard of care.[22]

CONCLUSION

Accordingly, it is my opinion that a medical malpractice review panel or a finder of fact must apply the standard of care for health care providers based on that degree of skill and diligence practiced by comparable health care providers throughout the Commonwealth, as well as the testimony of expert witnesses regarding such standard of care. However, Virginia law permits proof of local customs to determine the appropriate standard. Further, the General Assembly has not adopted either a national standard or a particular organization's standard of care.

[1] *See* VA. CODE ANN. § 8.01-581.1 (Supp. 2009) (defining "health care provider" for purposes of Chapter 21.1 of Title 8.01, §§ 8.01-581.1 to 8.01-581.20:1 (Medical Malpractice)). For purposes of this opinion, any reference to health care provider or health care providers means the entities and practitioners defined in § 8.01-581.1.

[2]*See* Black v. Bladergroen, 258 Va. 438, 443, 521 S.E.2d 168, 170 (1999); Michelle Huckaby Lewis, John K. Gohagan & Daniel J. Merenstein, *The Locality Rule and the Physician's Dilemma: Local Medical Practices vs the National Standard of Care*, 297 JAMA 2633, 2634 (June 20, 2007).

[3]*See id.* ("In many states, there is also a geographic, or locality, component to the determination of the standard of care. Although 29 states and the District of Columbia have adopted a national standard, 21 states maintain a version of the locality rule, in which the standard of care by which a physician is judged is the standard of care in a particular locality.").

[4]*See* Christian v. Surgical Specialists of Richmond, Ltd., 268 Va. 60, 65, 596 S.E.2d 522, 525 (2004); *see also* Report of the Joint Subcommittee Studying Virginia's Medical Malpractice Laws, H. Doc. No. 12, at 6 (1986) (discussing standard of medical care in Virginia; declining to recommend change to standard of care or adopt national standard).

[5]*See* Kathleen M. McCauley & Dana A. Dews, *Medical Malpractice Law*, 41 U. Rich. L. Rev. 231, 238 (2006) (noting essential component of medical malpractice case is to provide expert witness testimony that defendant breached standard of care).

[6]*See* Raines v. Lutz, 231 Va. 110, 113, 341 S.E.2d 194, 196 (1986).

[7]*See* Tim Cramm, Arthur J. Hartz & Michael D. Green, *Ascertaining Customary Care in Malpractice Cases: Asking Those Who Know*, 37 Wake Forest L. Rev. 699, 701 (2002).

[8]*See Christian*, 268 Va. at 62, 596 S.E.2d at 523.

[9]*Id.* at 63, 596 S.E.2d at 523.

[10]*Id.*

[11]*Id.* at 66, 596 S.E.2d at 525.

[12]*Id.* at 65-66, 596 S.E.2d at 525 (quoting *Black*, 258 Va. at 443, 521 S.E.2d at 170). "Expert testimony is not necessary for proof of negligence in nontechnical matters or those of which an ordinary person may be expected to have knowledge, or where the lack of skill or want of care is so obvious as to render expert testimony unnecessary." 61 Am. Jur. 2d *Physicians, Surgeons, and other Healers*, § 323, at 438 (2002). For example, a doctor's clear cut deviation from a drug manufacturer's recommendations to the medical profession of the conditions under which its drugs should be prescribed. *Id.* Further, in instances where a plaintiff can prove what is or is not proper practice based on a recognized standard or authoritative medical text or treatise. *Id.* Finally, an expert may not be employed in the rare instance where the medical malpractice is so egregious that lay persons, relying on common knowledge and experience, can recognize or infer negligence. *See Raines*, 231 Va. at 113 n.2, 341 S.E.2d at 196 n.2; 61 Am. Jur. 2d, *supra*, § 323, at 437.

[13]Cramm *et al.*, *supra* note 7, at 702 (citing 61 Am. Jur. 2d *Physicians, Surgeons, and other Healers* 206 (1999)).

[14]*Id.*

[15]*Id.* at 702-03.

[16]*Id.*

[17]Hinkley v. Koehler, 269 Va. 82, 88, 606 S.E.2d 803, 806 (2005); *see also* McCauley & Dews, *supra* note 5, at 238 (discussing *Hinkley* case).

[18]McCauley & Dews, *supra* note 5, at 238 (alteration in original) (citations omitted).

[19]*See* Jackson v. Qureshi, 277 Va. 114, 122, 671 S.E.2d 163, 167 (2009).

[20]Sami v. Varn, 260 Va. 280, 285, 535 S.E.2d 172, 174 (2000).

[21]*Id.* at 285, 535 S.E.2d at 174-75.

[22]*Id.* at 284, 535 S.E.2d at 174.

OP. NO. 09-025

COMMONWEALTH PUBLIC SAFETY: DEPARTMENT OF CRIMINAL JUSTICE SERVICES – BAIL BONDSMEN.

INSURANCE: FIDELITY AND SURETY INSURANCE – POWER OF ATTORNEY TO EXECUTE BONDS — INSURANCE AGENTS – DEFINITIONS AND GENERAL PROVISIONS.

Surety bail bondsman who executes secured bail bond as disclosed agent-in-fact for stated corporate surety is not personally liable to Commonwealth when criminal defendant absconds and bond is forfeited.

THE HONORABLE JAMES S. MATHEWS
JUDGE, NORFOLK GENERAL DISTRICT COURT
JUNE 1, 2009

ISSUE PRESENTED

You ask whether a surety bail bondsman who executes a secured bail bond as a disclosed agent-in-fact for the stated corporate surety is personally liable to the Commonwealth when the criminal defendant absconds, and the bond is forfeited.

RESPONSE

It is my opinion that a surety bail bondsman who executes a secured bail bond as a disclosed agent-in-fact for the stated corporate surety is not personally liable to the Commonwealth when the criminal defendant absconds, and the bond is forfeited.

APPLICABLE LAW AND DISCUSSION

Surety bail bondsmen, who must be licensed by the Department of Criminal Justice Services and the State Corporation Commission, sell, solicit, or negotiate surety insurance on behalf of insurers licensed in the Commonwealth.[1] The insurer thereby becomes surety on or guarantees a bond, which assures the performance of terms and conditions ordered as a condition of bail.[2]

A surety bail bondsman, acting as an agent for the surety company, acts through powers of attorney issued to the bondsman from the surety company.[3] Such powers of attorney enable the surety bail bondsman to execute bail bonds on behalf of the surety company.[4] Section 38.2-2420 recognizes that "[a]ny bond … executed in the name and on behalf of the insurer as surety under the authority of the power of attorney shall have the same force, effect and validity" as if executed by the insurer itself.

Generally, an authorized agent is not personally liable for contracts entered on behalf of the principal.[5] Absent proof to the contrary, it is presumed that an agent intends to bind the principal.[6] There are several exceptions, *e.g.*, when an agent exceeds the power vested in him by the principal[7] or when the agent expressly agrees to be liable.[8] The relevant licensure provisions of the *Virginia Code* do not affect these general legal principles.

A surety bail bondsman serves only as an agent-in-fact for the surety company and binds the surety company to bail bonds executed on behalf of the surety company. As such, a surety bail bondsman operating within the bounds of his authority cannot

be held personally liable to the Commonwealth for forfeited bonds when a defendant fails to comply with a condition of the bond.

CONCLUSION

Accordingly, it is my opinion that a surety bail bondsman who executes a secured bail bond as a disclosed agent-in-fact for the stated corporate surety is not personally liable to the Commonwealth when the criminal defendant absconds, and the bond is forfeited.

[1] *See* VA. CODE ANN. § 9.1-185 (Supp. 2008), § 9.1-185.5 (2006); VA. CODE ANN. §§ 38.2-1800, 38.2-1814 (2007).

[2] *See* § 9.1-185 (defining "surety bail bondsman"); VA. CODE ANN. § 19.2-119 (2008) (defining "bond"), § 38.2-121 (2007) (defining "surety insurance"); 6 VA. ADMIN. CODE § 20-250-10 (Supp. 2008) (defining "bond").

[3] *See* § 38.2-121 (defining "surety insurance"); § 38.2-1801(A) (2007) (deeming that licensed agent is agent of insurer that issues insurance); § 38.2-1833 (Supp. 2008) (governing appointment of agents to sell insurance); § 38.2-2417 (2007) (defining scope of power of attorney).

[4] *See* §§ 38.2-2416, 38.2-2417, 38.2-2420 (2007).

[5] Richmond Union Passenger Ry. Co. v. N.Y. & Sea Beach Ry. Co., 95 Va. 386, 395, 28 S.E. 573, 575 (1897); 1A MICHIE'S JUR. *Agency* § 71, at 814 (2004).

[6] *Id.*

[7] 1A MICHIE'S JUR., *supra* note 5.

[8] *Richmond Union*, 95 Va. at 395, 28 S.E. at 575.

OP. NO. 09-035

CONSERVATION: FLOOD PROTECTION AND DAM SAFETY – STORMWATER MANAGEMENT.

COUNTIES, CITIES AND TOWNS: GENERAL POWERS OF LOCAL GOVERNMENT – PUBLIC HEALTH AND SAFETY NUISANCES.

Authority under §§ 10.1-603.7(A) and 15.2-924.1(A) for Virginia locality to adopt ordinance regulating or prohibiting use or application of fertilizers within its jurisdictional boundaries provided locality makes factual findings required by § 10.1-603.7(A) and determines that ordinance is necessary to prevent further degradation to water resources or to address specific existing water pollution. Locality must comply with public hearing procedures required by § 10.1-603.7(A).

JAMES E. BARNETT
YORK COUNTY ATTORNEY
SEPTEMBER 1, 2009

ISSUE PRESENTED

You ask whether localities in Virginia may regulate or prohibit the use of fertilizers within their jurisdictional boundaries.

RESPONSE

It is my opinion that a Virginia locality is authorized by § 10.1-603.7(A) and § 15.2-924.1(A) to adopt an ordinance regulating or prohibiting the use or application

of fertilizers within its jurisdictional boundaries provided the locality makes the factual findings required by § 10.1-603.7(A) and determines that the ordinance is necessary to prevent any further degradation to water resources or to address specific existing water pollution. The locality also must comply with the public hearing procedures required by § 10.1-603.7(A).

BACKGROUND

You note that virtually all of York County drains either directly or indirectly into the Chesapeake Bay. You point out that the continued health of the Bay and its tributaries is important to the quality of residential life in the County and its tourism industry as well as the livelihoods of local watermen. Further, you note that fertilizer runoff has been identified as one of the major threats to the Bay's ecosystem. You also explain that various citizen groups in the County are concerned about the health of the Bay and have urged the York County Board of Supervisors to consider adopting a ban on, or stringent regulation of, the application of fertilizers and other lawn chemicals. Thus, you seek guidance concerning the authority of a locality to enact such a ban or regulation.

APPLICABLE LAW AND DISCUSSION

In determining the validity of a local government's exercise of legislative authority, Virginia follows the Dillon Rule of strict construction that provides "'municipal corporations have only those powers expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable'"[1] and its corollary that "[t]he powers of county boards of supervisors are fixed by statute and are limited to those powers conferred expressly or by necessary implication."[2] Therefore, to have the power to act in a certain area, local governments must have express enabling legislation or authority that is necessarily implied from enabling legislation.[3]

Section 3.2-3602 mandates that "[n]o locality shall regulate the registration, packaging, labeling, sale, or distribution of fertilizers." However, § 3.2-3602 does not prohibit localities from regulating the use or application of fertilizers. Section 15.2-924.1(A) addresses this question directly, providing that:

> No locality shall regulate the use, application, or storage of fertilizers, as defined in Chapter 36 (§ 3.2-3600 et seq.) of Title 3.2, except by ordinances consistent with the requirements of the Chesapeake Bay Preservation Act (§ 10.1-2100 et seq.), the Erosion and Sediment Control Law (§ 10.1-560 et seq.), the Stormwater Management Act (§ 10.1-603.1 et seq.) or other nonpoint source regulations promulgated by the Department of Conservation and Recreation or the Soil and Water Conservation Board.

I am not aware of any requirements in the Chesapeake Bay Preservation Act or its implementing regulations or in the Erosion and Sediment Control Law or its

implementing regulations that specifically address the authority of a locality to control the use or application of fertilizers.

The Stormwater Management Act[4] and its implementing regulations do not include any requirements concerning the regulation of fertilizer use and application by localities. However, § 10.1-603.7(A) of the Stormwater Act authorizes localities

> to adopt more stringent stormwater management ordinances than those necessary to ensure compliance with the [Virginia Soil and Water Conservation] Board's minimum requirements, provided that the more stringent ordinances are based upon factual findings of local or regional comprehensive watershed management studies or findings developed through the implementation of a MS4 permit or a locally adopted watershed management study and are determined by the locality to be necessary to prevent any further degradation to water resources or to address specific existing water pollution including nutrient and sediment loadings, stream channel erosion, depleted groundwater resources, or excessive localized flooding within the watershed and that prior to adopting more stringent ordinances a public hearing is held after giving due notice.

Furthermore, the Virginia Stormwater Management Program (VSMP) Permit Regulations,[5] promulgated by the Virginia Soil and Water Conservation Board pursuant to §10.1-603.4, require applications for VSMP permits for large and medium municipal separate storm sewer systems (MS4s) to include a management program that contains a description of control measures that will be used to reduce pollutants from stormwater runoff from commercial and residential areas, including:

> A description of a program to reduce to the maximum extent practicable, pollutants in discharges from municipal separate storm sewers associated with the application of pesticides, herbicides and fertilizer that will include, as appropriate, controls such as educational activities, permits, certifications and other measures for commercial applicators and distributors, and controls for application in public right-of-ways and at municipal facilities.[6]

Thus, the VSMP Permit Regulations recognize that control of the application of fertilizers is an appropriate method to reduce pollutants in stormwater runoff.

A local ordinance that regulates the use and application of fertilizers would be a more stringent stormwater management ordinance than that necessary to comply with the Virginia Soil and Water Conservation Board's minimum requirements under the Stormwater Management Act as permitted by § 10.1-603.7(A). Such an ordinance is authorized by §§ 10.1-603.7(A) and 15.2-924.1(A) when the stated statutory requirements are met.

CONCLUSION

Accordingly, it is my opinion that a Virginia locality is authorized by § 10.1-603.7(A) and § 15.2-924.1(A) to adopt an ordinance regulating or prohibiting the use or application of fertilizers within its jurisdictional boundaries provided the locality makes the factual findings required by § 10.1-603.7(A) and determines that the ordinance is necessary to prevent any further degradation to water resources or to address specific existing water pollution. The locality also must comply with the public hearing procedures required by § 10.1-603.7(A).

[1]Bd. of Supvrs. v. Countryside Investment Co., 258 Va. 497, 503, 522 S.E.2d 610, 613 (1999) (quoting Chesapeake v. Gardner Enters., 253 Va. 243, 246, 482 S.E.2d 812, 814 (1997)); *accord* Commonwealth v. County Bd., 217 Va. 558, 574, 232 S.E.2d 30, 40 (1977); Bd. of Supvrs. v. Horne, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975); City of Richmond v. Bd. of Supvrs., 199 Va. 679, 684, 101 S.E.2d 641, 645 (1958); 2008 Op. Va. Atty. Gen. 37, 38.

[2]County Bd. v. Brown, 229 Va. 341, 344, 329 S.E.2d 468, 470 (1985); *accord* Gordon v. Bd. of Supvrs., 207 Va. 827, 832, 153 S.E.2d 270, 274 (1967).

[3]Any doubt as to the existence of such power must be resolved against the locality. *See Board of Supervisors*, 199 Va. at 684, 101 S.E.2d at 645; 2009 Op. Va. Atty. Gen. 41, 42.

[4]*See* VA. CODE ANN. tit. 10.1, ch. 6, art. 1.1, § 10.1-603.1 (not set out), §§ 10.1-603.2 to 10.1-603.15 (2006 & Supp. 2009).

[5]4 VA. ADMIN. CODE §§ 50-60-10 to 50-60-1240 (Supp. 2008) (codified in scattered sections).

[6]4 VA. ADMIN. CODE § 50-60-380(C)(2)(d)(1)(f).

OP. NO. 09-026

CONSERVATION: OPEN-SPACE LAND ACT.

Pursuant to Act, municipal corporation may impose flat fee on every residential unit and every business unit within municipality to provide funding to maintain parks and open-space land owned by municipality.

THE HONORABLE CHARLES J. COLGAN
MEMBER, SENATE OF VIRGINIA
MAY 28, 2009

ISSUE PRESENTED

You ask whether a municipal corporation is authorized to impose a flat fee on every residential unit and every business unit within the municipality for the purpose of providing funding to maintain parks and open space owned by the municipality.

RESPONSE

It is my opinion that pursuant to the Open-Space Land Act, a municipal corporation may impose a flat fee on every residential unit and every business unit within the municipality to provide funding to maintain parks and open-space land owned by the municipality.

BACKGROUND

You advise that the governing body of the City of Manassas Park is considering the imposition of a flat fee to each residential and business unit within the City. The City

states that the fee would be used to provide funding for parks ("green space"). The potential fee would not be assessed to each property, but rather to each "unit," *e.g.*, a single family house, apartments, business suites, and the like.

Specifically, the City questions whether the proposed fee is consistent with the uniformity requirements of Article X, § 1 of the Constitution of Virginia. Therefore, you seek clarification to determine whether the City is authorized to impose such fee.

APPLICABLE LAW AND DISCUSSION

The power of a local governing body, unlike that of the General Assembly, "must be exercised pursuant to an express grant"[1] because its powers "are limited to those conferred expressly or by necessary implication."[2] "If the power cannot be found, the inquiry is at an end."[3] The Dillon Rule requires a narrow interpretation of all powers conferred on local governments since they are delegated powers.[4] Therefore, any doubt as to the existence of power must be resolved against the locality.[5]

The Open Space Land Act[6] authorizes public bodies to protect open space by acquiring easements in gross to preserve open-space land.[7] The Act defines "open-space land" as "any land which is provided or preserved for (i) park or recreational purposes, … [or] (iii) historic or scenic purposes."[8] It also defines a "public body" to include "any … municipality."[9] Section 10.1-1701 provides also that "[t]he use of the real property [purchased] for open-space land shall conform to the official comprehensive plan for the area in which the property is located."

The Supreme Court of Virginia has said that "when the primary purpose of an enactment is to raise revenue, the enactment will be considered a tax, regardless of the name attached to the act."[10] The Virginia Supreme Court has established that the appropriate inquiry into imposition of a municipal fee is whether the fee is a bona fide fee-for-service or an "invalid revenue-generating device."[11] There must be a reasonable correlation between the benefit conferred and the cost exacted by any ordinance imposing a tax labeled as a fee.[12] The reasonable correlation test is determinative of whether a fee enacted by a municipality is a permissible exercise of its police power as opposed to an impermissible revenue-producing device in the form of a special assessment, impact fee or the like. Whether an act is a valid fee or an impermissible tax does not depend on the label the municipality applies to it.[13] In this matter, § 10.1-1702(B)(4) permits a city to "levy taxes and assessments" for purposes of the Open-Space Land Act.

Article X, § 1, of the Virginia Constitution establishes the general rule that, except as otherwise provided in the Constitution, "[a]ll property … shall be taxed," and "[a]ll taxes … shall be uniform upon the same class of subjects." However, courts have long recognized that the mandate of § 1 is "not self-executing, and legislation is necessary to carry it into effect. One must be able to put his finger upon the letter of authority."[14] In this matter, § 10.1-1702(B)(4) provides the apparent statutory authority to impose such a flat fee which is uniform upon each residential and business unit.

Application of the Dillon Rule and the Open-Space Land Act to the facts you present support the conclusion that the City is authorized to impose the tax you describe.

CONCLUSION

Accordingly, it is my opinion that pursuant to the Open-Space Land Act, a municipal corporation may impose a flat fee on every residential unit and every business unit within the municipality to provide funding to maintain parks and open-space land owned by the municipality.

[1]Nat'l Realty Corp. v. Va. Beach, 209 Va. 172, 175, 163 S.E.2d 154, 156 (1968).

[2]Bd. of Supvrs. v. Horne, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975) (noting corollary to Dillon Rule).

[3]Commonwealth v. County Bd., 217 Va. 558, 575, 232 S.E.2d 30, 41 (1977).

[4]*See* Op. Va. Att'y Gen: 2002 at 77, 78; 1974-1975 at 403, 405; *see also* Bd. of Supvrs. v. Countryside Invest. Co., 258 Va. 497, 504-05, 522 S.E.2d 610, 613-14 (1999) (holding that county board of supervisors does not have unfettered authority to decide what matters to include in subdivision ordinance; must include requirements mandated by Land Subdivision and Development Act and may include optional provisions contained in act).

[5]2A Eugene McQuillen, The Law of Municipal Corporations § 10.19, at 369 (3d ed. 1996); Op. Va. Att'y Gen.: 2002 at 83, 84; 2000 at 75, 76.

[6]*See* Va. Code Ann. tit. 10.1, ch. 17, §§ 10.1-1700 to 10.1-1705 (2006).

[7]*See* § 10.1-1703; 1993 Op. Va. Att'y Gen. 7, 8.

[8]Section 10.1-1700.

[9]*Id.*

[10]Marshall v. N. Va. Transp. Auth., 275 Va. 419, 431, 657 S.E.2d 71, 77 (2008). "[S]tatutes imposing taxes are to be construed most strongly against the government, and in favor of the citizen, and are not to be extended by implication beyond the clear import of language used. Whenever there is just doubt, 'that doubt should absolve the taxpayer of his burden.'" City of Winchester v. Am. Woodmark Corp., 250 Va. 451, 456, 464 S.E.2d 148, 152 (1995) (alteration in original) (citation omitted), *quoted in In re* Tultex Corp., 250 B.R. 560, 564 (2000).

[11]*See* Mountain View Ltd. P'ship v. Clifton Forge, 256 Va. 304, 312, 504 S.E.2d 371, 376 (1998); *see also* Tidewater Ass'n of Homebuilders v. Va. Beach, 241 Va. 114, 400 S.E.2d 523 (1991); McMahon v. Va. Beach, 221 Va. 102, 267 S.E.2d 130 (1980).

[12]*Id.*

[13]*See supra* note 10 and accompanying text.

[14]Commonwealth v. Stringfellow, 173 Va. 284, 291, 4 S.E.2d 357, 360 (1939) (interpreting § 168 of 1902 Constitution of Virginia, predecessor to Article X, § 1).

OP. NO. 08-070

COUNTIES, CITIES AND TOWNS: GENERAL PROVISIONS.

Section 15.2-101(A) does not grandfather 'suitability of land provisions' in Botetourt County Code.

ELIZABETH K. DILLON
BOTETOURT COUNTY ATTORNEY
JANUARY 6, 2009

ISSUE PRESENTED

You ask whether § 15.2-101(A) grandfathers the "suitability of land provisions" contained in §§ 21-64 and 21-122 of the Botetourt County Code.

RESPONSE

It is my opinion that § 15.2-101(A) does not grandfather the "suitability of land provisions" contained in §§ 21-64 and 21-122 of the Botetourt County Code.

BACKGROUND

You advise that the § 21-64 of Botetourt County Code ("Ordinance § 21-64") directs that the subdivision agent

> shall not approve the subdivision of land if, from adequate investigation conducted by all public agencies concerned, it has been determined that in the best interest of the public the site is not suitable for platting and development purposes of the kind proposed.[1]

You also advise that in 2002 Botetourt County added § 21-122 ("Ordinance § 21-122") to the Subdivision Ordinances, which includes a similar suitability of land provision, but specifies the conditions that may be considered by the planning commission.[2] You relate that Botetourt County is considering amendments to eliminate the "suitability of land" provisions in §§ 21-64 and 21-122 because the provisions exceed the authority delegated by the General Assembly to localities in Article 6, Chapter 22 of Title 15.2, §§ 15.2-2240 through 15.2-2279. You also advise that it has been suggested that Ordinance § 21-64 was authorized by enabling legislation when it was adopted in 1958 and therefore is "grandfathered."

You conclude that the "suitability of land" provisions in Ordinances § 21-64 and § 21-122 are not authorized under the current Virginia subdivision enabling statutes and are not grandfathered provisions.[3]

APPLICABLE LAW AND DISCUSSION

The term "grandfathering" simply is a matter of legislative grace where the governing body, by ordinance or other legitimate formal policy, carves out a legislative exception to the general application of regulations for a particular provision.[4] The normal purpose of a "grandfather" provision is to delay the application of some new and stricter standard.[5]

The power of a local governing body, unlike that of the General Assembly, "must be exercised pursuant to an express grant"[6] because the powers of a county "are limited to those conferred expressly or by necessary implication."[7] "If the power cannot be found, the inquiry is at an end."[8] The Dillon Rule requires a narrow interpretation of all powers conferred on local governments since they are delegated powers.[9] Therefore, any doubt as to the existence of power must be resolved against the locality.[10]

Section 15.2-101(A) provides that:

> The repeal of Title 15.1 effective as of December 1, 1997, shall not affect the powers of any locality with respect to any ordinance, resolution or by-law adopted and not repealed or rescinded prior to such date[.]

Although § 15.2-101(A) does not define the term "power,"[11] it generally means "[t]he ability to act or not act"; "[t]he legal right or authorization to act or not act."[12] Words are to be given their ordinary meaning, given the context in which they are used in a statute.[13] "'The manifest intention of the legislature, clearly disclosed by its language, must be applied.'"[14] Therefore, it is clear that the authorization or authority of a locality to act pursuant to a grant or delegation of power by the General Assembly is not affected by the repeal of Title 15.1 with respect to local acts taken pursuant to a grant of power resulting in enactment of a local ordinance, resolution, or by law in effect prior to December 1, 1997. Section 15.2-101(A) simply means that the recodification and repeal of a particular statute that formerly authorized an action does not invalidate the actions taken by localities under a former grant of power by the General Assembly. However, it does not operate to grandfather ordinances adopted under a former grant of statutory authority.

CONCLUSION

Accordingly, it is my opinion that § 15.2-101(A) does not grandfather the "suitability of land provisions" contained in §§ 21-64 and 21-122 of the Botetourt County Code.

[1] *See* Botetourt County, Va., Code § 21-64 (2002), *available at* http://www.co.botetourt.va.us/government/ documents/mc/ch021.pdf.

[2] *See id.*, § 21-122 (2002).

[3] Section 2.2-505(B) requires that an opinion request from a county attorney "shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions."

[4] County of Fairfax v. Fleet Indus. Park Ltd. P'ship, 242 Va. 426, 431, 410 S.E.2d 669, 672 (1991); *see also* Parker v. County of Madison, 244 Va. 39, 41-42, 418 S.E.2d 855, 856 (1992) (noting principle that new laws apply only to future cases unless it is clear that law was intended to have retrospective effect).

[5] Op. Va. Att'y Gen.: 2004 at 146, 150; 1980-1981 at 331, 331.

[6] Nat'l Realty Corp. v. Va. Beach, 209 Va. 172, 175, 163 S.E.2d 154, 156 (1968).

[7] Bd. of Supvrs. v. Horne, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975).

[8] Commonwealth v. County Bd., 217 Va. 558, 575, 232 S.E.2d 30, 41 (1977).

[9] *See* Bd. of Supvrs. v. Countryside Invest. Co., 258 Va. 497, 504-05, 522 S.E.2d 610, 613-14 (1999) (holding that county board of supervisors does not have unfettered authority to decide what matters to include in subdivision ordinance; must include requirements mandated by Land Subdivision and Development Act and may include optional provisions contained in Act); Op. Va. Att'y Gen.: 2002 at 77, 78; 1974-1975 at 403, 405.

[10] 2A Eugene McQuillen, The Law of Municipal Corporations § 10.19, at 369 (3d ed. 1996); *see also* Op. Va. Att'y Gen.: 2002 at 83, 84; 2000 at 75, 76.

[11]When a term is not defined, it must be given its ordinary meaning. *See* McKeon v. Commonwealth, 211 Va. 24, 27, 175 S.E.2d 282, 284 (1970).

[12]BLACK'S LAW DICTIONARY 1207 (8th ed. 2004).

[13]Va. Beach v. Bd. of Supvrs., 246 Va. 233, 236-37, 435 S.E.2d 382, 384 (1993).

[14]Barr v. Town & Country Props., Inc., 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990) (quoting Anderson v. Commonwealth, 182 Va. 560, 566, 29 S.E.2d 838, 841 (1944).

OP. NO. 09-058

COUNTIES, CITIES AND TOWNS: INDUSTRIAL DEVELOPMENT AND REVENUE BOND ACT.

Section 15.2-4901, as it relates to subsidized single family housing facilities, is applicable to Industrial Development Authority of Pulaski County.

THOMAS J. MCCARTHY JR.
PULASKI COUNTY ATTORNEY
SEPTEMBER 21, 2009

ISSUE PRESENTED

You ask whether § 15.2-4901, which relates in part to subsidized single family housing facilities, is applicable to the Industrial Development Authority of Pulaski County.

RESPONSE

It is my opinion that § 15.2-4901, as it relates to subsidized single family housing facilities, is applicable to the Industrial Development Authority of Pulaski County.

BACKGROUND

You advise that the Industrial Development Authority of Pulaski County (the "Authority") seeks guidance regarding enabling legislation for the Authority related to subsidized single family housing facilities. You observe that § 15.2-4901 authorizes the Commonwealth to grant certain powers to industrial development authorities created by municipalities regarding facilities used primarily for single or multi-family residences. You advise that Pulaski County is not a municipality; it is a county. Further, you note that § 15.2-4902 refers to "authority facilities" or "facilities" and to "localities" without defining the term "localities." Finally, you observe that § 15.2-4905(13) provides that an authority "shall not have the power to operate any single or multi-family housing facilities."

Therefore, you conclude that the powers related to single or multi-family housing facilities have not been granted to county industrial development authorities. You believe that if the General Assembly had intended for such powers to be granted, it would have granted the authority to "municipalities and counties."[1]

APPLICABLE LAW AND DISCUSSION

Industrial development authorities are created under the Industrial Development and Revenue Bond Act[2] (the "Act"). The General Assembly has expressed its intent, by authorizing the creation of industrial development authorities, "that such authorities

may acquire, own, lease, and dispose of properties and make loans" in furtherance of specific purposes.[3] The purposes for an industrial development authority include the promotion of industry and the development of trade.[4] In § 15.2-4901, the General Assembly set forth an additional purpose "to grant to industrial development authorities created by one or more municipalities whose housing authorities have not been activated as provided by §§ 36-4 and 36-4.1[5] … the powers contained herein with respect to facilities used primarily for single or multi-family residences in order to promote safe and affordable housing." Section 15.2-102 defines certain terms, as used in Title 15.2, "unless [the definition] would be inconsistent with the context or manifest intent" of a particular statute in Title 15.2. The definition of the term "municipality" and "words or terms of similar import shall be construed to relate only to cities and towns."[6] Because § 15.2-4901 and the Act do not define the term "municipalities," the definition of "municipality" contained in § 15.2-102[7] must be applied.

Furthermore, § 15.2-4905 of the Act grants to authorities certain powers "together with all powers incidental thereto or necessary for the performance" of the powers expressed in the Act. An industrial development authority has the power to acquire, to improve or equip, to lease, and to convey "authority facilities."[8] Section 15.2-4902(xiii) defines "authority facilities" to include "facilities used primarily for single or multi-family residences." However, "[c]lause (xiii) applies only to industrial development authorities created by one or more *localities* whose housing authorities have not been activated as provided by §§ 36-4 and 36-4.1."[9] Neither § 15.2-4902, nor the Act, defines the term "localities." Thus, as discussed in the analysis regarding "municipalities," the definition of "locality" in § 15.2-102 would apply. In § 15.2-102, the General Assembly requires that the term "locality" or "local government" "shall be construed to mean a county, city, or town as the context may require."

Clearly, § 15.2-4901, which expresses the intent of the General Assembly to grant industrial development authorities created by a municipalities the powers contained in the Act related to facilities with a primary use as single or multi-family residences, is in direct conflict with the definition of the term "authority facilities" or "facilities" in § 15.2-4902. In § 15.2-4901, the General Assembly limits the grant of power to industrial development authorities regarding facilities used primarily for single or multi-family residences to the authorities of cities and towns. However, the definition of "authority facilities" or "facilities" in § 15.2-4902 grants such power to the industrial development authorities of counties, cities, or towns.

The primary goal of statutory interpretation is to ascertain and give effect to the intent of the General Assembly.[10] When the language of a statute is plain and unambiguous and its meaning is clear and definite, it must be given effect.[11] When resolving an apparent conflict between two statutes, the applicable rule of statutory construction is that the most recently enacted expression of legislative intent controls.[12] In this instance, both §§ 15.2-4901 and 15.2-4902 were amended by the 1997 Session of the

General Assembly.[13] However, the 2006 Session of the General Assembly (the "2006 Amendment") further amended the definition of "authority facilities" or "facilities" in § 15.2-4902 to provide that:

> "Authority facilities" or "facilities" means any or all … (xiii) facilities used primarily for single or multi-family residences. Clause (xiii) applies only to industrial development authorities created by one or more ~~municipalities~~ *localities* whose housing authorities have not been activated as provided by §§ 36-4 and 36-4.1.[14]

The 2006 Amendment did not expressly amend the intent of the legislature contained in § 15.2-4901; however, the 2006 Amendment is the most recent enactment by the General Assembly concerning the Act related to facilities used primarily as single or multi-family residences. Thus, the 2006 Amendment must control in determining the General Assembly's intent related to the powers of industrial development authorities regarding such facilities. Based on the principles of statutory construction, I am required to apply the changes in the 2006 Amendment to the definition of "authority facilities" or "facilities," which now includes facilities used primarily for single or multi-family residences created by one or more "localities," as defined in § 15.2-102. Therefore, § 15.2-4901 and the definitions contained in § 15.2-4902, which pertain to subsidized single family housing facilities, are applicable to the Authority.[15]

CONCLUSION

Accordingly, it is my opinion that § 15.2-4901, as it relates to subsidized single family housing facilities, is applicable to the Industrial Development Authority of Pulaski County.

[1]Section 2.2-505(B) requires that an opinion request from a county attorney "shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions."

[2]*See* VA. CODE ANN. tit. 15.2, ch. 49, §§ 15.2-4900 to 15.2-4920 (2008 & Supp. 2009).

[3]Section 15.2-4901 (2008).

[4]*Id.*

[5]Section 36-4 provides for the creation of housing authorities to be authorized by the qualified voters of a locality in a referendum election, held in accordance with § 36-4.1, to determine whether there is a need for such an authority prior to its activation for the transaction of business.

[6]Section 15.2-102 (2008).

[7]*See id.* (limiting construction of the term "municipality" to "cities and towns").

[8]Section 15.2-4905(4)-(6) (2008).

[9]Section 15.2-4902 (2008) (emphasis added).

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

[11]Temple v. Petersburg, 182 Va. 418, 423, 29 S.E.2d 357, 358 (1944); 1997 Op. Va. Att'y Gen. 16, 17.

[12]*See* Petersburg v. Gen. Baking Co., 170 Va. 303, 311, 196 S.E. 597, 600 (1938); Commonwealth v. Sanderson, 170 Va. 33, 39, 195 S.E. 516, 519 (1938); Commonwealth v. Rose, 160 Va. 177, 180, 168 S.E. 356, 357 (1933); Op. Va. Att'y Gen.: 1980-1981, 330, 331; 1974-1975 at 415, 416.

[13] *See* 1997 Va. Acts chs. 758, 763, at 1808, 1808-11, 1821, 1821-24, respectively (amending §§ 15.1-1375, 15.1-1374, predecessors to §§ 15.2-4901, 15.2-4902, respectively); *see also id.* ch. 587, at 976 (recodifying Title 15.1 as Title 15.2).

[14] 2006 Va. Acts ch. 324, at 402, 403.

[15] As you note, in enacting § 15.2-4905, the General Assembly expressly withholds from all industrial development authorities the "power to operate any single or multi-family housing facilities."

OP. NO. 09-074

COUNTIES, CITIES AND TOWNS: PLANNING SUBDIVISION OF LAND AND ZONING – LAND SUBDIVISION AND DEVELOPMENT.

Localities may not impose bonding requirements that exceed ten percent of estimated construction costs for administrative allowance required from developer.

THE HONORABLE M. KIRKLAND COX
MEMBER, HOUSE OF DELEGATES
OCTOBER 16, 2009

ISSUE PRESENTED

You ask whether localities may impose bonding requirements in excess of ten percent of the estimated construction costs for the administrative allowance required from a developer.

RESPONSE

It is my opinion that localities may not impose bonding requirements that exceed ten percent of the estimated construction costs for the administrative allowance required from a developer pursuant to § 15.2-2241(5).

APPLICABLE LAW AND DISCUSSION

Section 15.2-2241(5) provides, in pertinent part, that:

> 5. **(Effective until July 1, 2014)** 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, including traffic signalization and control, for public access streets, for structures necessary to ensure stability of critical slopes, and for storm water management facilities, financed or to be financed in whole or in part by private funds only if the owner or developer (i) certifies to the governing body that the construction costs have been paid to the person constructing such facilities; (ii) furnishes to the governing body a certified check or cash escrow in the amount of the estimated

> costs of construction or a personal, corporate or property bond, with surety satisfactory to the governing body or its designated administrative agency, in an amount sufficient for and conditioned upon the construction of such facilities, or a contract for the construction of such facilities and the contractor's bond, with like surety, in like amount and so conditioned; or (iii) furnishes to the governing body a bank or savings institution's letter of credit on certain designated funds satisfactory to the governing body or its designated administrative agency as to the bank or savings institution, the amount and the form. The amount of such certified check, cash escrow, bond, or letter of credit shall not exceed the total of the estimated cost of construction based on unit prices for new public or private sector construction in the locality and a reasonable allowance for estimated administrative costs, inflation, and potential damage to existing roads or utilities, which *shall not exceed 10 percent* of the estimated construction costs. "Such facilities," as used in this section, means those facilities specifically provided for in this section. [Emphasis added.]

The power of a local governing body, unlike that of the General Assembly, "must be exercised pursuant to an express grant."[1] Section 15.2-2241(5) specifically provides that the amount for administrative allowance required from a developer "*shall not* exceed 10 percent." (Emphasis added.) Prior to July 1, 2009, the amount permitted by § 15.2-2241(5) was "25 percent."[2] When the General Assembly amends a statutory provision, a presumption arises that the legislature intended to change existing law.[3] Clearly, such was the intent of the 2009 Session of the General Assembly in amending § 15.2-2241(5) as the only change was the reduction of the required bonding amount.[4]

CONCLUSION

Accordingly, it is my opinion that localities may not impose bonding requirements that exceed ten percent of the estimated construction costs for the administrative allowance required from a developer pursuant to § 15.2-2241(5).

[1]Nat'l Realty Corp. v. Va. Beach, 209 Va. 172, 175, 163 S.E. 154, 156 (1968).

[2]*See* 2009 Va. Acts ch. 193, at 310, 310 (amending § 15.2-2241(5) and deleting "25" and replacing it with "10" percent). However, I note that on July 1, 2014, the amount will revert to "25 percent." *See id.*, at 311, cl. 2 (mandating that provisions of act will expire on July 1, 2014).

[3]*See* Wisniewski v. Johnson, 223 Va. 141, 144, 286 S.E.2d 223, 224-25 (1982); City of Richmond v. Sutherland, 114 Va. 688, 693, 77 S.E. 470, 472 (1913).

[4]*See* 2009 Va. Acts ch. 193, *supra* note 2. Further, there is a presumption that an amendment to a law is intended to have some meaning and is not intended to be unnecessary or vain. *See* Cape Henry Towers, Inc. v. Nat'l Gypsum Co., 229 Va. 596, 600, 331 S.E.2d 476, 479 (1985); 2007 Op. Va. Att'y Gen. 69, 71. The amendment to § 15.2-2241(5) would be meaningless if not read to reduce the bonding requirement from twenty-five to ten percent during the effective period of the enactment. *See* 2009 Va. Acts ch. 193, *supra* note 2, cl. 2, at 311 (mandating that provisions of act will expire on July 1, 2014).

OP. NO. 08-105

COUNTIES, CITIES AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING – LAND SUBDIVISION AND DEVELOPMENT.

No authority for localities to require review and approval of boundary survey plats and physical survey plats prior to recordation. No authority for circuit court clerks to refuse recordation of such plats based solely on lack of such review and approval.

THE HONORABLE ROBERT B. BELL
MEMBER, HOUSE OF DELEGATES
FEBRUARY 25, 2009

ISSUES PRESENTED

You ask whether the *Virginia Code* authorizes localities to require the review and approval of boundary survey plats and physical survey plats[1] by local planning officials as a prerequisite to recordation. You further ask whether clerks of the circuit court are authorized to refuse to record boundary survey plats and physical survey plats until after the review and approval of such plats by local planning officials.

RESPONSE

It is my opinion that localities are not authorized to require the review and approval of boundary survey plats and physical survey plats as a prerequisite for recordation. It further is my opinion that circuit court clerks may not refuse to record such plats based solely on the lack of such review and approval from the local planning official.

BACKGROUND

You relate that land surveyors have advised you that several Virginia localities apply an informal policy requiring all boundary and physical survey plats to be reviewed and approved by local planning officials as a prerequisite to recordation. You believe that these localities base their actions upon the delegated authority to regulate land development and the subdivision of land. Further, you state that such policies are not included in those localities' published ordinances governing the development and subdivision of land. You note that these policies effectively prevent surveyors from recording such plats until after local planning officials have reviewed and approved them.

Furthermore, you advise that some circuit court clerks have refused to accept such boundary and physical survey plats for recordation until the plats were reviewed and approved by local planning officials. You state that the circuit court clerks of these localities have related they are without authority to accept such plats for recordation without the approval of the local planning officials.

You note that the standards for boundary and physical surveys, as developed by the Virginia Board of Architects, Professional Engineers, Land Surveyors, Certified Interior Designers and Landscape Architects, are set forth in 18 VAC §§ 10-20-370 and 10-20-380. Finally, it is your understanding that surveys that do require review and approval by local planning officials prior to recordation are: (1) subdivision

surveys, where an existing parcel is being subdivided into two or more parcels; (2) boundary or property line adjustment surveys, where the boundary line between parcels is changed from the original survey or deed description, but no new parcels are created; and (3) any survey, by any other name, which changes a property line or creates new parcels or lots.

APPLICABLE LAW AND DISCUSSION

The overriding goal of statutory interpretation is to discern and give effect to legislative intent.[2] The Commonwealth follows the rule of strict construction of statutory provisions.[3] The power of a county governing body "must be exercised pursuant to an express grant"[4] because the powers of a county "are limited to those conferred expressly or by necessary implication."[5] This rule is corollary to the Dillon Rule that municipal corporations similarly are limited in their powers.[6] Thus, the powers of localities acting through either a local planning commission or a local governing body are fixed by statute and are limited to those powers granted expressly or by necessary implication and those that are essential and indispensable.[7]

Localities enact subdivision ordinances pursuant to delegation by the General Assembly of the police power of the Commonwealth.[8] The rule of strict construction applies in interpreting the statutory authority of local governing bodies to adopt land use regulations.[9] Consequently, authority for imposed requirements must be found in the subdivision enabling statutes and may not be implied from other more general grants of local powers.[10]

Virginia's subdivision enabling statutes are detailed in Article 6, Chapter 22 of Title 15.2, §§ 15.2-2240 through 15.2-2279. Section 15.2-2240 requires that counties, cities, and towns adopt a subdivision ordinance "to assure the orderly subdivision of land and its development." Section 15.2-2258 requires that any person desiring to subdivide a tract of land must submit a plat of the proposed subdivision to the local subdivision agent for approval. Sections 15.2-2259, 15.2-2260, and 15.2-2261 govern the actions of the local planning commission and the locality regarding such plats and the approval and validity thereof. Section 15.2-2260(A) also authorizes a local governing body to enact an ordinance providing for submission of preliminary subdivision plats for tentative approval as a part of the orderly subdivision of land within its jurisdiction.[11] Finally, §§ 15.2-2259 and 15.2-2260 impose time constraints for the approval of subdivision plats.

Article 6 is replete with express grants of powers to local governing bodies and their authorized agents to administer and enforce subdivision regulations as they relate to survey plats.[12] I find no express statutory authority elsewhere in Title 15.2 for a Virginia locality to require a review and approval of boundary survey plats and physical survey plats by local planning officials as a prerequisite for recordation.

The Dillon Rule of strict construction also is applicable to constitutional officers.[13] Article VII, § 4 of the Constitution of Virginia creates the office of circuit court clerk and provides that a clerk's duties "shall be prescribed by general law or special act."[14]

As a general rule, circuit court clerks have no inherent powers, and the scope of their powers must be determined by reference to applicable statutes.[15] A 1987 opinion of the Attorney General (the "1987 Opinion") concludes that, "[a]s a general rule, a clerk is not responsible for determining if an instrument to be recorded is sufficient to meet the requirements of any particular provision of law."[16] Further, the 1987 Opinion concludes

> that a clerk may record a plat of division without the approval of the subdivision agent of the locality upon the oral assertion of the person presenting the plat for recordation on behalf of the owner that the subdivision ordinance does not apply to the plat of division offered for recordation. I would suggest, however, that the clerk make a notation on the plat of division concerning the oral assertion that the ordinance does not apply to the division of the parcel in question.[17]

I find no statutory provision authorizing a circuit court clerk to refuse to record boundary survey plats and physical survey plats until after the review and approval of such plats by local planning officials. Pursuant to the authority granted in Article 6, a circuit court clerk may refuse to record boundary survey plats and physical survey plats that are: (1) subdivision surveys, where an existing parcel is being subdivided into two or more parcels; (2) boundary or property line adjustment surveys, where the boundary line between parcels is changed from the original survey or deed description, but no new parcels are created; or (3) a survey, by any other name, which changes a property line or creates new parcels or lots.[18] However, the boundary survey plats and physical survey plats about which you inquire do not meet these criteria.[19]

CONCLUSION

Accordingly, it is my opinion that localities are not authorized to require the review and approval of boundary survey plats and physical survey plats as a prerequisite for recordation. It further is my opinion that circuit court clerks may not refuse to record such plats based solely on the lack of such review and approval from the local planning official.

[1]You advise that the boundary and physical surveys about which you inquire are surveys that do not change or alter property lines or create new parcels of land. Further, you explain that a boundary survey is a survey or a retracement of the metes and bounds of an existing parcel of land based on a prior survey or deed description of the property. A physical survey is a survey of a lot or parcel which also shows the location of all structures, physical and recorded encumbrances, and manmade physical features located within the property's existing boundaries. For purposes of this opinion, any reference to "boundary survey plats" and "physical survey plats" means the surveys you describe and about which you inquire unless otherwise noted.

[2]*See* Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983); Vollin v. Arlington Co. Electoral Bd., 216 Va. 674, 678-79, 222 S.E.2d 793, 797 (1976).

[3]2003 Op. Va. Att'y Gen. 45, 46.

[4]Nat'l Realty Corp. v. Va. Beach, 209 Va. 172, 175, 163 S.E.2d 154, 156 (1968).

[5]Bd. of Supvrs. v. Horne, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975).

[6]*Id.*

[7]Ticonderoga Farms, Inc. v. County of Loudoun, 242 Va. 170, 174, 409 S.E.2d 446, 448 (1991).

[8]*See* 1989 Op. Va. Att'y Gen. 100, 101.

[9]*See* Op. Va. Att'y Gen.: 1992 at 59, 61; 1990 at 94, 96.

[10]*See, e.g.*, *National Realty*, 209 Va. at 176-77, 163 S.E.2d at 157-58 (noting general authority to impose fees for licenses and permits did not authorize specific fee for review of subdivision plat).

[11]*See* 2006 Op. Va. Att'y Gen. 71, 74.

[12]*See, e.g.*, VA. CODE ANN. § 15.2-2245(A) (2008) (granting power to act on performance bonds); § 15.2-2254(2) (2008) (granting power to approve plats for recordation); § 15.2-2259 (2008) (granting power to planning commission to act on plats); §§ 15.2-2260, 15.2-2261(B)(1), 15.2-2271(1) (2008) (granting various powers to governing body regarding plats).

[13]*See, e.g.*, Op. Va. Att'y Gen.: 2006 at 200, 201; 1984-1985 at 284, 284.

[14]*See also* § 15.2-1600(A) (2008) (parallel statute).

[15]*See* Mendez v. Commonwealth, 220 Va. 97, 102, 255 S.E.2d 533, 535 (1979) (stating that "authority of a clerk of court to administer an oath or take an affidavit is purely a creature of statute"); Harvey v. Chesapeake & Potomac Tel. Co., 198 Va. 213, 218, 93 S.E.2d 309, 313 (1956) (noting that duties of clerk related to filing and lodging of court papers are ministerial); 21 C.J.S. *Courts* § 136 (2006); Op. Va. Att'y Gen.: 2001 at 121, 122; 1987-1988 at 80, 81.

[16]1987-1988 Op. Va. Att'y Gen. 208, 210.

[17]*Id.*

[18]*See, e.g.*, §§ 15.2-2254, 15.2-2258, 15.2-2265, and 15.2-2275 (2008).

[19]*See supra* note 1.

OP. NO. 09-027

COUNTIES, CITIES AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING – LOCAL PLANNING COMMISSIONS.

Withdrawal of Northampton County from Northampton County Joint Planning Commission requires towns of Eastville, Cheriton, and Nassawadox to create separate planning commissions.

DAVID W. ROWAN
NASSAWADOX TOWN ATTORNEY
JUNE 15, 2009

ISSUE PRESENTED

You ask whether the withdrawal of Northampton County from the Northampton County Joint Planning Commission requires the towns of Eastville, Cheriton, and Nassawadox to create separate planning commissions.

RESPONSE

It is my opinion that the withdrawal of Northampton County from the Northampton County Joint Planning Commission requires the towns of Eastville, Cheriton, and Nassawadox to create separate planning commissions.

BACKGROUND

You advise that on April 10, 1978, the Board of Supervisors of Northampton County and the Town Council of Exmore entered into an agreement ("Agreement") creating the Northampton County Joint Planning Commission ("Commission") under § 15.1-443, the predecessor statute to § 15.2-2219. The Agreement set forth the general duties and composition of the Commission, which contemplated the addition of other municipalities. Subsequently, the towns of Cheriton, Nassawadox, and Eastville were admitted to the Commission.

You further advise that Article V, Section 2 of the Agreement provides that:

> Any governmental subdivision may withdraw from the Commission by submitting to the Commission in writing, at least 30 days before the end of the Commission's then current fiscal year, a notice of intent to withdraw. Such withdrawal shall become effective upon the conclusion of the Commission's then current fiscal year.

You relate that the Northampton County Board of Supervisions, by letter dated April 16, 2009, to Cheriton, Eastville, and Nassawadox, announced the County's intention to withdraw from the Commission effective on June 30, 2009. You note that Exmore previously had withdrawn from the Commission. When the withdrawal of Northampton County becomes effective, the Commission will be comprised solely of representatives of Eastville, Cheriton, and Nassawadox.

Finally, you advise it is your legal conclusion[1] that the three remaining municipalities in the Commission, Nassawadox, Eastville, and Cheriton, are not adjoining or adjacent.[2] All three towns are located within Northampton County; however, Nassawadox is nearly ten miles from Eastville and more than fourteen miles from Cheriton. Further, you note that Cheriton and Eastville are nearly five miles apart.

APPLICABLE LAW AND DISCUSSION

"The power of a municipality, unlike that of the [General Assembly], must be exercised pursuant to an express grant"[3] because "municipal corporations have only those powers expressly granted, those necessarily or fairly implied therefrom, and those that are essential and indispensable."[4] "If the power cannot be found, the inquiry is at an end."[5] The Dillon Rule requires a narrow interpretation of all powers conferred on local governments since they are delegated powers.[6] Therefore, any doubt as to the existence of power must be resolved against the locality.[7]

Section 15.2-2210 requires every local governing body in the Commonwealth to create a local planning commission:

> Every locality shall by resolution or ordinance create a local planning commission in order to promote the orderly development of the locality and its environs. In accomplishing the objectives of § 15.2-2200 the local planning commissions shall serve primarily in an advisory capacity to the governing bodies.

> Any locality may participate in a planning district commission in accordance with Chapter 42 (§ 15.2-4200 et seq.) of this title or a joint local commission in accordance with § 15.2-2219.

Section 15.2-2210 provides that localities may participate in a joint local commission under § 15.2-2219, which provides that:

> Any one or more adjoining or adjacent counties or municipalities including any municipality within any such county may[8] by agreement provide for a joint local planning commission for any two or more of such counties and municipalities. The agreement shall provide for the number of members of the commission and how they shall be appointed, in what proportion the expenses of the commission shall be borne by the participating localities, and any other matters pertinent to the operation of the commission as the joint local planning commission for the localities. Any commission so created shall have, as to each participating locality, the powers and duties granted to and imposed upon local planning commissions under [Chapter 22].

The General Assembly does not define the terms "adjoining" or "adjacent" in § 15.2-2219. Generally, when a term is not defined by the General Assembly, it must be given its ordinary meaning.[9] The term "adjoining" generally means "[t]ouching; sharing a common boundary; CONTIGUOUS."[10] "Adjacent" generally means "[l]ying near or close to, but not necessarily touching."[11]

As previously noted, you advise that the three remaining municipalities in the Commission, Eastville, Cheriton, and Nassawadox, are not adjoining or adjacent.[12] It is well-settled that "[i]f the language of a statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it."[13] It is unnecessary to resort to any rules of statutory construction when the language of a statute is unambiguous.[14]

The application of the Dillon Rule in the Commonwealth requires a narrow interpretation of all powers conferred on local governments because any such powers are delegated powers.[15] Thus, the withdrawal of Northampton County effectively abolishes the Commission because the remaining municipalities are not adjacent as that term is narrowly interpreted.

CONCLUSION

Accordingly, it is my opinion that the withdrawal of Northampton County from the Northampton County Joint Planning Commission requires the towns of Eastville, Cheriton, and Nassawadox to create separate planning commissions.

[1] Any request by a town 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." VA. CODE ANN. § 2.2-505(B) (2008).

[2]*See infra* note 12.

[3]Nat'l Realty Corp. v. Va. Beach, 209 Va. 172, 175, 163 S.E.2d 154, 156 (1968).

[4]Bd. of Supvrs. v. Horne, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975) (noting Dillon Rule).

[5]Commonwealth v. County Bd., 217 Va. 558, 575, 232 S.E.2d 30, 41 (1977).

[6]*See* Bd. of Supvrs. v. Countryside Invest. Co., 258 Va. 497, 504-05, 522 S.E.2d 610, 613-14 (1999) (holding that county board of supervisors does not have unfettered authority to decide what matters to include in subdivision ordinance; must include requirements mandated by Land Subdivision and Development Act, but may include optional provisions contained in act); Op. Va. Att'y Gen.: 2002 at 77, 78; 1974-1975 at 403, 405.

[7]2A Eugene McQuillen, The Law of Municipal Corporations § 10.19, at 369 (3d ed. 1996); *see also* Op. Va. Att'y Gen.: 2002 at 83, 84; 2000 at 75, 76.

[8]"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' should be given its ordinary meaning–permission, importing discretion." Masters v. Hart, 189 Va. 969, 979, 55 S.E.2d 205, 210 (1949), *quoted in* Bd. of Supvrs. v. Weems, 194 Va. 10, 15, 72 S.E.2d 378, 381 (1952); *see also* Op. Va. Att'y Gen.: 2000 at 29, 32 n.2; 1999 at 193, 195 n.6; 1997 at 10, 12 (noting that use of "may" in statute indicates statute is permissive and discretionary, rather than mandatory).

[9]*See* McKeon v. Commonwealth, 211 Va. 24, 27, 175 S.E.2d 282, 284 (1970).

[10]Black's Law Dictionary 44 (8th ed. 2004).

[11]*Id.*

[12]This opinion does not provide an analysis or conclusion regarding the definition of adjacent for purposes of § 15.2-2219. Instead, I rely upon the conclusion that you state in your request dated May 4, 2009. Generally, adjoining or contiguous means touching, and adjacent means an object intervenes. *See* 1966-1967 Op. Va. Att'y Gen. 90, 90. The size and nature of the object may render the question of whether the localities are adjacent for purposes of § 15.2-2219 a question of fact. Attorneys General historically have declined to render official opinions when the request involves a question of fact rather than one of law. *See, e.g.*, Op. Va. Att'y Gen.: 2007 at 116, 118; 1997 at 195, 196; 1996 at 207, 208.

[13]Temple v. Petersburg, 182 Va. 418, 423, 29 S.E.2d 357, 358 (1944).

[14]Commonwealth v. Sanderson, 170 Va. 33, 38-39, 195 S.E. 516, 519 (1938).

[15]*See supra* note 6 and accompanying text.

OP. NO. 08-112

COUNTIES, CITIES AND TOWNS: SERVICE DISTRICTS; TAXES AND ASSESSMENTS FOR LOCAL IMPROVEMENTS – SERVICE DISTRICTS.

Authority for Campbell County Board of Supervisors to create service district to provide, among other services, library and recreational related services.

THE HONORABLE ROBERT HURT
MEMBER, SENATE OF VIRGINIA

THE HONORABLE KATHY J. BYRON
MEMBER, HOUSE OF DELEGATES
JANUARY 6, 2009

ISSUE PRESENTED

You ask whether § 15.2-2403(1) authorizes the Campbell County Board of Supervisors to create a service district to provide, among other services, library and recreational related services.

RESPONSE

It is my opinion that § 15.2-2403(1) authorizes the Campbell County Board of Supervisors to create a service district to provide, among other services, library and recreational related services.

BACKGROUND

You advise that the Timberlake Community Complex, a project of the Campbell County Library Foundation, is a facility that will provide multiple services to the community. You advise further that the Complex will offer a library, public computers, indoor facilities for county recreation programs, a gymnasium and stage, meeting places for county programs, ball fields and other recreational facilities. You relate that Campbell County has donated the land and is planning to create a service district to assist in the cost of construction and operation of the facility.

You note that § 15.2-2403(1) grants powers to service districts to construct, maintain, and operate such facilities and equipment as may be necessary or desirable to provide additional, more complete, or more timely governmental services within a service district. You observe that there are numerous services described including, but not limited to, items such as "sponsorship and promotion of recreational and cultural activities."

APPLICABLE LAW AND DISCUSSION

Section 15.2-2403 provides that:

> After adoption of an ordinance or ordinances or the entry of an order creating a service district, the governing body or bodies shall have the following powers with respect to the service districts:
>
> 1. To construct, maintain, and operate such facilities … as may be necessary or desirable to provide additional, more complete, or more timely governmental services within a service district, including, but not limited to … sponsorship and promotion of recreational and cultural activities; … and other services, events, or activities that will enhance the public use and enjoyment of … and public well-being within a service district.

"The province of [statutory] construction lies wholly within the domain of ambiguity, and that which is plain needs no interpretation."[1] But when statutory language is clear and unambiguous, the plain meaning and intent of the enactment will be given to it.[2] The language used in § 15.2-2403(1) is clear and unambiguous where the General Assembly authorizes service districts to construct facilities to provide more complete governmental services. Such governmental services include "sponsorship and promotion of recreational activities."

Section 42.1-33 provides that the governing body of any county shall have the power to establish a free public library. Under § 42.1-33, the term "support,"

includes, but is not limited to, "purchase of land for library buildings, purchase or erection of buildings for library purposes, purchase of library books, materials and equipment, compensation of library personnel, and all maintenance expenses for library property and equipment." Therefore, the establishment of a free public library is a governmental service specifically authorized by the General Assembly. Furthermore, a 1982 opinion of the Attorney General concludes that the meaning of the term "recreational facility" must be determined from the context of the statute within which it is used, and accepts the broad definition of such a facility as one "for amusement" or "for entertainment."[3]

CONCLUSION

Accordingly, it is my opinion that § 15.2-2403(1) authorizes the Campbell County Board of Supervisors to create a service district to provide, among other services, library and recreational related services.

[1]Winston v. City of Richmond, 196 Va. 403, 408, 83 S.E.2d 728, 731 (1954).

[2]Brown v. Lukhard, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985).

[3]*See* 1982-1983 Op. Va. Att'y Gen. 205, 205.

OP. NO. 09-046

COUNTIES, CITIES AND TOWNS: TRANSITION OF COUNTIES TO CITIES.

Should Fairfax County become city pursuant to Chapter 39 of Title 15.2, there would be no effect on existing charters and impact on legal powers of or limitations on City of Fairfax and Town of Vienna. Town and township, as used in § 15.2-3916, virtually are same. General Assembly would have to approve charter for new city, including its name.

THE HONORABLE J. CHAPMAN PETERSEN
MEMBER, SENATE OF VIRGINIA
AUGUST 24, 2009

ISSUES PRESENTED

You inquire regarding what effect Fairfax County becoming a city would have on the existing charter for the City of Fairfax (the "City") and the Town of Vienna (the "Town"). You also ask whether there is any difference between a town and a township as those terms are used in § 15.2-3916, and whether Fairfax County becoming a city would have any impact on the legal powers or limitations of the City and the Town. Finally, you ask whether Fairfax County is prevented from using the name City of Fairfax should it become a city.

RESPONSE

It is my opinion that should Fairfax County become a city pursuant to Chapter 39 of Title 15.2, there would be no effect on the existing charters of the City of Fairfax and the Town of Vienna. It further is my opinion that a town and a township, as those terms are used in § 15.2-3916, essentially are the same. Further, should Fairfax County become a city, it is my opinion that there will be no impact on the legal

powers of or limitations on the City and the Town. Finally, it is my opinion that the General Assembly would have to approve the charter for the new city, which would include its name.

APPLICABLE LAW AND DISCUSSION

Chapter 39 of Title 15.2, §§ 15.2-3900 through 15.2-3919, governs the process for the transition of counties to cities. Section 15.2-3915 provides that:

> A county may become an independent city in accordance with the foregoing provisions of [Chapter 39] without the necessity of any action being taken by the council of any town situated in such county and without the necessity of separate referenda in any such town on the question of the transition of the county to a city.

Furthermore, § 15.2-3916(A) provides:

> Each town located within any county which becomes a city pursuant to the provisions of [Chapter 39] shall automatically continue as a township within the city, and the charter of each such town shall become the charter of the township with the law governing the relationship of the town to the county continuing in effect. Such townships established pursuant to this subsection shall continue to exercise such powers and elect such officers as the township charter may authorize and such other powers as the former town previously exercised under general law.

Finally, § 15.2-3917 provides Chapter 39 "shall in no way affect the organization, government, officers, charter or laws governing any city declared to be such prior to July 1, 1978."

The 1892 Session of the General Assembly originally incorporated the City of Fairfax as a town.[1] By order of the Circuit Court of Fairfax County, dated June 30, 1961,[2] the Town of Fairfax was made a city of the second class, and the 1962 Session of the General Assembly enacted a new charter for the City of Fairfax.[3] Therefore, the City was "declared to be such prior to July 1, 1978."

Statutory language is ambiguous when it may be understood in more than one way.[4] An ambiguity also exists when statutory language lacks clarity and precision, or is difficult to comprehend.[5] "The province of [statutory] construction lies wholly within the domain of ambiguity, and that which is plain needs no interpretation."[6] However, when statutory language is clear and unambiguous, the plain meaning and intent of the enactment will be given to it.[7] It is my opinion that §§ 15.2-3915, 15.2-3916 and 15.2-3917 are free of any ambiguities. Therefore, the existing charters for the City and the Town would not be affected should Fairfax County become a city under Chapter 39.

In § 15.2-102, the General Assembly defines the term "town" for purposes of Title 15.2 to mean

> any existing town or an incorporated community within one or more counties which became a town before noon, July one, nineteen hundred seventy-one, as provided by law or which has within defined boundaries a population of 1,000 or more and which has become a town as provided by law.

Because § 15.2-3916 is a part of Title 15.2, the definition of "town" in § 15.2-102 is applicable. However, the General Assembly has not defined the term "township" as it is used in § 15.2-3916. The only difference between the use of the term "town" and the term "township" is set forth by the General Assembly in § 15.2-3916(A). When a county becomes a city under the provisions of Chapter 39 of Title 15.2, each town located within that county automatically becomes a township based on its geographical location within the county. In addition, § 15.2-3916(A) provides that the charter of the town becomes the charter of the township, "with the law governing the relationship of the town to the county continuing in effect." Furthermore, the townships formed as a result of a county becoming a city "shall continue to exercise such powers and elect such officers as the township charter may authorize and such other powers as the former town previously exercised under general law." In the context of this statute, there is no substantive legal distinction between a town and a township.

Finally, the General Assembly previously enacted a charter for the City when the Town of Fairfax was made a city of the second class by order of the Circuit Court of Fairfax County.[8] In considering the request of Fairfax County, pursuant to approval of its proposed charter as a city,[9] to use the name of the "City of Fairfax," the General Assembly must consider the fact that the name already exists and is used by the City. Accordingly, the General Assembly may permit the County to use the name "City of Fairfax" by approving the proposed charter upon certification by the special court. To prevent the confusion that would occur should two localities bear the name of the City of Fairfax, the General Assembly would need to pass special legislation to amend the existing charter of the City to change its name accordingly.

CONCLUSION

Accordingly, it is my opinion that should Fairfax County become a city pursuant to Chapter 39 of Title 15.2, there would be no effect on the existing charters of the City of Fairfax and the Town of Vienna. It further is my opinion that a town and a township, as those terms are used in § 15.2-3916, essentially are the same. Further, should Fairfax County become a city, it is my opinion that there will be no impact on the legal powers of or limitations on the City and the Town. Finally, it is my opinion that the General Assembly would have to approve the charter for the new city, which would include its name.

[1]*See* 1891-1892 Va. Acts ch. 282, at 464, 464-68.

[2]*See* 1962 Va. Acts ch. 360, at 770, 770 (noting order of circuit court in enacting clause).

[3]*Id.* at 770-83.

[4]Supinger v. Stakes, 255 Va. 198, 205, 495 S.E.2d 813, 817 (1998); Va.-Am. Water Co. v. Prince William County Serv. Auth., 246 Va. 509, 514, 436 S.E.2d 618, 621 (1993); Va. Dep't of Labor & Indus. v. Westmoreland Coal Co., 233 Va. 97, 101, 353 S.E.2d 758, 762 (1987).

[5]*Supinger*, 255 Va. at 205, 495 S.E.2d at 817; Lee-Warren v. Sch. Bd., 241 Va. 442, 445, 403 S.E.2d 691, 692 (1991).

[6]Winston v. City of Richmond, 196 Va. 403, 408, 83 S.E.2d 728, 731 (1954).

[7]Brown v. Lukhard, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985).

[8]*See supra* notes 2-3 and accompanying text.

[9]Section 15.2-3914 requires that the proposed charter for a county that desires to become a city which is adopted by a majority voting at the required election, must be submitted by the special court "in the form of a proposed bill to grant the charter" and "shall be certified to one or more members of the General Assembly representing the county for introduction as a bill in the General Assembly."

OP. NO. 09-048

COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS – IMMEDIATE CUSTODY, ARREST, DETENTION AND SHELTER CARE.

Absent judicial or statutory definition, 'offensive conduct' includes acts of harassing, stalking, threatening, or placing person in reasonable fear of bodily injury.

COLONEL W.S. (STEVE) FLAHERTY
SUPERINTENDENT, DEPARTMENT OF STATE POLICE
AUGUST 27, 2009

ISSUE PRESENTED

You ask whether "offensive conduct" includes the acts of harassing, stalking, threatening, or placing a person in reasonable fear of bodily injury.

RESPONSE

It is my opinion that "offensive conduct" includes the acts of harassing, stalking, threatening, or placing a person in reasonable fear of bodily injury.

APPLICABLE LAW AND DISCUSSION

The Department of State Police maintains a computerized Protective Order Registry which may be shared with law enforcement agencies through the Virginia Criminal Information Network ("VCIN").[1] VCIN includes a "Brady Indicator Field" for subjects who are prohibited from "harassing, stalking, or threatening an intimate partner of such person or child of such intimate partner or person, or engaging in other conduct that would place an intimate partner in reasonable fear of bodily injury to the partner or child" by way of a judicial protective order.[2]

Section 16.1-253(A)(1) authorizes juvenile and domestic relations district courts to issue child protective orders that require persons "[t]o abstain from offensive conduct against the child, a family or household member of the child or any person

to whom custody of the child is awarded."[3] The General Assembly has not defined "offensive conduct," nor has a Virginia court interpreted its meaning. Thus, the plain and ordinary meaning of the statutory term must be considered.[4] "Offensive" means "[u]npleasant or disagreeable to the senses; obnoxious" or "[c]ausing displeasure … repugnant to the prevailing sense of what is decent or moral."[5] "Conduct" may be defined as "[p]ersonal behavior, whether by action or inaction; the manner in which a person behaves."[6] These are broad terms that encompass a wide variety of behavior. It is my opinion that harassing, stalking, threatening, or engaging in other conduct that would place a person or child in reasonable fear of bodily injury would constitute "offensive conduct."

CONCLUSION

Accordingly, it is my opinion that absent a judicial or statutory definition, "offensive conduct" includes the acts of harassing, stalking, threatening, or placing a person in reasonable fear of bodily injury.

[1] *See* Va. Code Ann. § 19.2-387.1(A) (2008); *see also* Va. Code Ann. § 52-45 (2005) (requiring Superintendent to establish and maintain Registry regarding outstanding, valid protective orders).

[2] 18 U.S.C.S. § 922(g)(8)(B) (LexisNexis 2005).

[3] Va. Code Ann. § 16.1-253(A)(1) (Supp. 2009).

[4] Winborne v. Va. Lottery, 278 Va. 142, 148, 677 S.E.2d 304, 306 (2009).

[5] Black's Law Dictionary 1188 (9th ed. 2009).

[6] *Id.* at 336; *see also id.* at 337 (defining "wrongful conduct" as "an act that unjustly infringes on another's rights"; defining "disorderly conduct" as "[b]ehavior that tends to disturb the public peace, offend public morals, or undermine public safety").

OP. NO. 09-045

COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS – TRANSFER AND WAIVER.

Juvenile court order pursuant to § 16.1-269.1(A) immediately divests juvenile court of jurisdiction and such juvenile may be moved from the juvenile detention facility to local correctional facility any time after entry of such order by juvenile court, unless execution of order is suspended pending appeal.

THE HONORABLE V. THOMAS FOREHAND JR.
CHIEF JUDGE, FIRST JUDICIAL CIRCUIT OF VIRGINIA
SEPTEMBER 1, 2009

ISSUES PRESENTED

In a recent opinion to you dated June 26, 2009 ("2009 Opinion"), I concluded that a circuit court is not required to enter an enabling order where the transfer decision of a juvenile and domestic relations district court ("juvenile court") pursuant to § 16.1-269.1(A) has not been appealed.[1] In light of the 2009 Opinion, you ask at what point the juvenile court is divested of jurisdiction in a case that is transferred to circuit court pursuant to § 16.1-269.1(A) when the transfer decision is not appealed. Further, you inquire at what point such juvenile may be moved from a juvenile detention facility to a local correctional facility.

RESPONSE

It is my opinion that a juvenile court order pursuant to § 16.1-269.1(A) immediately divests the juvenile court of jurisdiction and such juvenile may be moved from the juvenile detention facility to a local correctional facility at any time after entry of such order by the juvenile court, unless execution of the order is suspended pending an appeal.

APPLICABLE LAW AND DISCUSSION

Section 16.1-269.1(A) provides, in part, that:

> if a juvenile fourteen years of age or older at the time of an alleged offense is charged with an offense which would be a felony if committed by an adult, the court shall, on motion of the attorney for the Commonwealth and prior to a hearing on the merits, hold a transfer hearing and *may retain jurisdiction or transfer* such juvenile for proper criminal proceedings to the appropriate circuit court having criminal jurisdiction of such offenses if committed by an adult. [Emphasis added.]

Thus, it appears that under § 16.1-269.1(A), the court has the discretion to retain jurisdiction or transfer the juvenile to circuit court. I note that § 16.1-241(A) provides, in part, that:

> In any case in which the juvenile is alleged to have committed a violent juvenile felony enumerated in subsection B of § 16.1-269.1, and for any charges ancillary thereto, the jurisdiction of the juvenile court shall be limited to conducting a preliminary hearing to determine if there is probable cause to believe that the juvenile committed the act alleged and that the juvenile was 14 years of age or older at the time of the commission of the alleged offense, and any matters related thereto. In any case in which the juvenile is alleged to have committed a violent juvenile felony enumerated in subsection C of § 16.1-269.1, and for all charges ancillary thereto, if the attorney for the Commonwealth has given notice as provided in subsection C of § 16.1-269.1, the jurisdiction of the juvenile court shall be limited to conducting a preliminary hearing to determine if there is probable cause to believe that the juvenile committed the act alleged and that the juvenile was 14 years of age or older at the time of the commission of the alleged offense, and any matters related thereto. A determination by the juvenile court following a preliminary hearing pursuant to subsection B or C of § 16.1-269.1 to certify a charge to the grand jury shall divest the juvenile court of jurisdiction over the charge and any ancillary charge. In any case in which a transfer hearing is held pursuant to subsection A of § 16.1-269.1, if the juvenile court determines to transfer the case, jurisdiction of the juvenile court over the case shall be divested as provided in § 16.1-269.6.

Further, you note that § 16.1-269.1(D) mirrors § 16.1-241(A) by providing, in pertinent part, that:

> Upon a finding of probable cause pursuant to a preliminary hearing under subsection B or C, the juvenile court shall certify the charge, and all ancillary charges, to the grand jury. Such certification shall divest the juvenile court of jurisdiction as to the charge and any ancillary charges. Nothing in this subsection shall divest the juvenile court of jurisdiction over any matters unrelated to such charge and ancillary charges which may otherwise be properly within the jurisdiction of the juvenile court.

As discussed in the 2009 Opinion, § 16.1-269.6(B) applies only to cases coming before the circuit court on appeal from the juvenile court's transfer order.[2] However, §§ 16.1-241(A) and 16.1-269.1(D) are silent regarding the point at which the juvenile court is divested of jurisdiction of a case transferred pursuant to § 16.1-269.1(A) which is not appealed by either party.

Juvenile court orders that are appealed to the circuit court are not suspended pending an appeal except in circumstances which are not relevant to your question.[3] Therefore, even when the transfer decision under § 16.1-269.1(A) is appealed, the transfer order remains in effect until it is affirmed or reversed by the circuit court. Once the juvenile court enters an order transferring the case to the circuit court for trial as an adult, there is nothing more for the juvenile court to do in the matter.[4]

You further ask at what point a juvenile, who is transferred to circuit court for trial as an adult under § 16.1-269.1(A) and who does not appeal the transfer order, may be moved from the juvenile detention home to a local correctional facility. Section 16.1-249(D) provides, in part, that:

> When a case is transferred to the circuit court in accordance with the provisions of subsection A of § 16.1-269.1 and an order is entered by the circuit court in accordance with § 16.1-269.6, or in accordance with the provisions of § 16.1-270 where the juvenile has waived the jurisdiction of the district court, or when the district court has certified a charge to the grand jury pursuant to subsection B or C of § 16.1-269.1, the juvenile, if in confinement, may be transferred to a jail or other facility for the detention of adults and need no longer be entirely separate and removed from adults.

Further, § 16.1-269.6(B) provides, in part, that:

> Upon advising the attorney for the Commonwealth that he may seek an indictment, the circuit court may issue an order transferring the juvenile from the juvenile detention facility to an appropriate local

> correctional facility where the juvenile need no longer be entirely separate and removed from adults, unless, upon motion of counsel, good cause is shown for placement of the juvenile pursuant to the limitations of subdivision E (i), (ii), and (iii) of § 16.1-249.

Although neither § 16.1-249(D) nor § 16.1-269(B) specifically apply to a transfer decision under § 16.1-269.1(A) that is not appealed, the analysis regarding divestiture of juvenile court jurisdiction as discussed herein applies to this question. Once the juvenile court enters an order transferring the case to circuit court, the order effectively draws the dividing line between treatment of the defendant as a juvenile and his treatment as an adult. Therefore, a juvenile may be moved from a detention facility to a local correctional facility at any time after entry of the transfer order by the juvenile court.[5]

CONCLUSION

Accordingly, it is my opinion that a juvenile court order pursuant to § 16.1-269.1(A) immediately divests the juvenile court of jurisdiction and such juvenile may be moved from the juvenile detention facility to a local correctional facility at any time after entry of such order by the juvenile court, unless execution of the order is suspended pending an appeal.

[1] *See* 2009 Op. Va. Att'y Gen No. 53.

[2] *Id.* at 55.

[3] *See* VA. CODE ANN. § 16.1-298(A) (Supp. 2009) (providing that "a petition for or the pendency of an appeal or writ of error shall not suspend any judgment, order or decree of the juvenile court nor operate to discharge any child concerned or involved in the case from the custody of the court or other person, institution or agency to which the child has been committed unless so ordered by the judge of the juvenile court, the judge of a circuit court or directed in a writ of supersedeas by the Court of Appeals or the Supreme Court or a judge or justice thereof"); *see also* Martin v. Bales, 7 Va. App. 141, 145, 371 S.E.2d 823, 825 (1988) (holding that § 16.1-298 "provides that an appeal shall not suspend any order of the juvenile court unless ordered by the judge of the juvenile court or circuit court, or directed by an appellate court …. It is obvious that the legislature intended continuity of such orders pending appeal.").

[4] Since a transfer under § 16.1-269.1(B) or (C) divests the juvenile court of jurisdiction, it appears that a transfer under § 16.1-269.1(A) likewise would divest the juvenile court of jurisdiction.

[5] Placement in a local correctional facility for adults is discretionary, and the court may keep the juvenile in the detention facility for juveniles. *See* §§ 16.1-249(D), 16.1-269.6(B) (Supp. 2009).

OP. NO. 09-031

COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS COURTS – TRANSFER AND WAIVER.

COURTS OF RECORD: CIRCUIT COURTS.

Circuit court is not required to enter enabling order where transfer decision of juvenile court has not been appealed. Commonwealth's attorney may seek indictment after period for appeal has expired, provided no appeal was noted.

THE HONORABLE V. THOMAS FOREHAND JR.
CHIEF JUDGE, FIRST JUDICIAL CIRCUIT OF VIRGINIA
JUNE 26, 2009

ISSUE PRESENTED

When a juvenile is transferred to circuit court by a Juvenile and Domestic Relations District Court ("juvenile court") pursuant to § 16.1-269.1(A) and the decision is not appealed, you inquire whether the circuit court must enter an enabling order pursuant to § 16.1-269.6(B)(ii). If so, you ask concerning the jurisdictional consequence of an indictment absent an enabling order.

RESPONSE

It is my opinion that a circuit court is not required to enter an enabling order where the transfer decision of the juvenile court has not been appealed. It further is my opinion that a Commonwealth's attorney may seek an indictment after the period for an appeal has expired, provided no appeal has been noted.

APPLICABLE LAW AND DISCUSSION

Section 16.1-269.6(B) provides, in part, that:

> The circuit court, when practicable, shall, within 45 days after receipt of the case from the juvenile court pursuant to subsection A of § 16.1-269.1, (i) if either the juvenile or the attorney for the Commonwealth has appealed the transfer decision, examine all such papers, reports and orders and conduct a hearing to take further evidence on the issue of transfer, to determine if there has been substantial compliance with subsection A of § 16.1-269.1, but without redetermining whether the juvenile court had sufficient evidence to find probable cause; and (ii) enter an order either remanding the case to the juvenile court or advising the attorney for the Commonwealth that he may seek an indictment.

In interpreting a statute, the principle objective is to give effect to the legislative intent.[1] Where a statute is not ambiguous, the rules of statutory construction are not necessary, and the statute is given effect in accordance with its plain meaning.[2] "'The manifest intention of the legislature, clearly disclosed by its language, must be applied.'"[3]

When the General Assembly amends a statutory provision, a presumption arises that the legislature intended to change existing law.[4] A related presumption is that the amendment to a law is intended to have some meaning and is not intended to be unnecessary or vain.[5]

The 1996 Session of the General Assembly amended § 16.1-269.6(B) (the "1996 Amendment").[6] Prior to the 1996 Amendment, § 16.1-296.6(B) provided that:

> The circuit court shall, within a reasonable time after receipt of the case from the juvenile court, (i) examine all such papers, reports and orders; (ii) if either the juvenile or the attorney for the Commonwealth has appealed the transfer decision, conduct a hearing to take further evidence on the issue of transfer, to determine if there has been substantial compliance with § 16.1-269.1, but without redetermining whether the juvenile court had sufficient evidence to find probable cause; and (iii) and enter an order either remanding the case to the juvenile court or advising the attorney for the Commonwealth that he may seek an indictment.[7]

The Supreme Court of Virginia has interpreted the prior version of § 16.1-269.6(B) to require that a circuit court examine the papers, hold a hearing if an appeal of the transfer decision was noted, and enter an order either remanding the case or directing the attorney for the Commonwealth to seek an indictment.[8] The Court found that entry of an enabling order was necessary before indictment because the statute required an examination of the papers in every case, whether the transfer decision had been appealed or not.[9] However, the Court noted that the 1996 Amendment effected a substantive change: "[t]he statute presently in effect does not require the review if the transfer decision is not appealed."[10] Likewise, in interpreting § 16.1-269.6(B) in its current form, the Court of Appeals of Virginia noted that "[b]y its own terms, this provision only applies when either party appeals a *transfer* decision."[11]

Thus, prior to the 1996 Amendment, § 16.1-269.6(B) clearly provided that a circuit court must examine the papers in every case in which jurisdiction was transferred from the juvenile court.[12] Further, the court had to enter an order either remanding the case to the juvenile court or directing the Commonwealth's attorney to seek an indictment.[13] However, subsequent to the 1996 Amendment, a circuit court must examine the papers and enter the enabling order only when the transfer decision is appealed by one of the parties.[14]

Statutes should not be interpreted to produce absurd results or irrational consequences.[15] If an indictment could only be obtained after entry of an enabling order, and an enabling order could only be required after considering a transfer decision on appeal, the result would be that no indictment could be obtained or jurisdiction acquired by the circuit court unless the transfer decision was appealed. In my opinion, the General Assembly did not intend such a result.

CONCLUSION

Accordingly, it is my opinion that a circuit court is not required to enter an enabling order where the transfer decision of the juvenile court has not been appealed. It further is my opinion that a Commonwealth's attorney may seek an indictment after the period for an appeal has expired, provided no appeal has been noted.

[1]*See* 2009 Op. Va. Att'y Gen. 69, 70.

[2]*Id.*

[3]*See* Barr v. Town & Country Props., Inc., 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990) (quoting Anderson v. Commonwealth, 182 Va. 560, 566, 29 S.E.2d 838, 841 (1944)), *quoted in* 2009 Op. Va. Att'y Gen. 16, 17-18.

[4]*See* Wisniewski v. Johnson, 223 Va. 141, 144, 286 S.E.2d 223, 224-25 (1982); 2003 Op. Va. Att'y Gen. 52, 54.

[5]*See* 2003 Op. Va. Att'y Gen., *supra* note 4, at 54 (citing Cape Henry Towers, Inc. v. Nat'l Gypsum Co., 229 Va. 596, 600, 331 S.E.2d 476, 479 (1985)).

[6]*See* 1996 Va. Acts ch. 755, at 1315, 1338-39.

[7]*See* Va. Code Ann. § 16.1-296.6(B) (Supp. 1995).

[8]*See* Jackson v. Commonwealth, 255 Va. 625, 642, 499 S.E.2d 538, 549 (1998).

[9]*Id.*

[10]*Id.* at 642 n.4, 499 S.E.2d at 549 n.4 (citing 1996 Va. Acts ch. 755, at 1338).

[11]Lampkins v. Commonwealth, 44 Va. App. 709, 718, 607 S.E.2d 722, 727 (2005) (emphasis in original).

[12]*See supra* notes 7 and 9 and accompanying text.

[13]*Id.*

[14]*See* § 16.1-269.6(B) (Supp. 2008); *Jackson*, 255 Va. at 642 n.4, 499 S.E.2d at 549 n.4; *Lampkins*, 44 Va. App. at 718, 607 S.E.2d at 727.

[15]*See* McFadden v. McNorton, 193 Va. 455, 461, 69 S.E.2d 445, 449 (1952); 2005 Op. Va. Att'y Gen. 121, 124 n.5.

OP. NO. 09-055

COURTS OF RECORD: CLERKS, CLERKS' OFFICES AND RECORDS – FEES.

No authority for locality or circuit court judge to direct how circuit court clerk uses Technology Trust Fund monies allocated to his office.

THE HONORABLE JOHN T. FREY
FAIRFAX COUNTY CIRCUIT COURT CLERK
OCTOBER 8, 2009

ISSUE PRESENTED

You ask whether a locality or a circuit court judge is authorized to direct the manner in which a clerk of the circuit court ("circuit court clerk" or "clerk") uses the Technology Trust Fund monies collected pursuant to § 17.1-279.

RESPONSE

It is my opinion that a locality or a circuit court judge does not have the statutory authority to direct how a circuit court clerk uses the Technology Trust Fund monies allocated to such clerk's office pursuant to § 17.1-279.

BACKGROUND

You state that § 17.1-279(A) requires each circuit court clerk to assess a fee for the "Technology Trust Fund Fee." You observe that the statute sets out allowable uses for which the clerk may use the monies collected by the fee. You also note that while

§ 17.1-279 provides that the Compensation Board, circuit court clerks, and other users of court records are to develop and update policies governing the allocation of such funds, it appears that exclusive control over the allocation of these funds, subject to the allowable uses and policies developed, is granted to the clerk.

APPLICABLE LAW AND DISCUSSION

Article VII, § 4 of the Constitution of Virginia establishes the office of clerk of the court and provides that the clerk's duties are "prescribed by general law or special act."[1] Among the duties the General Assembly assigns to the clerks' offices to perform are keeping records of the proceedings in circuit court,[2] providing access to such records,[3] and maintaining and purging the records.[4] The comprehensive list of statutory duties placed upon circuit court clerks by the General Assembly demonstrates that when the General Assembly intends to require a clerk to perform a task, it knows how to express its intention.[5] In addition, the Dillon Rule of strict construction is applicable to constitutional officers.[6]

Numerous prior opinions of the Attorney General conclude that local governing bodies have no authority to supervise or intervene in the management and control of a constitutional officer's duties.[7] These opinions support the long-standing rule that constitutional officers are independent of their respective localities' management and control.[8] This independence is derived from the constitutional status of the office and the popular election of the individual filling the office. Finally, considerable deference is given to the decisions made by constitutional officers, such as circuit court clerks, unless such decisions are contrary to law.[9]

Section 17.1-279(A) establishes a trust fund ("Trust Fund") for the Technology Trust Fund Fee, which is administered by the Compensation Board[10] and funded by a five dollar fee to be assessed by each circuit court. The fee is assessed "upon each instrument to be recorded in the deed books, and upon each judgment to be docketed in judgment lien docket book."[11]

Section 17.1-279(B) enumerates the permissible uses of allocations from the Trust Fund:

> Four dollars of every $5 fee shall be allocated by the Compensation Board from the trust fund for the purposes of: (i) developing and updating individual *land records* automation plans for *individual* circuit court clerks' offices; (ii) implementing automation plans to modernize *land records* in *individual* circuit court clerks' offices and provide secure remote access to land records throughout the Commonwealth pursuant to § 17.1-294; (iii) obtaining and updating office automation and information technology equipment including software and conversion services; (iv) preserving, maintaining and enhancing court records…; and (v) improving public access to court record. The Compensation Board in consultation with

> circuit court clerks and other users of court records shall develop and update policies governing the allocation of funds for these purposes. [Emphasis added.]

The allocation uses enumerated in § 17.1-279(B) may be categorized by their purposes. In "i" and "ii," the purposes relate to improvements and automation of land records. Moreover, allocations for these two purposes are intended to be used for land records for "individual circuit court clerks' offices"[12] or to "provide secure remote access to land records throughout the Commonwealth."[13] Therefore, for any other type of request, one of the other enumerated purposes must justify the allocation of funds. The purposes in "iii," "iv," and "v," respectively, allow for statewide allocations for "obtaining and updating office automation and information technology equipment," "preserving, maintaining and enhancing court records," and "improving public access to court records." Notably absent is language authorizing allocations for these three purposes to be made to individual circuit court clerks' offices. Section 17.1-279(F) offers an exception to the limitation and provides, in pertinent part, that:

> If a circuit court clerk provides secure remote access to land records on or before July 1, 2008, then *that clerk* may apply to the Compensation Board for an allocation from the Technology Trust Fund for automation and technology improvements in *his* office that are not related to land records.[14] [Emphasis added.]

Therefore, § 17.1-279(F) authorizes an individual clerk to apply for such an allocation from the Trust Fund only when "secure remote access to [his] land records" was established on or before July 1, 2008. The requirement for actual secure remote access in § 17.1-279(F) is different from the certification that secure remote access will be provided in § 17.1-279(B). The certification requirement in subsection B relates only to an application from a clerk for "proposed technology improvements of his land records." Therefore, a circuit court clerk would not have the authority to apply to the Compensation Board for an allocation of funds from the Technology Trust Fund to improve "automation or technology in his office that are not related to land records" unless his office provided secure remote access to its land records on or before July 1, 2008.

Absent any ambiguity, the plain meaning of a statute must prevail.[15] The General Assembly plainly requires the Compensation Board, in consultation with circuit court clerks and other users of court records, to develop and update policies governing the allocation of funds for the purposes set forth in § 17.1-279(B). It is my opinion that § 17.1-279(B) is free of ambiguity.

CONCLUSION

Accordingly, it is my opinion that a locality or a circuit court judge does not have the statutory authority to direct how a circuit court clerk uses the Technology Trust Fund monies allocated to such clerk's office pursuant to § 17.1-279.

[1]The General Assembly has established the duties of clerks of the court. *See* VA. CODE ANN. tit. 17.1, ch. 2, §§ 17.1-200 to 17.1-295 (2003 & Supp. 2009). The General Assembly also has established provisions governing courts of record, which include certain duties for circuit court clerks. *See generally* tit. 17.1, ch. 1, §§ 17.1-100 to 17.1-132 (2003 & Supp. 2009); ch. 5, §§ 17.1-500 to 17.1-524 (2003 & Supp. 2009).

[2]*See* § 17.1-123(A) (2003) (requiring clerk to record orders from each day's proceedings of circuit court in order book); § 17.1-124 (Supp. 2009) (requiring clerk to "keep order books recording all proceedings, orders and judgments of the court").

[3]*See* § 17.1-208 (Supp. 2009).

[4]*See* § 17.1-209 (Supp. 2009) (requiring clerk to preserve all papers lawfully returned to or filed in clerk's office); § 17.1-213 (Supp. 2009) (requiring clerk to keep certain records permanently; authorizing clerk to destroy certain records).

[5]*See* 2005 Op. Va. Att'y Gen. 78, 78, and opinions cited therein.

[6]*See, e.g.*, Op. Va. Att'y Gen.: 2006 at 200, 201; 1984-1985 at 284, 284.

[7]*See* Op. Va. Att'y Gen.: 1993 at 59, 67; *see also* 1989 at 71, 73 (concluding that board of supervisors has no authority to approve or deny purchases or change equipment specifications determined by constitutional officer); 1986-1987 at 69, 69 (noting that constitutional officer has exclusive control over personnel policies of office); 1978-1979 at 237, 237 (noting that constitutional officer is not subject to control of and jurisdiction of governing body); *id.* at 289, 289 (concluding that treasurer is not subject to control of board of supervisors in determining what tax collection methods to employ); 1976-1977 at 46 (concluding that county government may not investigate personnel practices of constitutional officer). Under certain statutes, a local governing body may add additional duties to be performed by a constitutional officer, as long as those additional duties are not inconsistent with the office and its statutorily prescribed duties. *See, e.g.*, 1978-1979 Op. Va. Att'y Gen. 289, 292 (concluding that pursuant to § 15.1-706(d), predecessor to § 15.2-408(d), county board of supervisors may increase number of duties that treasurer performs, so long as additional duties are consistent with office; board may not dictate methods of carrying out duties).

[8]*See, e.g.*, 1993 Op. Va. Att'y Gen. *supra* note 7, at 67.

[9]*See* Op. Va. Att'y Gen.: 2003 at 60, 60; 2002 at 62, 62.

[10]*See* § 17.1-279(B)-(C) (Supp. 2009). I note that other subsections in § 17.1-279 refer to the trust fund as the Technology Trust Fund. *See* § 17.1-279(D)(2), (F). However, § 17.1-279(A) merely establishes the Technology Trust Fund Fee and provides that "[s]uch fee shall be deposited by the State Treasurer into a trust fund."

[11]Section 17.1-279(A).

[12]Section 17.1-279(B)(i)-(ii).

[13]Section 17.1-279(B)(ii).

[14]It is noteworthy that the 2006 Session of the General Assembly revised subsection F of § 17.1-279. *See* 2006 Va. Acts ch. 647, at 869, 870. Prior to the 2006 amendment, § 17.1-279(F) provided that "[i]f a circuit court clerk *has implemented an automation plan for his land records that will accommodate* secure remote access *on a statewide basis*, then that clerk may apply … for an allocation from the Technology Trust Fund." VA. CODE ANN. § 17.1-279(F) (Supp. 2005) (emphasis added). In 2006, the General Assembly deleted the italicized words. *See* 2006 Va. Acts, *supra*. Thus, after the 2006 amendment, § 17.1-279(F) no longer allowed circuit court clerks merely to have a plan in place for remote access in order to receive an allocation from the Trust Fund to use for automation and technology improvements in the civil and criminal divisions. Further, the 2007 Session of the General Assembly amended subsection F to provide, in part, that: "[i]f a circuit court clerk provides secure remote access to land records on or before July 1, ~~2007~~*2008*, then that clerk may apply to the Compensation Board for an allocation from the Technology Trust Fund for automation and technology improvements in ~~the civil divisions; or the criminal division, of~~ his office *that are not related to land records*." 2007 Va. Acts chs. 548, 626, at 748, 752, 872, 876, respectively.

[15]*See* Loudoun Co. Dep't Soc. Servs. v. Etzold, 245 Va. 80, 85, 425 S.E.2d 800, 802 (1993).

OP. NO. 09-007

COURTS OF RECORD: CLERKS, CLERKS' OFFICES AND RECORDS — GENERAL PROVISIONS — CIRCUIT COURTS.

Statutory duties of circuit court clerk do not require preparation of sketch orders in civil cases or attendance at civil or criminal docket call proceedings. When clerk does not attend docket call, clerk must exercise significant care to ensure accurate records of proceedings are maintained.

THE HONORABLE JUDY L. WORTHINGTON
CHESTERFIELD COUNTY CIRCUIT COURT CLERK
FEBRUARY 27, 2009

ISSUES PRESENTED

You ask whether a circuit court clerk has a statutory obligation to prepare sketch orders in civil cases for the court. Additionally, you ask whether a circuit court clerk has a statutory obligation to attend civil and criminal docket call proceedings.

RESPONSE

It is my opinion that the statutory duties of a circuit court clerk do not require the preparation of sketch orders in civil cases. It further is my opinion that such duties do not require attendance at civil or criminal docket call proceedings. However, I would caution that when a clerk does not attend a docket call, significant care must be exercised by the clerk to ensure that accurate records of such proceedings are maintained.

APPLICABLE LAW AND DISCUSSION

Article VII, § 4 of the Constitution of Virginia establishes the office of clerk of the court and provides that the clerk's duties are "prescribed by general law or special act."[1] Among the duties the General Assembly requires clerks' offices to perform are keeping records of the proceedings in circuit court,[2] providing access to such records,[3] and maintaining and purging the records.[4]

Prior opinions of the Attorney General note that the clerk's office is an integral part of the administrative operations of the circuit court and provides numerous services to judicial and other public officials, as well as to the public.[5] While circuit court clerks may, in their discretion, assist the court by preparing orders in civil cases, I find no statute that compels this practice. Circuit courts may set cases for trial at a docket call on such days or at such intervals as directed by order of the court.[6] While clerks may assist circuit courts at docket calls to set civil and criminal cases for trial, I find no statute that compels this practice. Notwithstanding the lack of a statutory provision, a clerk who does not attend a docket call must exercise significant care to ensure that accurate records of such proceedings are maintained. The decision not to attend a docket call may make fulfillment of this responsibility more difficult.

The comprehensive list of statutory duties placed upon circuit court clerks demonstrates that when the General Assembly intends to require a clerk to perform a task, it knows how to express its intention.[7] Furthermore, unlike the clerks of the general district and juvenile and domestic relations district courts, the General

Assembly has not required circuit court clerks to perform "other duties as may be prescribed by the judge."[8]

CONCLUSION

Accordingly, it is my opinion that the statutory duties of a circuit court clerk do not require the preparation of sketch orders in civil cases. It further is my opinion that such duties do not require attendance at civil or criminal docket call proceedings. However, I would caution that when a clerk does not attend a docket call, significant care must be exercised by the clerk to ensure that accurate records of such proceedings are maintained.

[1]The General Assembly has established the duties of clerks of the court. *See* VA. CODE ANN. tit. 17.1, ch. 2, §§ 17.1-200 to 17.1-295 (2003 & Supp. 2008). The General Assembly also has established provisions governing courts of record, which include certain duties for circuit court clerks. *See generally* tit. 17.1, ch. 1, §§ 17.1-100 to 17.1-132 (2003 & Supp. 2008); ch. 5, §§ 17.1-500 to 17.1-524 (2003 & Supp. 2008).

[2]*See* § 17.1-123(A) (2003) (requiring clerk to record orders from each day's proceedings in order book); § 17.1-124 (Supp. 2008) (requiring clerk to keep order books recording all proceedings, orders, and judgments of court).

[3]*See* § 17.1-208 (Supp. 2008).

[4]*See* § 17.1-209 (Supp. 2008) (requiring clerk to preserve all papers lawfully returned to or filed in clerk's office); § 17.1-213 (Supp. 2008) (requiring clerk to keep certain records permanently; authorizing clerk to destroy certain records).

[5]*See* 2003 Op. Va. Att'y Gen. 60, 60 and opinions cited therein.

[6]*See* VA. SUP. CT. R. 1:20; *see also* § 17.1-517 (2003) (authorizing chief judge to fix days for dockets); VA. CODE ANN. § 8.01-332 (2007) (providing that current docket may be called to fix cases for trial on days or at intervals as directed by court order); VA. CODE ANN. § 19.2-241 (2008) (authorizing circuit court judges to fix days for commencement of criminal trials).

[7]*See* 2005 Op. Va. Att'y Gen. 78, 78 and opinions cited therein.

[8]VA. CODE ANN. § 16.1-69.40 (2003) (governing personnel of district courts).

OP. NO. 08-099

COURTS OF RECORD: CLERKS, CLERKS' OFFICES AND RECORDS – OTHER CLERKS AND CLERKS' OFFICES.

CRIMINAL PROCEDURES PROCEEDINGS ON QUESTION OF INSANITY.

HEALTH: REGULATION OF MEDICAL CARE FACILITIES – HOSPITAL AND NURSING HOME LICENSURE AND INSPECTION.

Competency evaluation report that was ordered by and submitted to court as part of court's record is open to inspection, provided such report is not sealed by court order.

THE HONORABLE GEORGE E. SCHAEFER
CLERK OF NORFOLK CIRCUIT COURT
FEBRUARY 25, 2009

ISSUE PRESENTED

You ask whether a competency evaluation report ordered by and submitted to a court pursuant to § 19.2-169.1, which is not sealed by court order, is open to inspection under § 17.1-208 or protected by § 32.1-127.1:03.

RESPONSE

It is my opinion that a competency evaluation report that was ordered by and submitted to a court as part of the court's record is open to inspection under § 17.1-208, provided such report is not sealed by court order.

APPLICABLE LAW AND DISCUSSION

When a court finds probable cause to believe that a criminal defendant "lacks substantial capacity to understand the proceedings against him or to assist his attorney in his own defense," the court must order a competency evaluation.[1] The evaluator must submit a written report to the court and attorneys of record addressing, among other things, the defendant's capacity to understand the proceedings and his ability to assist his attorney.[2] You ask whether the public may access the evaluation report.

There is a presumption in the common law that judicial records are open to public inspection.[3] Section 17.1-208, which codifies this presumption,[4] provides, in relevant part, that:

> Except as otherwise provided by law, any records and papers of every circuit court that are maintained by the clerk of the circuit court shall be open to inspection by any person and the clerk shall, when requested, furnish copies thereof, except in cases in which it is otherwise specially provided.

Section 32.1-127.1:03 establishes an individual's privacy right to his health records and prohibits health care entities from disclosing health records except when permitted or required by state law. Further, § 32.1-127.1:03(A)(3) prevents a person to whom health records have been disclosed from further disclosing the records without first obtaining the authorization of the individual who is the subject of the records. Section 32.1-127.1:03(B) defines a "health record" as "any written, printed or electronically recorded material maintained by a health care entity in the course of providing health services to an individual concerning the individual and the services provided." A health record further includes "information otherwise acquired by the health care entity about an individual in confidence and in connection with the provision of health services to the individual."[5] A "health care entity" encompasses any health care provider, including all persons who are licensed by any health regulatory board within the Department of Health Professions.[6] "Health services," include, but are not limited to, examination, diagnosis, and evaluation.[7] Based on these definitions, a competency evaluation report prepared by a psychiatrist or clinical psychologist that addresses the defendant's capacity and treatment is a "health record." However, § 19.2-169.1(D) requires the evaluator to submit the report to the court and to the attorneys of record, which places the report under the authority of the court subject to the provisions of § 17.1-208.

With respect to competency evaluation reports, it is clear that both §§ 17.1-208 and 32.1-127.1:03 apply. Section 32.1-127.1:03 applies generally to all health records

and their use and disclosure. However, § 17.1-208 applies to all records and papers maintained by the clerk of the court, which would include competency evaluation reports filed as part of a court record. When there is an apparent conflict between different statutes, the more specific statute prevails.[8] Because § 17.1-208 specifically governs the records and papers maintained by the circuit court clerks, § 32.1-127.1:03 must yield to § 17.1-208.[9]

Applying these principles, the Court of Appeals of Virginia has considered whether the media and the public[10] may have access to a criminal competency hearing as well as the documents admitted into evidence during such hearing.[11] The Court relied upon the federal and state constitutions[12] to grant such access, noting that courts in other jurisdictions favored a qualified right of access to competency hearings[13] and that public access to such hearings can play a significant positive role in criminal competency hearings.[14] A decision to seal a report rests within the sound discretion of the court.[15]

CONCLUSION

Accordingly, it is my opinion that a competency evaluation report that was ordered by and submitted to a court as part of the court's record is open to inspection under § 17.1-208, provided such report is not sealed by court order.

[1]Va. Code Ann. § 19.2-169.1(A) (2008).

[2]Section 19.2-169.1(D).

[3]*See, e.g.*, *In re* Worrell Enters., Inc., 14 Va. App. 671, 680, 419 S.E.2d 271, 277 (1992).

[4]Shenandoah Publ'g House, Inc. v. Fanning, 235 Va. 253, 258-59, 368 S.E.2d 253, 255-56 (1988) (construing legislative history of § 17-43, predecessor to § 17.1-208).

[5]Va. Code Ann. § 32.1-127.1:03(B) (Supp. 2008) (defining "health record").

[6]*See id.* (defining "health care entity" and "health care provider").

[7]*Id.* (defining "health services").

[8]*See, e.g.*, 2009 Op. Va. Att'y Gen. 113, 114 and cases cited therein.

[9]*See* Perreault v. Free Lance-Star, 276 Va. 375, 391, 666 S.E.2d 352, 360 (2008) (noting statutory presumption of public access to judicial records); *see also* 2000 Op. Va. Att'y Gen. 94, 95 (concluding general provisions of § 32.1-271(A), which prohibits inspection and disclosure of vital records, must give way to specific provisions of § 17.1-208).

[10]The press and public generally enjoy the same right of access. *See Worrell Enterprises*, 14 Va. App. at 676, 419 S.E.2d at 274.

[11]*In re* Times-World Corp., 25 Va. App. 405, 488 S.E.2d 677 (1997).

[12]*Id*. at 419, 488 S.E.2d at 684. Access to a criminal competency hearing can only be denied by showing a compelling governmental interest and the denial must be narrowly tailored to serve that interest. *Id*. at 415-16, 488 S.E.2d at 682.

[13]*Id.* at 414, 488 S.E.2d at 681 (citing cases from other jurisdictions).

[14]*Id.* at 415, 488 S.E.2d at 682.

[15]*See Perreault*, 276 Va. at 389, 666 S.E.2d at 359-60.

OP. NO. 08-111

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY – OTHER ILLEGAL WEAPONS.

Exemption for Commonwealth's and assistant Commonwealth's attorneys from general prohibitions on carrying concealed handguns, subject only to restrictions in § 18.2-308(J1); may carry concealed handguns on school property. No specific prohibition against such individuals consuming alcohol while carrying concealed handguns; restricted by existing statute against being 'under the influence' of alcohol or illegal drugs. No presumption that General Assembly specifically considered issues analyzed in opinion when it enacted 2008 Amendments. Presumption that General Assembly is aware of Attorney General opinion; may amend statute to supersede opinion.

THE HONORABLE R. LEE WARE
MEMBER, HOUSE OF DELEGATES
JULY 13, 2009

ISSUES PRESENTED

You request guidance concerning interpretation of the 2008 amendments to § 18.2-308 that became effective on July 1, 2008[1] ("2008 Amendments"). Specifically, you inquire whether the 2008 Amendments to § 18.2-308(B)(9) authorize Commonwealth's attorneys and assistant Commonwealth's attorneys: (1) to carry concealed handguns in certain restaurants and clubs, generally prohibited by § 18.2-308(J3); (2) to consume alcohol while carrying concealed handguns in such settings; and (3) to possess a handgun on school property as prohibited by § 18.2-308.1.

RESPONSE

It is my opinion that the 2008 Amendments clearly exempt Commonwealth's attorneys and assistant Commonwealth's attorneys from the general prohibitions on carrying concealed handguns, subject only to the restrictions in § 18.2-308(J1). Therefore, pursuant to state law such individuals may carry concealed handguns on school property. Further, it is my opinion that the 2008 Amendments do not specifically prohibit such individuals from consuming alcohol while carrying concealed handguns; however, they are restricted by existing statute from being "under the influence" of alcohol or illegal drugs.[2] I also note that Virginia does not rely upon a legislative record to determine legislative intent. I do not presume that the General Assembly specifically considered the issues analyzed in this opinion when it enacted the 2008 Amendments. However, the General Assembly is presumed to be aware of opinions of the Attorney General and is capable of amending the statute to supersede this opinion.[3]

APPLICABLE LAW AND DISCUSSION

The authority of the General Assembly to prohibit the carrying of concealed handguns and the privilege of granting exceptions to that prohibition have long been recognized.[4] Therefore, the issues you present are limited to interpretation of the 2008 Amendments.

The 2008 Amendments[5] are clear and unambiguous. "[W]here a law is expressed in plain and unambiguous terms, whether those terms are general or limited, the

legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction."[6] Section 18.2-308(B) provides that "[e]xcept as provided in subsection J1, *this section* shall not apply to" the listed classes. (Emphasis added.) Therefore, the only limitations imposed by § 18.2-308 on individuals exempt under § 18.2-308(B) are those contained in § 18.2-308(J1). Use of the phrase, "this section," clearly indicates a legislative intent to exclude from § 18.2-308 the persons within the classes enumerated in § 18.2-308(B). The clear language of § 18.2-308(B)(9) makes the exemption applicable to any Commonwealth's or assistant Commonwealth's attorney.

Accordingly, it is my opinion that a Commonwealth's attorney or assistant Commonwealth's attorney is not prohibited from carrying a concealed handgun into a restaurant or club licensed to sell and serve alcoholic beverages as prohibited by § 18.2-308(J3).[7]

Likewise, Commonwealth's attorneys and assistant Commonwealth's attorneys are exempt from the general prohibitions related to concealed handguns on school property by virtue of § 18.2-308.1.[8] Section 18.2-308.1(B) provides that "[t]he exemptions set out in § 18.2-308 shall apply, mutatis mutandis, to the provisions of *this section*." (Emphasis added.) Therefore, the exemptions in § 18.2-308(B)-(C) are included by reference as exemptions under § 18.2-308.1.[9] Because the 2008 Amendments, which added § 18.2-308(B)(9), created a new exception for Commonwealth's attorneys, such individuals are not subject to the restrictions generally imposed by § 18.2-308.1.[10]

While specifically exempted from the operation of § 18.2-308(J3), the final question is whether Commonwealth's attorneys may consume alcohol while carrying a concealed handgun. Section 18.2-308(J1) provides that "any person permitted to carry a concealed handgun" is prohibited from being "*under the influence* of alcohol or illegal drugs while carrying such handgun in a public place." (Emphasis added.) The primary goal in construing a statute is to discern and give effect to the legislative intent.[11] "The ascertainment of legislative intention involves appraisal of the subject matter, purposes, objects and effects of the statute, in addition to its express terms."[12] "The plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction."[13] If the General Assembly had intended to prohibit any consumption of alcohol while carrying a concealed handgun, it could have enacted a complete prohibition against such consumption. Instead, the General Assembly chose to use the phrase, "under the influence."[14] An individual meeting the standards for "intoxicated" pursuant to § 4.1-100 would be prohibited from possessing a firearm, but determination of such a question of fact is for a court to decide.[15]

CONCLUSION

Accordingly, it is my opinion that the 2008 Amendments clearly exempt Commonwealth's attorneys and assistant Commonwealth's attorneys from the general prohibitions on carrying concealed handguns, subject only to the restrictions in

§ 18.2-308(J1). Therefore, pursuant to state law such individuals may carry concealed handguns on school property. Further, it is my opinion that the 2008 Amendments do not specifically prohibit such individuals from consuming alcohol while carrying concealed handguns; however, they are restricted by existing statute from being "under the influence" of alcohol or illegal drugs.[16] I also note that Virginia does not rely upon a legislative record to determine legislative intent. I do not presume that the General Assembly specifically considered the issues analyzed in this opinion when it enacted the 2008 Amendments. However, the General Assembly is presumed to be aware of opinions of the Attorney General and is capable of amending the statute to supersede this opinion.[17]

[1] *See* 2008 Va. Acts ch. 464, at 657, 658 (amending § 18.2-308 related to concealed weapons by adding § 18.2-308(B)(9) and amending § 18.2-308(C)).

[2] *See* Va. Code Ann. § 18.2-308(J1) (Interim Supp. 2009) (creating rebuttable presumption based on convictions for other offenses to define "under the influence").

[3] The General Assembly is presumed to have knowledge of and acquiesce in the Attorney General's interpretation of a statute when no corrective amendments are thereafter enacted. *See* Lee Gardens Arlington Ltd. P'ship v. Arlington County Bd., 250 Va. 534, 540, 463 S.E.2d 646, 649 (1995); 1996 Op. Va. Att'y Gen.123, 124 n.4.

[4] *See* 1838 Va. Acts ch. 101, at 76-77 (enacting act to prevent carrying of concealed weapon); *see also* Withers v. Commonwealth, 109 Va. 837, 65 S.E. 16 (1909) (interpreting *Code* section regarding carrying of concealed weapons by conservators of the peace).

[5] *See supra* note 1.

[6] South Hill v. Allen, 177 Va. 154, 165, 12 S.E.2d 770, 774 (1941).

[7] *See* 1998 Op. Att'y Gen. Va. 55 (addressing scope of exemptions within § 18.2-308(B) in context of retired law-enforcement officers and reaching similar conclusion). The exemptions within § 18.2-308(B) provide a broader authority to carry concealed weapons and are subject to fewer restrictions than the ability to carry a concealed handgun by virtue of a permit. Prior opinions of the Attorney General have concluded that concealed carry permits are limited through § 18.2-308(O). *See* Op. Va. Att'y Gen.: 1995 at 123; *id.* at 118. Thus, a concealed handgun permit does not authorize a permit holder to conceal a handgun in a restaurant or bar as proscribed by § 18.2-308(J3).

[8] *See* Frias v. Commonwealth, 34 Va. App. 193, 197, 538 S.E.2d 374, 376 (2000). Although the court determined that the individual was not a "conservator of the peace" for purposes of § 18.2-308; "'conservators of the peace' are exempt from the prohibition against carrying a gun on school grounds." *Id.*

[9] *See* 2000 Op. Va. Att'y Gen. 100, 102 n.6 (defining exemptions incorporated by reference as § 18.2-308.1(B)).

[10] I note that this opinion addresses only state law and does not address whether a Commonwealth's attorney is prohibited by federal law from possessing a loaded firearm on school property. *See* 18 U.S.C.S. § 922(q)(2) (2005). However, exclusion from the requirement of a permit under state law is not the equivalent of possessing a license under § 922(q)(2)(B)(ii). See § 18.2-308(B)(7)-(8) for examples of exemptions that are deemed equivalent to holding a permit for purposes of federal law and state reciprocity.

[11] Vollin v. Arlington Co. Electoral Bd., 216 Va. 674, 678-79, 222 S.E.2d 793, 797 (1976).

[12] *Id.* at 679, 222 S.E.2d at 797.

[13] *Id.*

[14] Section 18.2-308(J1).

[15]For many years, Attorneys General have concluded that § 2.2-505, the authorizing statute for official opinions of the Attorney General, does not contemplate that such opinions be rendered on matters requiring factual determinations, rather than matters interpreting questions of law. *See, e.g.*, 2003 Op. Va. Att'y Gen. 21, 24 and opinions cited therein.

[16]*See supra* note 2.

[17]*See supra* note 3.

OP. NO. 09-070

CRIMINAL PROCEDURE: CENTRAL CRIMINAL RECORDS EXCHANGE.

Service of criminal show cause summons does not constitute 'arrest' or trigger requirement to report to Central Criminal Records Exchange.

THE HONORABLE DENNIS S. PROFFITT
CHESTERFIELD COUNTY SHERIFF
OCTOBER 26, 2009

ISSUE PRESENTED

You ask whether § 19.2-390 requires that the sheriff make a report to the Central Criminal Records Exchange ("CCRE") when a show cause summons is served.

RESPONSE

It is my opinion that service of a criminal show cause summons does not constitute an "arrest" or trigger the reporting requirements of § 19.2-390.

APPLICABLE LAW AND DISCUSSION

Section 19.2-390 provides, in pertinent part, that:

> A. 1. Every state official or agency having the power to arrest, the sheriffs of counties, the police officials of cities and towns, and any other local law-enforcement officer or conservator of the peace having the power to arrest for a felony shall make a report to the Central Criminal Records Exchange, on forms provided by it, *of any arrest*, including those arrests involving the taking into custody of, or service of process upon, any person on charges resulting from an indictment, presentment or information, the arrest on capias or warrant for failure to appear, and the service of a warrant for another jurisdiction, on any of the following charges:
>
> a. Treason;
>
> b. Any felony;
>
> c. Any offense punishable as a misdemeanor under Title 54.1; or
>
> d. Any misdemeanor punishable by confinement in jail (i) under Title 18.2 or 19.2, except an arrest for a violation of

> § 18.2-119, Article 2 (§ 18.2-415 et seq.) of Chapter 9 of Title 18.2, or any similar ordinance of any county, city or town, (ii) under § 20-61, or (iii) under § 16.1-253.2.
>
> The reports shall contain such information as is required by the Exchange and shall be accompanied by fingerprints of the individual arrested. [Emphasis added.]

Section 19.2-390(A)(1) does not explicitly mention a show cause summons. Therefore, the issue is whether the service of a show cause summons qualifies as an "arrest" within the meaning of § 19.2-390.

Chapter 7 of Title 19.2, §§ 19.2-71 through 19.2-83.2, governs the procedures for arrest in the Commonwealth. Section 19.2-76 provides that "[a] *warrant or capias shall be executed by the arrest* of the accused, and a *summons shall be executed by delivering a copy* to the accused personally." (Emphasis added.) Thus, there is a distinction between a warrant or capias and a summons. The Supreme Court of Virginia has held that an arrest involves "a person who is detained in custody by authority of law or one who is under legal restraint."[1] Therefore, it is my opinion that for purposes of § 19.2-390, an arrest would mean that a person would be subject to physical restraint, restriction of personal freedom, or detainment for custody.

I find no statutory definition of the term "show cause summons." When a particular word in a statute is not defined in the statute, it will be given its ordinary meaning.[2] A "show cause order" is "[a]n order directing a party to appear in court and explain why the party took (or failed to take) some action or why the court should or should not grant some relief. — Also termed *order to show cause*; *rule to show cause*, *show-cause rule*."[3] Further, the term "rule to show cause" means "[an] expedited proceeding on a show-cause order. — Also termed *rule to show cause*[.]"[4] A "summons" is "[a] notice requiring a person to appear in court."[5] Based on these definitions, a show cause order or summons is an instrument of notice and not a charging instrument.[6] Being an instrument of notice, the specific purpose of a show cause order or summons is to notify and command that a respondent appear before the court to answer questions stemming from a matter that is or has been already before the court.[7] While a capias and a show cause summons both are used to bring a person before the court, the capias includes an ability to detain and seize while the show cause summons does not.[8]

Finally, a prior opinion of the Attorney General has concluded that where an accused has merely been served with a summons, without being detained, there has been no arrest and no requirement to make an arrest report to CCRE.[9] Thus, service of a show cause summons is not an arrest for purposes of § 19.2-390.

CONCLUSION

Accordingly, it is my opinion that service of a criminal show cause summons does not constitute an "arrest" or trigger the reporting requirements of § 19.2-390.

[1]Moore v. Commonwealth, 218 Va. 388, 394, 237 S.E.2d 187, 192 (1977) (interpreting meaning of "arrested" in context of § 19.1-163.1; noting that person whose freedom of movement and liberty is not subject to legal restriction is not person who is arrested); *see also* 1972-1973 Op. Va. Att'y Gen. 266, 267 (noting that arrest means to deprive person of liberty by legal authority; taking person into custody for purpose of holding or detaining him to answer criminal charge).

[2]*See* McKeon v. Commonwealth, 211 Va. 24, 27, 175 S.E.2d 282, 284 (1970). "[W]ords in common use must be given their plain and natural meaning in the absence of any showing that such words were used in any other than their usual and ordinary sense." McClung v. County of Henrico, 200 Va. 870, 875, 108 S.E.2d 513, 516 (1959); *see also* Roller v. Shaver, 178 Va. 467, 472, 17 S.E.2d 419, 422 (1941) (noting that words and phrases should be given usual and ordinary meaning).

[3]Black's Law Dictionary 1207 (9th ed. 2009).

[4]*Id.* at 1505; *see also id.* at 1450 (referring to "show-cause proceeding" for definition of "rule to show cause").

[5]*Id.* at 1574.

[6]Although a judge may, after the service of a show cause summons and disposal of the immediate matter, find contempt, it is not considered to be the charging instrument.

[7]*See supra* notes 3-5 and accompanying text. A show cause order or summons is also distinct from a capias, which is "[a]ny of various types of writs that require an officer to take a named defendant *into custody*." Black's Law Dictionary, *supra* note 3, at 236 (emphasis added).

[8]*See generally* Va. Code Ann. § 18.2-271.1(F) (2009) (providing that show cause is served by mailing to last known address); Va. Code Ann. § 19.2-76 (2008) (providing that capias is executed by arrest of accused while summons is executed by delivering copy to accused); *see also* § 19.2-390(A)(2) (delaying requirement to report to CCRE certain violations or misdemeanors of persons arrested and released on summons issued and served in place of warrant until final outcome of charge).

[9]*See* 1975-1976 Op. Va. Att'y Gen. 13, 15 (interpreting CCRE reporting requirement in context of summons issued pursuant to § 19.2-73).

OP. NO. 08-108

CRIMINAL PROCEDURE: SENTENCE; JUDGMENT; EXECUTION OF SENTENCE – DETENTION CENTER INCARCERATION PROGRAM – DIVERSION CENTER INCARCERATION PROGRAM.

General Assembly intends that court not sentence same defendant to active incarceration with Department of Corrections and to Detention or Diversion Center. Where court imposes Detention or Diversion Center sentence and another court sentence imposes incarceration with Department, Department must give effect to both sentences, notwithstanding legislative intent that Detention or Diversion Center is alternative sentence and should not be imposed as 'bridge' between prison sentence and release into community.

THE HONORABLE G. CARTER GREER
JUDGE, TWENTY-FIRST JUDICIAL CIRCUIT
CITY OF MARTINSVILLE CIRCUIT COURT
FEBRUARY 25, 2009

ISSUE PRESENTED

You ask under what circumstances a criminal defendant may receive an active sentence to a state correctional facility and a sentence to the Detention Center Incarceration Program or the Diversion Center Incarceration Program.

RESPONSE

It is my opinion that the General Assembly intended that a court should not sentence the same defendant to active incarceration with the Department of Corrections and

to the Detention Center Incarceration Program or the Diversion Center Incarceration Program. It further is my opinion that in a situation where one court imposes a Detention or Diversion Center sentence that would be countermanded by another court's sentence for incarceration with the Department, the Department must give effect to the sentences imposed by both courts. This is so notwithstanding the general legislative intent that a Detention or Diversion Center sentence is an alternative to an active sentence and should not be imposed as a "bridge" between a prison sentence and release into the community.

BACKGROUND

You describe a situation where the criminal defendant has received an active sentence for incarceration with the Department of Corrections (the "Department") for a period of one year for a probation violation and a sentence to the Detention Center Incarceration Program for a new criminal conviction. You state that the same court imposed both sentences after conducting sentencing hearings for both events on the same day. You relate that a Department representative has advised the court that it interprets the applicable *Code* sections to preclude sentencing of the same defendant to active terms of incarceration with both the Department and the Detention Center. Therefore, you seek guidance on this matter.

APPLICABLE LAW AND DISCUSSION

The General Assembly has afforded the judiciary a variety of sentencing options to impose punishment for a criminal conviction without imposing an active prison sentence. Two such alternatives are the Detention Center Incarceration Program[1] (the "Detention Center") and the Diversion Center Incarceration Program[2] (the "Diversion Center") (collectively, the "Programs"). The Programs are intended for defendants "who otherwise would have been sentenced to incarceration for a nonviolent felony."[3] However, prior to 2005, there was no prohibition against a court combining an active sentence with a sentence to the Programs.[4] Some courts did just that.[5]

The 2005 Session of the General Assembly amended §§ 19.2-316.2(A)(3) and 19.2-316.3(A)(3) (the "2005 Amendments") to provide that "[*a*] *sentence to the* [*Detention Center*] [*Diverson Center*] *Incarceration Program shall not be imposed as an addition to an active sentence to a state correctional facility.*"[6] Thus, after the effective date of the 2005 Amendments, a court could not sentence a defendant to the Department while also imposing a sentence to one of the Programs.[7] The 2005 Amendments effectively ended the authority for a court to utilize a Detention or Diversion Center as a bridge between confinement with the Department and release into the community.

The principle objective when interpreting a statute is to determine and give effect to the legislative intent.[8] "The ascertainment of legislative intention involves appraisal of the subject matter, purposes, objects and effects of the statute, in addition to its express terms."[9] Where a statute is not ambiguous the rules of statutory construction are not necessary, and the statute is given effect in accordance with its plain meaning.[10]

The legislative intent of § 19.2-316.2 is to provide one of a number of "alternative sentencing sanctions to the trial courts in the form of a state-wide community based system of programs."[11] Both the Detention Center and the Diversion Center are intended for a defendant "who *otherwise* would have been sentenced to incarceration."[12] While the nature of the conviction determines the individual's eligibility for the Programs, the ascertainment of his suitability after evaluation is specific to the individual.[13] Therefore, the primary factor in determining whether the defendant is admitted to the Detention or Diversion Center is based on determinations peculiar to the person, not to the offense. It is my opinion that the legislative intent is to divert the person away from traditional incarceration with the Department. The Programs are not designed to authorize incarceration with the Department for one criminal offense while diverting the defendant to the Detention or Diversion Center for another conviction.[14]

Finally, I cannot conclude that the General Assembly has intended to allow one court to undo another court's sentence by imposing an active sentence after a defendant is sentenced to a Detention or Diversion Center by another court. Similarly, I cannot conclude that the General Assembly intended to allow one court, by first imposing an active sentence to the Department, to preclude another court's finding for incarceration in either a Detention or Diversion Center. Thus, where different courts make contrary conclusions about incarceration in the Detention Center and with the Department, the Department must give effect to the sentencing orders of both courts.

CONCLUSION

Accordingly, it is my opinion that the General Assembly intended that a court should not sentence the same defendant to active incarceration with the Department of Corrections and to the Detention Center Incarceration Program or the Diversion Center Incarceration Program. It further is my opinion that in a situation where one court imposes a Detention or Diversion Center sentence that would be countermanded by another court's sentence for incarceration with the Department, the Department must give effect to the sentences imposed by both courts. This is so notwithstanding the general legislative intent that a Detention or Diversion Center sentence is an alternative to an active sentence and should not be imposed as a "bridge" between a prison sentence and release into the community.

[1] *See* Va. Code Ann. § 19.2-316.2 (2008).

[2] *See* § 19.2-316.3 (2008). Both of these Programs provide regimented environments with demanding structured programs. *See* Word v Commonwealth, 41 Va. App. 496, 503, 586 S.E.2d 282, 285 (2003).

[3] Sections 19.2-316.2(A), 19.2-316.3(A).

[4] *See* §§ 19.2-316.2, 19.2-316.3 (2004).

[5] *See, e.g.*, Rhodes v Commonwealth, 45 Va. App. 645, 647, 613 S.E.2d 466, 467-68 (2005) (noting that trial court imposed three year active sentence to be followed by Detention and Diversion Centers).

[6] *See* 2005 Va. Acts chs. 512, 580, at 703, 704, 769, 770, respectively (amending § 19.2-316.2(A)(3)); *see id.* ch. 604, at 799, 800 (amending § 19.2-316.3(A)(3)).

[7] It is important to note that a sentence of one year is a sentence to the Department, while a sentence of twelve months is a jail sentence. *Compare* Va. Code Ann. § 53.1-20(B) (2005) (mandating that persons convicted of felonies and sentenced to the Department or to confinement in jail for year or more are placed

in custody of the Department and received into state corrections system) *with* § 53.1-21(B)(3) (2005) (providing that no persons convicted of misdemeanors or felonies who receive jail sentences of twelve months or less will be committed or transferred to custody of the Department without consent).

[8]*See* 1998 Op. Va. Att'y Gen. 3, 4.

[9]Vollin v Arlington Co. Electoral Bd., 216 Va. 674, 679, 222 S.E.2d 793, 797 (1976), *quoted in* 1998 Op. Va. Att'y Gen., *supra* note 8, at 4.

[10]Ambrogi v Koontz, 224 Va. 381, 386, 297 S.E.2d 660, 662 (1982); 1999 Op. Va. Att'y Gen. 150, 151.

[11]Peyton v Commonwealth, 268 Va. 503, 509, 604 S.E.2d 17, 20 (2004).

[12]Sections 19.2-316.2(A), 19.2-316.3(A) (emphasis added).

[13]*See* §§ 19.2-316.2(A)(1)-(3), 19.2-316.3(A)(1)-(3).

[14]Confinement in a Detention Center is incarceration. *See* Charles v Commonwealth, 270 Va. 14, 18, 613 S.E.2d 432, 434 (2005). The Detention Center is an alternative sanction to the traditional penal confinement in a Department prison. *See Peyton*, 268 Va. at 509, 604 S.E.2d at 20.

OP. NO. 09-072

DOMESTIC RELATIONS: MARRIAGE GENERALLY — DIVORCE, AFFIRMATION AND ANNULMENT.

No statutory or equitable authority for court to affirm marriages that were not performed under license of marriage. Court may not direct circuit court clerk to issue marriage licenses retrospectively under these circumstances.

THE HONORABLE JOHN T. FREY
FAIRFAX CIRCUIT COURT CLERK
DECEMBER 10, 2009

ISSUES PRESENTED

You inquire about the status of certain marriages for which the parties did not obtain marriage licenses. Specifically, you ask whether a court may affirm such marriages when the marriages were performed by a religious or civil celebrant: (1) authorized to perform marriages in Virginia; or (2) not authorized to perform marriages in Virginia. Further, you ask whether a court may order the clerk of the circuit court ("clerk" or "circuit court clerk") to issue a marriage license retrospectively under these circumstances.

RESPONSE

It is my opinion that a court does not have the statutory or equitable authority to affirm marriages that were not performed under a license of marriage. Further, it is my opinion that a court may not direct a circuit court clerk to issue marriage licenses retrospectively under these circumstances.

BACKGROUND

You advise that several couples have inquired about the status of their respective marriages. In each case, you note that the couple did not obtain a marriage license, but did participate in a religious ceremony of marriage. You state that some of the celebrants were authorized to perform marriages in Virginia, some were not, and the status of some celebrants is unknown.

APPLICABLE LAW AND DISCUSSION

The *Virginia Code* is clear that a marriage license is required. "Every marriage in this Commonwealth shall be under a license and solemnized in the manner herein provided."[1] In each of the situations you present, the couple did not obtain a marriage license. Thus, the status of the celebrant is irrelevant with respect to the marital status of the couple. The Supreme Court of Virginia also has spoken clearly on this issue. "[N]o marriage or attempted marriage, if it took place in this State, can be held valid here, unless it has been shown to have been under a license, and solemnized according to [the] statutes."[2] Therefore, in the situations you present, it is my opinion the marriages are not valid under Virginia law.

The centrality to marriage of a properly issued license is underscored by § 20-28, which provides criminal sanctions for celebrants who perform ceremonies without licenses being obtained.[3] Further, the General Assembly has placed numerous statutory duties upon a clerk or deputy clerk regarding the issuance of a marriage license[4] as well as responsibilities subsequent to such issuance.[5] A marriage performed "under a license issued in this Commonwealth" cannot be adjudged to be void "on account of any want of authority" in the celebrant, or by "any defect, omission or imperfection in such license."[6] However, this statutory cure is limited to the status of the celebrant or errors in a properly issued license.[7] Section 20-13 presumes the issuance of a marriage license.[8]

Section 20-90 provides that:

> When the validity of any marriage shall be denied or doubted by either of the parties, the other party may institute a suit for affirmance of the marriage, and upon due proof of the validity thereof, it shall be deemed to be valid, and such decree shall be conclusive upon all persons concerned.

Based on the facts you present, it appears that the parties could not provide "due proof of the validity"[9] because no marriage licenses were issued. Without the statutorily required proof, a court is without authority to decree the marriage to be valid.

Further, I find no authority for a court to exercise "equitable authority" to affirm marriages. The Court of Appeals of Virginia has held that "the law of Virginia *must* be applied to determine the question of validity of the marriage within this state."[10] For a court to declare a "marriage" when no license was issued would not be an affirmation of a marriage. Such an action would be the creation of a marriage. I find no such broad grant of authority to Virginia's courts.

Finally, you ask whether a court may order a clerk to issue a marriage license under these circumstances. A circuit court judge has the authority to issue a license only when "neither the clerk nor deputy clerk is able to issue the license."[11] It is well settled that "the primary objective of statutory construction is to ascertain and give effect to legislative intent."[12] When the language of a statute is plain and unambiguous, courts are bound by the plain meaning of that language.[13] Thus, a circuit court judge may

issue a marriage license only when the clerk or deputy clerks are unable to issue the license. A court has no other statutory or equitable authority to issue or direct the issuance of a license.

CONCLUSION

Accordingly, it is my opinion that a court does not have the statutory or equitable authority to affirm marriages that were not performed under a license of marriage. Further, it is my opinion that a court may not direct a circuit court clerk to issue marriage licenses retrospectively under these circumstances.

[1] VA. CODE ANN. § 20-13 (2008).

[2] Offield v. Davis, 100 Va. 250, 263, 40 S.E. 910, 914 (1902).

[3] "If any person knowingly perform[s] the ceremony of marriage without lawful license, or officiate[s] in celebrating the rites of marriage without being authorized by law to do so, he shall be confined in jail not exceeding one year, and fined not exceeding $500." Section 20-28 (2008).

[4] *See* § 20-14.2 (2008) (providing that certain health information be furnished to marriage applicants); § 20-15 (2008) (directing clerk to collect license tax); § 20-16 (2008) (requiring clerk to take oath).

[5] *See* § 20-20 (2008) (providing that clerk shall file and preserve returned licenses and certificates and index names of parties); § 20-21 (2008) (mandating that clerk compile list of all marriage licenses issued during calendar year that were not returned by celebrant and to furnish list to Commonwealth's attorney).

[6] Section 20-31 (2008).

[7] *See* 1982-1983 Op. Va. Att'y Gen. 336, 337.

[8] I note that § 20-16.1 allows a clerk, under certain circumstances, to amend marriage records. However, § 20-16.1 also presumes the issuance of a license.

[9] Section 20-90 (2008).

[10] Hager v. Hager, 3 Va. App. 415, 416, 349 S.E.2d 908, 909 (1986) (emphasis added).

[11] Section 20-14 (2008).

[12] Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983).

[13] Cummings v. Fulghum, 261 Va. 73, 77, 540 S.E.2d 494, 496 (2001).

OP. NO. 08-085

EDUCATION: PROGRAMS, COURSES OF INSTRUCTION, ETC. – SPECIAL EDUCATION.

PERSONS WITH DISABILITIES: RIGHTS OF PERSONS WITH DISABILITIES.

School board, charged with responsibility to operate and supervise public schools, is appropriate arbiter to resolve dispute over transportation of pupils. Decision to permit two students to ride separate buses is not unreasonable or unlawful.

THE HONORABLE JILL H. VOGEL
MEMBER, SENATE OF VIRGINIA
MARCH 18, 2009

ISSUE PRESENTED

You ask which of two students has the superior right to ride a school bus when one student has a service dog and the other student is allergic to dogs.

RESPONSE

It is my opinion that a school board, charged with the responsibility to operate and supervise the public schools, is the appropriate arbiter to resolve a dispute over transportation of pupils. It further is my opinion that based on the facts you present, the decision to permit the two students to ride separate buses is not unreasonable or unlawful.[1]

BACKGROUND

You state that two students who attend the same public school potentially would ride the same bus to school. Student A is a student with a disability and has been diagnosed with Asperger's Syndrome, an autism spectrum disorder. Student A, who receives education services as prescribed in an individual education plan ("IEP"), is assisted by a service dog although his IEP does not require the use of a service animal. The school division permits the service dog to accompany Student A on the special education school bus; however, his parents have requested that he ride a regular school bus with his service dog. You state that Student B has a "severe" allergy to dogs, and his parents have requested that the service dog not be permitted on the regular school bus. You relate that the school division has considered other options, such as a modification of bus routes, but it does not have a cost effective alternative to permit both students to ride regular, but separate, school buses.

APPLICABLE LAW AND DISCUSSION

As a student with a disability, Student A is afforded the rights provided under the federal Individuals with Disabilities Education Act[2] ("IDEA"). The centerpiece of these rights is a "free and appropriate public education."[3] A student's achievement goals, the educational services to be provided, and the criteria for evaluating progress are contained in the student's IEP.[4] You state the IEP for Student A does not include the use of a service animal. Therefore, under IDEA, the school division is not obligated to provide or accommodate the service dog used by Student A.

Although IDEA does not require the school division to provide or accommodate a service animal, other provisions of law must be considered. Section 51.5-44(B) of the *Code of Virginia* enumerates certain rights of persons with disabilities, which include

> full and equal accommodations, advantages, facilities, and privileges of all common carriers, airplanes, motor vehicles, railroad trains, motor buses, streetcars, subways, boats or any other public conveyances or modes of transportation, restaurants, hotels, lodging places, places of public accommodation, amusement or resort, *public entities including schools*, and other places to which the general public is invited subject only to the conditions and limitations established by law and applicable alike to all persons. [Emphasis added.]

In addition, any "disabled person shall have the right to be accompanied by a dog, trained as a service dog, in a harness, backpack, or vest identifying the dog as a trained service dog" in any of the places listed in § 51.5-44(B).[5] For purposes of this opinion, I assume that Student A's service animal is trained and wears the appropriate equipment to identify it as a service dog. Accordingly, Student A is entitled to be accompanied at school by his service dog. Based on the facts you provide, it appears the school division has complied with the requirements of § 51.5-44.

The school division has permitted Student A's service dog to accompany him on the school bus. Therefore, it is not necessary for me to opine whether such transportation to and from school is a means of transportation within the meaning of § 51.5-44. However, I note that state law requires school divisions to provide transportation to school at no cost for students with disabilities when "enrolled in and attending a special education program" provided pursuant to § 22.1-216 or § 22.1-218 "if such transportation is necessary" for the student to obtain the educational benefit.[6] Apart from that exception, state law permits but does not *require* school divisions to provide transportation to students.[7]

I find no provision of state or federal law that applies to the situation you describe, nor do I find any case law on point. You offer a number of arguments and documents proposed by the two sides in this dispute; however, none are controlling.

Some disputes between parties are best resolved by appealing to reason and compromise and not by recourse to laws and the court system. A local school board has the power to operate, maintain, and supervise the public schools.[8] Therefore, the school board is the appropriate arbiter to resolve the dispute.[9] The solution reached permits the students to ride separate buses to school. Although the parent of one student is not pleased with the solution, I find no statutory law or case law to suggest that the compromise is unlawful.

CONCLUSION

Accordingly, it is my opinion that a school board, charged with the responsibility to operate and supervise the public schools, is the appropriate arbiter to resolve a dispute over transportation of pupils. It further is my opinion that based on the facts you present, the decision to permit the two students to ride separate buses is not unreasonable or unlawful.[10]

[1]Attorneys General defer to interpretations of the agency charged with administering law unless the agency's interpretation clearly is wrong. *See, e.g.*, 2002 Op. Va. Att'y Gen. 293, 294 and opinions cited therein.

[2]*See* 20 U.S.C.A. §§ 1400 to 1482 (2000 & Supp. 2008) (codified in scattered sections).

[3]*Id.* § 1412(a)(1)(A) (Supp. 2008).

[4]*See id.* § 1414(d)(1)(A) (Supp. 2008).

[5]VA. CODE ANN. § 51.5-44(E) (Supp. 2008). "As used in [Chapter 9], *'service dog'* means a dog trained to accompany its owner or handler for the purpose of carrying items, retrieving objects, pulling a wheelchair, alerting the owner or handler to medical conditions, or other such activities of service or support necessary to mitigate a disability." *Id.*

[6]*See* VA. CODE ANN. § 22.1-221(A) (2006).

[7]*See* § 22.1-176(A) (2006).

[8]*See* Bradley v. Sch. Bd., 462 F.2d 1058, 1067 (4th Cir. 1972), *aff'd* 412 U.S. 92 (1973).

[9]*See id.*; *see also supra* note 1.

[10]*See supra* note 1.

OP. NO. 09-022

EDUCATION: PROGRAMS, COURSES OF INSTRUCTION, ETC. – TEXTBOOKS.

ADMINISTRATION OF GOVERNMENT: DEPARTMENT OF LAW – GENERAL PROVISIONS (OFFICIAL OPINIONS OF ATTORNEY GENERAL).

Local school board may select and use textbooks that are not approved by Board of Education, provided it complies with Board's regulations governing such selection. Local school board must give 'official approval' of criteria to be used for review and assessment of textbooks at local level. Attorney General declines to respond to factual determination of whether evaluation committee had 'official approval.'

THE HONORABLE ROBERT G. MARSHALL
MEMBER, HOUSE OF DELEGATES
JULY 27, 2009

ISSUE PRESENTED

You ask whether the Prince William County School Board complied with the regulations of the State Board of Education concerning the adoption of textbooks, which require textbook evaluation criteria to have the "official approval" of the local board.

RESPONSE

It is my opinion that a local school board may select and use textbooks that are not approved by the Board of Education, provided it complies with the Board's regulations governing such selection. It further is my opinion that a local school board must give "official approval" of criteria to be used for review and assessment of textbooks at the local level. Finally, it is my opinion that whether the evaluation committee in this instance had "official approval" is a factual determination, and I must decline to respond.[1]

BACKGROUND

You relate that in 2006, the Prince William County School Board ("School Board") adopted the textbook series "Investigations in Number, Data, and Space" for use as the primary math text in kindergarten through the fifth grade. Further, you note that the State Board of Education[2] ("State Board") has approved the "Investigations" texts for use in kindergarten through the fourth grade.

The School Board has established an instruction/regulation governing the selection process for the adoption of state and local textbooks:

> [II.] D. Develop evaluative criteria to be used by committees in textbook examination and selection. Textbook evaluation shall include but not be limited to: alignment with the Virginia Standards of Learning and the Prince William County Public Schools' curriculum; factual accuracy; a logical sequence of instruction; age/grade/reading level appropriateness; and freedom from ethnic, racial, sex, religious, age, and political bias.[3]

You state that the School Board adopted the "Investigations" text for use in the fifth grade. You note that at least one parent has expressed concern about this decision and has asserted that the criteria did not have the "official approval" of the School Board. The parent contends that the School Board has failed to comply with the regulations of the State Board.

APPLICABLE LAW AND DISCUSSION

The Constitution of Virginia "apportions various responsibilities for the creation and maintenance of Virginia's system of public education among the General Assembly, the State Board of Education, and the local school boards."[4] Article VIII of the Virginia Constitution vests the broader, statewide responsibilities in the General Assembly,[5] in the State Board,[6] and in the Superintendent of Public Instruction.[7] Article VIII, § 7, provides that "[t]he supervision of schools in each school division shall be vested in a school board."[8] The constitutional scheme for public education makes the authority and responsibilities of local school boards subject to direction and limitation from the State Board and the General Assembly.

Consistent with this triune scheme, the General Assembly enacted § 22.1-238, which provides, in relevant part, that:

> A. The Board of Education shall have the authority to approve textbooks suitable for use in the public schools and shall have authority to approve instructional aids and materials for use in the public schools. The Board shall publish a list of all approved textbooks on its website and shall list the publisher and the current lowest wholesale price of such textbooks.
>
> B. Any school board may use textbooks not approved by the Board provided the school board selects such books in accordance with regulations promulgated by the Board.

Pursuant to § 22.1-238,[9] the State Board has promulgated regulations (the "Regulations") governing the adoption of textbooks by local school boards, including textbooks that have not been approved by the State Board.[10] The Regulations set forth the substantive and procedural requirements for such adoption.[11] These procedural

requirements include the local board's appointment of an evaluation committee, which shall first consider the state-approved textbooks.[12] The Regulations also address the standards by which the local evaluation committee will measure textbooks: "Criteria to be used by the evaluation committee in the review and assessment of textbooks must have the official approval of the local school board."[13]

As previously noted, the State Board has approved the "Investigations" texts for use in kindergarten through the fourth grade. No further action by a local board is required for the use of textbooks that have been approved by the State Board.[14] State law permits local school boards to approve the use of textbooks that have not been approved by the State Board, provided the local boards comply with regulations adopted by the State Board.[15] The School Board directs the curriculum supervisor in the content area to develop evaluative criteria to be used by the committees charged with the evaluation of textbooks.[16]

This Office has received information from you as well as unsolicited information from other sources related to the textbook approval by the School Board. Based on the information that was received, it is unclear what actually occurred at the School Board level.

Whether the criteria used by the evaluation committee had the "official approval" of the local board is dependent upon the facts. This Office historically has declined to render opinions that involve determinations of fact rather than questions of law.[17] It also is important to recognize that any inquiry into whether a local school board has complied with the Regulations of the State Board appropriately is the province of the State Board. An administrative agency's interpretation of its own enabling authority, while not absolute, is entitled to reasonable deference.[18]

CONCLUSION

Accordingly, it is my opinion that a local school board may select and use textbooks that are not approved by the Board of Education, provided it complies with the Board's regulations governing such selection. It further is my opinion that a local school board must give "official approval" of criteria to be used for review and assessment of textbooks at the local level. Finally, it is my opinion that whether the evaluation committee in this instance had "official approval" is a factual determination, and I must decline to respond.[19]

[1]Although I decline to respond to the specific question, I have offered general guidance concerning the Commonwealth's statutes and regulations governing the adoption of textbooks.

[2]*See* VA. CODE ANN. § 22.1-8 (2006) (vesting general supervision of schools in Board).

[3]*See* Prince William County Public Schools, Regulation 653-2, INSTRUCTION, pt. II(D), at *2 (Sept. 22, 2004), *available at* http://www.pwcs.edu/admin/pwcs/admin_pdfs/R653-2.pdf [hereinafter "Instruction"].

[4]Dennis v. County Sch. Bd., 582 F. Supp. 536, 543 (W.D. Va. 1984).

[5]VA. CONST. art. VII, §§ 1–3.

[6]*Id.*, §§ 2, 4, 5.

[7]*Id.*, § 6.

[8]*See also* § 22.1-28 (2006) (parallel statute).

[9]*See also* § 22.1-16 (2006) (granting authority to State Board to promulgate regulations necessary to carry out its powers and duties).

[10]8 VA. ADMIN. CODE §§ 20-230-10 to 20-230-40 (2002).

[11]*Id.* §§ 20-230-30, 20-230-40.

[12]*Id.* §20-230-30(1), (3).

[13]*Id.* § 20-230-30(5).

[14]*See* § 22.1-238(A) (Supp. 2009); 8 VA. ADMIN. CODE § 20-230-20.

[15]See § 22.1-238(B).

[16]*See supra* note 3 and accompanying text.

[17]*See* 1991 Op. Va. Att'y Gen. 122, 124.

[18]*See* 1991 Op. Va. Att'y Gen. 157, 158.

[19]*See supra* note 1.

OP. NO. 09-081

ELECTIONS: ELECTION DISTRICTS, PRECINCTS, POLLING PLACES – REQUIREMENTS FOR ELECTION DISTRICTS, PRECINCTS, AND POLLING PLACES.

Section 24.2-310(D) governs process required to move polling place based on emergency. General Assembly requires that emergency exists that makes polling place unusable or inaccessible, local electoral board must select alternative polling place and obtain approval of State Board of Elections for declaration of emergency and alternative polling place. If State Board approves emergency and alternative polling place, local board must notify voters of change.

THE HONORABLE DAVID A. NUTTER
MEMBER, HOUSE OF DELEGATES
OCTOBER 16, 2009

ISSUE PRESENTED

You ask, under Virginia law, what process is required to move a polling place based on an emergency.[1]

RESPONSE

It is my opinion that the Virginia law governing the process required to move a polling place based on an emergency is found in § 24.2-310(D). The General Assembly requires that: (i) there be an emergency that makes a polling place unusable or inaccessible; (ii) the local electoral board select an alternative polling place; (iii) the local electoral board obtain the approval of the State Board of Elections for both the declaration of emergency and the alternative polling place; and (iv) if the State Board of Election approves the emergency and the alternative polling place, the local electoral board must give notice to the voters of the change in polling place that is appropriate to the circumstances of the emergency.

APPLICABLE LAW AND DISCUSSION

Generally, a local governing board is statutorily authorized to alter the boundaries of voting precincts or polling places at any time other than within sixty days before any general election.[2] However, in § 24.2-310(D), the General Assembly provides an exception to the sixty-day prohibition[3] against changes in local polling places before a general election:

> If an emergency makes a polling place unusable or inaccessible, the electoral board shall provide an alternative polling place and give notice of the change in polling place, subject to the prior approval of the State Board. The electoral board shall provide notice to the voters appropriate to the circumstances of the emergency.

The General Assembly does not define the terms "emergency," "unusable," and "inaccessible" as used in § 24.2-310(D) or in Title 24.2. When a term is not defined by the General Assembly, it must be given its ordinary meaning.[4] The term emergency means "an unforeseen combination of circumstances or the resulting state that calls for immediate action."[5] The term unusable means "not serviceable: USELESS,"[6] and the term inaccessible means "not accessible … not capable of being reached."[7]

When a statute is expressed in plain and unambiguous terms, whether general or limited, it is assumed that the General Assembly means what it plainly has expressed, and no room is left for construction.[8] Consequently, when an unforeseen combination of circumstances makes a polling place useless or not accessible, the General Assembly requires the local electoral board to provide an alternative polling place "subject to the prior approval of the State Board."[9]

Should the State Board approve of both the emergency declared by and the alternative polling place selected by the local electoral board, the General Assembly requires that the local board "give notice of the change in polling place," which must be "appropriate to the circumstances of the emergency."[10]

It is well-established that statutes are not to be read in isolation.[11] Furthermore, statutes relating to the same subject should be considered *in pari materia*.[12] Moreover, statutes dealing with the same subject matter should be construed together to achieve a harmonious result, resolving conflicts to give effect to legislative intent.[13] The use of an alternative polling place arises from an emergency declared by the local electoral board that is approved by the State Board.[14] Therefore, such polling place would be used only for the duration of time that the original polling place is unusable or inaccessible. The local electoral board is the entity that selects the alternative polling place and gives notice to the voters[15] rather than the board of supervisors or city council, which are otherwise required by the General Assembly to establish by ordinance all voting precincts that are required within the county or city.[16] While Attorneys General consistently have declined to render official opinions on specific factual matters,[17] the statutory language regarding "emergency" for purposes of § 24.2-310(D) implies that an event would be rare and unforeseen.[18]

CONCLUSION

Accordingly, it is my opinion that the Virginia law governing the process required to move a polling place based on an emergency is found in § 24.2-310(D). The General Assembly requires that: (i) there be an emergency that makes a polling place unusable or inaccessible; (ii) the local electoral board select an alternative polling place; (iii) the local electoral board obtain the approval of the State Board of Elections for both the declaration of emergency and the alternative polling place; and (iv) if the State Board of Election approves the emergency and the alternative polling place, the local electoral board must give notice to the voters of the change in polling place that is appropriate to the circumstances of the emergency.

[1]I have not addressed any federal requirements that may be related to changes of polling places. Virginia is subject to the federal Voting Rights Act of 1965, which requires changes in practice or procedure related to elections to be submitted to the Department of Justice for review and evaluation. *See generally* 2005 Op. Va. Att'y Gen. 97.

[2]*See* 2006 Op. Va. Att'y Gen. 119 (interpreting §§ 24.2-305(A), 24.2-306(A), and 24.2-307 related to voting precincts). I note that § 24.2-306(A) also applies to changes in polling places. It is my opinion that the analysis applicable to changes in voting precincts equally applies to changes in polling places.

[3]*See* VA. CODE ANN. § 24.2-306(A) (2006) (prohibiting changes in local voting precincts "within 60 days next preceding any general election").

[4]*See* McKeon v. Commonwealth, 211 Va. 24, 27, 175 S.E.2d 282, 284 (1970).

[5]WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 741 (1993).

[6]*Id.* at 2514.

[7]*Id.* at 1139.

[8]South Hill v. Allen, 177 Va. 154, 165, 12 S.E.2d 770, 774 (1941).

[9]Section 24.2-310(D) (Supp. 2009). For purposes of Title 24.2, "State Board" means the State Board of Elections. *See* § 24.2-101 (Supp. 2009).

[10]Section 24.2-310(D).

[11]2B NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 51:2 (West 7th ed. 2008); Op. Va. Att'y Gen.: 1999 at 22, 22; 1998 at 123, 124; *id.* at 19, 21; 1996 at 197, 198; 1995 at 146, 147; 1993 at 160, 162; *id.* at 135, 137; 1992 at 108, 112.

[12]*See* Prillaman v. Commonwealth, 199 Va. 401, 405-06, 100 S.E.2d 4, 7-8 (1957); 1996 Op. Va. Att'y Gen. 134, 135. "*In pari materia*" is the Latin phrase meaning "[o]n the same subject; relating to the same matter." BLACK'S LAW DICTIONARY 862 (9th ed. 2009).

[13]*See* 2A SINGER & SINGER, *supra* note 11, at § 46:5 (West 7th ed. 2007); 2000 Op. Va. Att'y Gen. 182, 185.

[14]*See* § 24.2-310(D).

[15]*Id.*

[16]*See* § 24.2-307 (2006).

[17]*See, e.g.*, 2002 Op. Va. Att'y Gen. 321, 325 and opinions cited therein.

[18]*See supra* notes 5-7 and accompanying text. You describe a situation where the potential problem with the original polling place was identified as early as November 2008. The fact that a local electoral board has waited until the present time to address the issue with such polling place is troubling because it has the effect of avoiding the application of § 24.2-306(A), which prohibits the enactment of a change in a local polling place "within 60 days next preceding any general election."

OP. NO. 09-076

HEALTH: DISEASE AND PREVENTION CONTROL – DISEASE CONTROL MEASURES.

PROFESSIONS AND OCCUPATIONS: DRUG CONTROL ACT.

Authority for EMS providers to administer vaccinations for H1N1 flu or seasonal flu only when designated and authorized by State Health Commissioner in accordance with §§ 32.1-42.1 and 54.1-3408(P).

THE HONORABLE H. MORGAN GRIFFITH
MEMBER, HOUSE OF DELEGATES
OCTOBER 23, 2009

ISSUE PRESENTED

You ask whether Virginia law permits emergency medical services ("EMS") providers[1] to administer the H1N1 and seasonal flu vaccinations under the guidance of their respective operational medical directors.

RESPONSE

It is my opinion that emergency medical service providers may only administer vaccinations for the H1N1 flu or the seasonal flu when designated and authorized by the State Health Commissioner in accordance with §§ 32.1-42.1 and 54.1-3408(P).

APPLICABLE LAW AND DISCUSSION

The issues you raise are questions requiring the interpretation of Virginia statutes. It is well settled that "the primary objective of statutory construction is to ascertain and give effect to legislative intent."[2] "The plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction."[3] When the language of a statute is plain and unambiguous, a court is bound by the plain meaning of that language.[4] It is presumed "that the General Assembly acted with full knowledge of the law in the area in which it dealt."[5] The courts "assume that the legislature chose, with care, the words it used when it enacted the relevant statute."[6]

The Drug Control Act[7] governs the administration of certain drugs and vaccinations. The only provision of the Act that addresses EMS providers is § 54.1-3408(B), which provides, in part, that

> a prescriber[8] may cause drugs and devices to be administered to patients by emergency medical services personnel who have been certified and authorized to administer such drugs and devices pursuant to Board of Health regulations governing emergency medical services and who are acting within the scope of such certification.

The regulations promulgated by the Board of Health define "emergency medical services" or "EMS" to mean:

> *the services used in responding to an individual's perceived needs for immediate medical care in order to prevent loss of life or aggravation of physiological or psychological illness or*

> *injury* including all of the services that could be described as first response, basic life support, advanced life support, neonatal life support, communications, training and medical control.[9]

Article 2.1, Chapter 4 of Title 32.1, §§ 32.1-111.1 through 32.1-111.15 (codified in scattered sections), contains Virginia's laws governing statewide emergency medical services. Section 32.1-111.1 of Article 2.1 defines "emergency medical services personnel" to mean "persons responsible for the direct provision of emergency medical services in a given medical emergency." Consequently, EMS providers may only provide emergency medical services in an emergency situation and may only administer drugs when responding to an individual's need for "immediate medical care."[10] While EMS providers, such as certified paramedics and advanced life support providers, administer drugs, and start intravenous fluids, they do so in the provision of "immediate medical care" to "prevent loss of life or aggravation of physiological or psychological illness or injury."[11] It strains the definition to assert that the administration of the H1N1 and seasonal flu vaccination may be construed as a requirement for an individual's "immediate medical care."

The General Assembly clearly intends that the Drug Control Act limit the persons who are authorized to administer vaccinations. Section 54.1-3408 of the Act specifically authorizes the administration of vaccinations by certain individuals:

> I. *A prescriber may authorize*, pursuant to a protocol approved by the Board of Nursing, *the administration of vaccines to adults for immunization, when a practitioner with prescriptive authority is not physically present,* (i) *by licensed pharmacists,* (ii) *by registered nurses, or* (iii) *licensed practical nurses under the immediate and direct supervision of a registered nurse*. A prescriber acting on behalf of and in accordance with established protocols of the Department of Health may authorize the administration of vaccines to any person by a pharmacist or nurse when the prescriber is not physically present.
>
> ….
>
> P. In addition, this section shall not prevent the administration or dispensing of drugs[12] … by persons if they are authorized by the State Health Commissioner in accordance with protocols established by the State Health Commissioner pursuant to § 32.1-42.1 (i) *when the Governor has declared a disaster or a state of emergency or the United States Secretary of Health and Human Services has issued a declaration of an ... actual or potential public health emergency;* (ii) *it is necessary to permit the provision of needed drugs or devices; and* (iii) *such persons have received the training necessary to safely administer or dispense the needed drugs or devices. Such persons shall administer or*

> *dispense all drugs or devices under the direction, control and supervision of the State Health Commissioner*.
>
> ….
>
> T. *Persons who are otherwise authorized to administer controlled substances in hospitals shall be authorized to administer influenza or pneumococcal vaccines pursuant to § 32.1-126.4*.
>
> ….
>
> W. *A prescriber*, acting in accordance with guidelines developed pursuant to § 32.1-46.02, *may authorize the administration of influenza vaccine to minors by a licensed pharmacist, registered nurse, or licensed practical nurse under the direction and immediate supervision of a registered nurse, when the prescriber is not physically present*. [Emphasis added.]

The General Assembly did not specifically authorize EMS providers to administer vaccinations through the Drug Control Act. The Supreme Court of Virginia has held that "'[w]hen a legislative enactment limits the manner in which something may be done, the enactment also evinces the intent that it shall not be done another way.'"[13] The General Assembly expressly states the persons authorized to administer vaccinations and the circumstances under which EMS providers may administer drugs. Thus, EMS providers generally are not authorized to administer vaccinations such as the seasonal flu vaccine.

Although the Drug Control Act does not authorize EMS providers to administer H1N1 and seasonal flu vaccinations under normal conditions, there are circumstances which may permit EMS providers to administer such vaccinations. Section 32.1-42.1 permits the State Health Commissioner (the "Commissioner") to authorize persons, which would include EMS providers, to administer vaccinations in accordance with established protocols:

> *when* (i) *the Governor has declared a disaster or a state of emergency or the United States Secretary of Health and Human Services has issued a declaration of an actual or potential bioterrorism incident or other actual or potential public health emergency;* (ii) *it is necessary to permit the provision of needed drugs or devices; and* (iii) *such persons have received the training necessary to safely administer or dispense the needed drugs or devices. Such persons shall administer or dispense all drugs or devices under the direction, control and supervision of the Commissioner*. For purposes of this section, "administer," "device," "dispense," and "drug"[14] shall have the same meaning as provided in § 54.1-3401. The Commissioner shall develop protocols, in consultation with the Department of Health Professions, that address the required

> training of such persons and procedures for such persons to use in administering or dispensing drugs or devices.[15] [Emphasis added.]

Thus, the Commissioner may authorize EMS providers to dispense and administer vaccinations when: (1) it is in response to a declared state of emergency or declared public health emergency;[16] (2) it is necessary to permit the provision of the vaccinations; and (3) EMS providers have received the necessary training to administer the drugs. Should the Commissioner authorize EMS providers to administer such vaccinations, they would be under the "direction, control and supervision of the"[17] Commissioner, not that of their respective EMS agency's operational medical directors.

CONCLUSION

Accordingly, it is my opinion that emergency medical service providers may only administer vaccinations for the H1N1 flu or the seasonal flu when designated and authorized by the State Health Commissioner in accordance with §§ 32.1-42.1 and 54.1-3408(P).

[1]For purposes of this opinion, an EMS provider is "a person who holds a valid certification issued by the Office of EMS." 12 VA. ADMIN. CODE § 5-31-10 (2008).

[2]Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983).

[3]Commonwealth v. Zamani, 256 Va. 391, 395, 507 S.E.2d 608, 609 (1998).

[4]Cummings v. Fulghum, 261 Va. 73, 77, 540 S.E.2d 494, 496 (2001); Earley v. Landsidle, 257 Va. 365, 370, 514 S.E.2d 153, 155 (1999); Ragan v. Woodcroft Vill. Apartments, 255 Va. 322, 326, 497 S.E.2d 740, 742 (1998).

[5]Philip Morris USA, Inc. v. Chesapeake Bay Found., Inc., 273 Va. 564, 576, 643 S.E.2d 219, 225 (2007).

[6]Barr v. Town & Country Props., Inc., 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990); *see also* Jackson v. Fid. & Deposit Co., 269 Va. 303, 313, 608 S.E.2d 901, 906 (2005) (noting assumption that legislature chooses, with care, words that it uses).

[7]VA. CODE ANN. §§ 54.1-3400 to 54.1-3472 (2009) (codified in scattered sections).

[8]A "prescriber" is "a practitioner who is authorized pursuant to §§54.1-3303 and 54.1-3408 to issue a prescription." Section 54.1-3401.

[9]12 VA. ADMIN. CODE § 5-31-10 (emphasis added).

[10]*Id.*

[11]*Id.*

[12]"*'Drug'* means … articles or substances intended for use in the diagnosis, cure, *mitigation*, treatment or *prevention* of disease[.]" Section 54.1-3401 (emphasis added). It is my opinion that in the context of mitigation and prevention of disease, a vaccination for influenza would meet the definition of a drug.

[13]Commonwealth v Brown, 259 Va. 697, 705, 529 S.E.2d 96, 100 (2000) (quoting Grigg v. Commonwealth, 224 Va. 356, 364, 297 S.E.2d 799, 803 (1982) (explaining maxim *expressio unius est exclusio alterius*)).

[14]*See supra* note 12.

[15]I note that the language in § 32.1-42.1 mirrors that of § 54.1-3408(P) regarding public health emergencies.

[16]I note that the United States Secretary of Health and Human Services has issued a declaration determining "that 2009 H1N1 influenza constitutes a public health emergency." 74 Fed. Reg. 51153, 51156 (Oct. 5,

2009), *available at* http://frwebgate3.access.gpo.gov/cgi-bin/PDFgate.cgi?WAISdocID=26046013077+2+2+0&WAISaction=retrieve.

[17] Sections 32.1-42.1, 54.1-3408(P).

OP. NO. 08-081

HIGHWAYS, BRIDGES AND FERRIES: OUTDOOR ADVERTISING IN SIGHT OF HIGHWAYS – GENERAL REGULATIONS.

Political campaign signs generally may not be posted within state highway rights-of-way. Fairfax County may enter into an agreement with Commonwealth Transportation Commissioner to enforce § 33.1-373.

THE HONORABLE DAVID S. EKERN
COMMISSIONER, VIRGINIA DEPARTMENT OF TRANSPORTATION
FEBRUARY 2, 2009

ISSUE PRESENTED

You ask for clarification of an opinion issued July 28, 2008, to David Bobzien[1] (the "2008 Opinion"). Specifically, you ask whether the 2008 Opinion has general application throughout the Commonwealth or whether it applies only to agreements between the Commonwealth Transportation Commissioner and Fairfax County under § 33.1-375.1.

RESPONSE

It is my opinion that only Fairfax County is authorized to enter into an agreement with the Commonwealth Transportation Commissioner to enforce the provisions of § 33.1-373 as addressed in the 2008 Opinion.[2]

APPLICABLE LAW AND DISCUSSION

The General Assembly has enacted Article 1, Chapter 7 of Title 33.1, §§ 33.1-351 through 33.1-378 ("Article 1"), of the Outdoor Advertising in Sight of Public Highways Act (the "Act") to govern outdoor advertising in and adjacent to highway rights-of-way. Section 33.1-351 establishes the overall policy implemented by the Act and provides, in part, that:

> In order to promote the safety, convenience, and enjoyment of travel on and protection of the public investment in highways within this Commonwealth, to attract tourists and promote the prosperity, economic well-being, and general welfare of the Commonwealth, and to preserve and enhance the natural scenic beauty or aesthetic features of the highways and adjacent areas, the General Assembly declares it to be the policy of the Commonwealth that the erection and maintenance of outdoor advertising *in areas adjacent to the rights-of-way* of the highways within the Commonwealth shall be regulated in accordance with the terms of [Article 1] and regulations promulgated by the Commonwealth Transportation Board pursuant thereto. [Emphasis added.]

Additionally, § 33.1-351 defines the following terms used in Article 1:

> The following terms, wherever used or referred to in [Article 1], shall have the following meanings *unless a different meaning clearly appears from the context*:
>
> *"Advertisement"* means any writing, printing, picture, painting, display, emblem, drawing, sign, or similar device which is posted 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 manufactured, produced, bought, sold, conducted, furnished, or dealt in by any person; the term shall also include any part of an advertisement recognizable as such.
>
> ….
>
> *"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. [Emphasis added.]

Section 33.1-12(3) empowers the Commonwealth Transportation Board (the "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." (Emphasis added.) 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.[3] Section 33.1-369(13) provides that no advertisement or advertising structure shall be erected, maintained, or operated if it is inconsistent with regulations adopted by the Board.

Section 33.1-375 provides that:

> Any *sign*, advertisement or advertising structure which is erected, used, maintained, operated, posted or displayed *in violation of §§ 33.1-369*, 33.1-370, or § 33.1-372 or *for which no permit has been obtained where such is required,* or after revocation or more than thirty days after expiration of a permit, or which, whether or not excepted under the provisions of § 33.1-355, is not kept in a good general condition and in a reasonably good state of repair and is not, after thirty days' written notice to the person erecting,

> using, maintaining, posting or displaying the same, put into good general condition and in a reasonably good state of repair, *is hereby declared to be a public and private nuisance and may be forthwith removed, obliterated or abated by the Commissioner or his representatives.* The Commissioner may collect the cost of such removal, obliteration or abatement from the person erecting, using, maintaining, operating, posting or displaying such sign, advertisement or advertising structure. [Emphasis added.]

Section 33.1-373, regarding placement of advertisements within the limits of any state highway, provides that:

> Any person who in any manner (i) paints, prints, places, puts or affixes any advertisement upon or to any rock, stone, tree, fence, stump, pole, …or other object *lawfully within the limits of any highway* or (ii) erects, paints, prints, places, puts, or affixes any advertisement *within the limits of any highway* shall be assessed a civil penalty of $100.… Advertisements placed *within the limits of the highway* are hereby declared a public and private nuisance and may be forthwith removed, obliterated, or abated by the Commonwealth Transportation Commissioner or his representatives without notice….
>
> The provisions of this section shall not apply to signs or other outdoor advertising regulated under Chapter 7 (§ 33.1-351 et seq.) of [Title 33.1]. [Emphasis added.]

Section 33.1-378 provides that Article 1 "shall be liberally construed with a view to the effective accomplishment of its purposes." Prior to the 1993 Session of the General Assembly, § 33.1-351 defined the term "advertisement" to mean

> any writing, printing, picture, painting, display, emblem, drawing, sign, or similar device which is posted 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, property, real or personal, business, services, entertainment or amusement manufactured, produced, bought, sold, conducted, furnished or dealt in by any person *or for any political party or for the candidacy of any individual for any nomination or office*; the term shall also include any part of an advertisement recognizable as such[.] [Emphasis added.][4]

A primary goal of statutory interpretation is to ascertain the intent of the General Assembly.[5] In addition, statutes pertaining to the same subject should be considered *in pari materia*.[6] While the 1993 Session of the General Assembly deleted political campaign signs from the definition of "advertisement" in § 33.1-351,[7] this is not

necessarily dispositive of whether political campaign signs may be posted within state highway rights-of-way. Language preceding the definitions contained in § 33.1-351 notes that the defined terms are to have the meanings provided, unless a different meaning appears from the context. In addition, § 33.1-351, which describes the Act's general policy, specifies that the Act is intended to address and regulate outdoor advertising in areas *adjacent* to highway rights-of-way. Unlike most of the provisions in the Act that govern outdoor advertising in areas visible from highways and *adjacent* to highway rights-of-way, § 33.1-373 and, in part, § 33.1-375 govern signs and advertisements *within* the limits of the highway, which would include highway rights-of-way.

Section 33.1-375.1(A) specifically authorizes the Commissioner to enter into such agreements with Fairfax County, but imposes limitations on the authority granted under such an agreement. One such limitation provides that signs and advertising supporting an individual's candidacy for elected public office or other ballot issues are not subject to an agreement between the Commissioner and Fairfax County unless they have been in place for more than three days after the election to which they apply.[8] Section 33.1-375.1(A) also provides that "[s]igns and advertising promoting and/or providing directions to a special event" that remain in place more than three days after the event concludes and other "signs and advertising erected for no more than three days" are not subject to an agreement between the Commissioner and Fairfax County. The foregoing limitation, explicitly noted by the statute, does not apply to an agreement between the Commissioner and any other locality under § 33.1-375.1(D). By prohibiting Fairfax County from enforcing § 33.1-373 for signs and advertising relating to political candidacy and other ballot issues and in characterizing the prohibition as a "limitation" in § 33.1-375.1, it is clear that § 33.1-375.1 contemplates that such signs and advertising and ballot issues are otherwise subject to and governed by § 33.1-373. Section 33.1-375.1(D) expressly limits enforcement of § 33.1-373 by Fairfax County, but does not apply to agreements between the Commissioner and other localities.

CONCLUSION

Accordingly, it is my opinion that only Fairfax County is authorized to enter into an agreement with the Commonwealth Transportation Commissioner to enforce the provisions of § 33.1-373 as addressed in the 2008 Opinion.[9]

[1] *See* 2008 Op. Va. Att'y Gen. 115.

[2] The 2008 Opinion addressed a question that was specific to Fairfax County. To the extent that this opinion is inconsistent with the 2008 Opinion, that opinion is overruled. *See id.*

[3] *See* 24 VA. ADMIN. CODE § 30-20-80 (1996).

[4] *See* VA. CODE ANN. § 33.1-351 (1990).

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

[6] *See* Prillaman v. Commonwealth, 199 Va. 401, 405-06, 100 S.E.2d 4, 7-8 (1957); 1996 Op. Va. Att'y Gen. 134, 135.

[7]*See* 1993 Va. Acts, ch. 538, at 668, 668.

[8]*See* § 33.1-375.1(C)(1) (2005).

[9]*See supra* note 2.

OP. NO. 09-005

MECHANICS' AND CERTAIN OTHER LIENS: MECHANICS' AND MATERIALMEN'S LIENS.

Based upon Supreme Court of Virginia decision, notice stating that owner is notified of filing of lien, which is recorded with general contractor's mechanic's lien which merely indicates on its face that it is addressed to owner at last known address and lists certified mail number, is not sufficient to satisfy strict requirement of § 43-4.

THE HONORABLE KEN CUCCINELLI II
MEMBER, SENATE OF VIRGINIA
JULY 8, 2009

ISSUE PRESENTED

You inquire concerning a notice stating that the owner is notified of the filing of a lien which is recorded with a general contractor's mechanic's lien. Such notice shows on its face that it is addressed to the owner at its last known address and lists the certified mail number, but it does not expressly state that the claimant certifies that the lien was mailed to the owner. Specifically, you ask whether such notice is sufficient to satisfy the statutory requirement of § 43-4 that "[a] lien claimant who is a general contractor … also shall file along with the memorandum of lien, a certification of mailing of a copy of the memorandum of lien."

RESPONSE

It is my opinion, based upon a recent decision of the Supreme Court of Virginia upon which I am bound to rely,[1] that a notice stating that the owner is notified of the filing of a lien which is recorded with a general contractor's mechanic's lien which merely indicates on its face that it is addressed to the owner at its last known address and lists the certified mail number is not sufficient to satisfy the strict statutory requirement of § 43-4 that "[a] lien claimant who is a general contractor … also shall file along with the memorandum of lien, a certification of mailing of a copy of the memorandum of lien."

BACKGROUND

You seek an interpretation of § 43-4 regarding whether a lien can be invalidated for not containing particular certification language if the actual notice is received by the property owner. You relate that a notice, which stated the owner was notified of the filing of a lien, was recorded with a general contractor's mechanic's lien. Further, the notice shows on its face that it was addressed to the owner at his last known address and included the certified mail number. You advise that the notice was mailed certified mail to the property owner, and the owner actually received the notice.

Additionally, you note that § 43-15 protects liens from certain inaccuracies in a memorandum, but you question whether the statute would apply to the certification of mailing required by § 43-4.

APPLICABLE LAW AND DISCUSSION

Section 43-4 provides that:

> A general contractor …, in order to perfect the lien given by § 43-3, … shall file a memorandum of lien at any time after the work is commenced or material furnished …. The memorandum shall be filed in the clerk's office in the county or city in which the building, structure or railroad, or any part thereof is located. The memorandum shall show the names of the owner of the property sought to be charged, and of the claimant of the lien, the amount and consideration of his claim, … and giving a brief description of the property on which he claims a lien.… A lien claimant who is a general contractor … also shall file along with the memorandum of lien, a certification of mailing of a copy of the memorandum of lien on the owner of the property at the owner's last known address.

Statutory language is ambiguous when it may be understood in more than one way.[2] An ambiguity also exists when statutory language lacks clarity and precision, or is difficult to comprehend.[3] "The province of [statutory] construction lies wholly within the domain of ambiguity, and that which is plain needs no interpretation."[4] But when statutory language is clear and unambiguous, the plain meaning and intent of the enactment will be given to it.[5] It is my opinion that § 43-4 is free of any ambiguities.

The Supreme Court of Virginia has stated that "[a] mechanic's lien is purely a creature of statute" and is "in derogation of the common law."[6] As a result, when there are questions concerning the existence and perfection of such a lien, the mechanic's lien statutes must be strictly construed.[7] The reason for such a rule is evident from the priority conferred by statute on a mechanic's lien. Within the parameters set forth in § 43-21, a mechanic's lien "leaps to the head of the class," receiving priority over most other liens. It is a powerful device to secure the payment of monies due and owing. The mere recordation of a memorandum of lien is enough to encumber a piece of property until the question of the lien is resolved.

In determining the existence and perfection of mechanic's liens, the statutes must be strictly construed.[8] The situation you present involves a notice which: (1) stated that the owner was notified of the filing of a lien; (2) is recorded with a general contractor's mechanic's lien; (3) showed on its face that it is addressed to the owner at its last known address; and (4) listed the certified mail number. In 2006 in a substantially similar factual context, the Virginia Supreme Court decided that the certification of mailing requirement contained in § 43-4 must be strictly construed.[9] The Court further concluded that failure to comply with such certification requirement invalidated mechanic's liens where the certifications of mailing were not filed along with the memoranda of liens.[10]

Section 43-15 provides that:

> No inaccuracy in the memorandum filed, or in the description of the property to be covered by the lien, shall invalidate the lien, if the property can be reasonably identified by the description given and the memorandum conforms substantially to the requirements of §§ 43-5, 43-8 and 43-10, respectively, and is not willfully false.

In considering whether the inclusion of an item in a memorandum of mechanic's lien affidavit that represented reimbursement for a fine was an "inaccuracy" within the meaning of § 43-15, the Virginia Supreme Court accepted the definition of the term "inaccuracy" to mean "'the condition of being inaccurate.'"[11] Further, the Court noted the meaning of the word "inaccurate" to be "'not accurate: as … containing a mistake or error: incorrect, erroneous.'"[12]

You describe a situation where a lien did not contain the particular mailing certification language. Clearly, such situation does not meet the definition of "inaccuracy" adopted by the Virginia Supreme Court. Instead, what you describe constitutes an "omission"[13] of a filing specifically required[14] rather than an "inaccuracy." Therefore, it is my opinion that § 43-15 is not applicable.

Therefore, I must conclude that the subject mechanic's lien does not comply with the requirements of § 43-4 although the property owner actually received notice of the lien. Section 43-4 clearly and unambiguously requires that a general contractor "shall file along with the memorandum of lien, a certification of mailing of a copy of the memorandum of lien on the owner of the property at the owner's last known address." Thus, a mechanic's lien may be invalidated for failure to contain such certification of lien notwithstanding the fact that the property owner received actual notice.[15]

CONCLUSION

Accordingly, it is my opinion, based upon a recent decision of the Supreme Court of Virginia upon which I am bound to rely,[16] that a notice stating that the owner is notified of the filing of a lien which is recorded with a general contractor's mechanic's lien which merely indicates on its face that it is addressed to the owner at its last known address and lists the certified mail number is not sufficient to satisfy the strict statutory requirement of § 43-4 that "[a] lien claimant who is a general contractor … also shall file along with the memorandum of lien, a certification of mailing of a copy of the memorandum of lien."

[1] *See* Britt Constr. v. Magazzine Clean, LLC, 271 Va. 58, 623 S.E.2d 886 (2006). I recognize that the response to the issue you present appears harsh. If not for the very specific guidance of the Virginia Supreme Court, a different outcome could be argued. However, the statute, as interpreted by the Court, does not permit a different result.

[2]Supinger v. Stakes, 255 Va. 198, 205, 495 S.E.2d 813, 817 (1998); Va.-Am. Water Co. v. Prince William County Serv. Auth., 246 Va. 509, 514, 436 S.E.2d 618, 621 (1993); Va. Dep't of Labor & Indus. v. Westmoreland Coal Co., 233 Va. 97, 101, 353 S.E.2d 758, 762 (1987).

[3]*Supinger*, 255 Va. at 205, 495 S.E.2d at 817; Lee-Warren v. Sch. Bd., 241 Va. 442, 445, 403 S.E.2d 691, 692 (1991).

[4]Winston v. City of Richmond, 196 Va. 403, 408, 83 S.E.2d 728, 731 (1954).

[5]Brown v. Lukhard, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985).

[6]Rosser v. Cole, 237 Va. 572, 576, 379 S.E.2d 323, 325 (1989).

[7]*Id.*

[8]*Id.*

[9]*Britt Construction*, 271 Va. at 64, 623 S.E.2d at 889.

[10]*Id.* The court was very specific in its direction stating "that the certification of mailing is not merely a notice provision." *Id.* at 63, 623 S.E.2d at 888.

[11]Reliable Constructors, Inc. v. CFJ Props., 263 Va. 279, 281, 559 S.E.2d 681, 682 (2002) (quoting Webster's Third New International Dictionary 1139 (1986)).

[12]*Id.* at 282, 559 S.E.2d at 682 (alteration in original).

[13]"The act of omitting whether by leaving out or by abstention from inserting or by failure to include or perform." Webster's New International Dictionary 1574 (1993). I note that the 1993 edition of the *Webster's* dictionary contains the same definitions for "inaccuracy" and "inaccurate" as the version quoted by the court in *Reliable Constructors*. *See id.* at 1139.

[14]*Britt Construction*, 271 Va. at 63-64, 623 S.E.2d at 888-89.

[15]*See supra* note 1.

[16]*Id.*

OP. NO. 09-018

MINES AND MINING: THE VIRGINIA GAS AND OIL ACT – GAS AND OIL CONSERVATION.

Virginia Gas and Oil Board may issue compulsory pooling orders that permit deduction of post-production costs downstream of wellhead when computing gas owners' one-eighth royalty interests.

MR. BRADLEY C. LAMBERT
CHAIRMAN, VIRGINIA GAS & OIL BOARD
JUNE 10, 2009

ISSUE PRESENTED

You ask whether the Virginia Gas and Oil Board is authorized to issue compulsory pooling[1] orders that permit deduction of post-production costs downstream of the wellhead when computing the gas owners' one-eighth royalty interests.

RESPONSE

It is my opinion that the Virginia Gas and Oil Board may issue compulsory pooling orders that permit deduction of post-production costs downstream of the wellhead when computing gas owners' one-eighth royalty interests.

BACKGROUND

You advise that beginning around 1992, the Virginia Gas and Oil Board[2] (the "Board") has issued compulsory pooling orders that contain the following provision:

> 9.2 Option 2 - To Receive A Cash Bonus Consideration: In lieu of participating in the Well Development and Operation in Subject Drilling Unit under Paragraph 9.1 above, any Gas Owner or Claimant named in Exhibit B-3 hereto who does not reach a voluntary agreement with the Unit Operator may elect to accept a cash bonus consideration of **$____** per net mineral acre owned by such person, commencing upon entry of this Order and continuing annually until commencement of production from Subject Drilling Unit, and thereafter **a royalty of 1/8th of 8/8ths [twelve and one-half percent (12.5%)] of the net proceeds** received by the Unit Operator for the sale of the Coalbed Methane Gas produced from any Well Development and Operation covered by this Order multiplied by that person's Interest in Unit or proportional share of said production **[for purposes of this Order, net proceeds shall be actual proceeds received less post-production costs incurred downstream of the wellhead, including, but not limited to, gathering, compression, treating, transportation and marketing costs, whether performed by Unit Operator or a third person]** as fair, reasonable and equitable compensation to be paid to said Gas Owner or Claimant.

You further state that the Board's legal authority to issue orders providing such allowance for deduction of post-production costs has been challenged by citizens and at least two legislators. You provide a partial copy of the Board's March 17, 2009 meeting transcript where one such challenge was based on the Dillon Rule.

HISTORICAL BACKGROUND

Historically, gas has been viewed as a transient mineral and has been analyzed by analogy to the common law concerning wild animals.[3] Under common law principles, when a wild animal leaves an owner's property and goes on to the property of another, the subsequent property owner has the legal right to capture the animal for his own use.[4]

Just as with wild animals, the "rule of capture" traditionally has been applied to migratory, fugacious minerals such as gas. The rule of capture has been referred to as the "cornerstone of the oil and gas industry and is fundamental both to property rights and to state regulation."[5] Under the common law, when someone drills a legal well on adjacent property and as a result of the natural migration of the gas the gas pool underlying both properties is drained by that single legal well, the original owner had no right to complain of trespass or to be compensated for the gas by the well operator.[6] With the "rule of capture," there was no taking and no protection of correlative rights of others in the pool.[7]

As noted by the Supreme Court of Virginia, the Commonwealth previously followed the common law rule of capture: "[t]he courts are practically unanimous in holding that a landowner, under whose land there is oil, gas, or water, cannot complain of a neighbor who in pumping on his own property drains the oil, gas, or water from his lands."[8]

The Supreme Court of the United States has affirmed the constitutional power of individual states "to regulate production of oil and gas so as to prevent waste and to secure equitable apportionment among landholders of the migratory gas and oil underlying their land, fairly distributing among them the costs of production and of the apportionment."[9] To address any inequity under the "rule of capture" and protect correlative rights of others in the same pool, as well as to eliminate the race to drill unnecessary competing wells and to maximize the recovery of the Commonwealth's natural resources to meet growing energy needs, the 1990 Session of the General Assembly enacted the current Virginia Gas and Oil Act[10] ("the Act") that allows compulsory pooling and has established the Board with statewide jurisdiction.

The Act[11] significantly changed both the common law and prior statutory provisions concerning gas and oil in Virginia.[12] The Act extensively reorganized the predecessor act and consolidated the Virginia Well Review Board and the Virginia Oil and Gas Conservation Board into the Virginia Gas and Oil Board, provided a new pooling mechanism to encourage the production of coalbed methane gas,[13] and enhanced enforcement procedures allowing civil penalties and charges to be assessed.[14]

APPLICABLE LAW AND DISCUSSION

The current Board was established as an adjunct to the Division of Gas and Oil within the Department of Mines, Minerals and Energy.[15] As such, the Board is an agency of the state.[16] The Board's statutorily delegated powers are expansive. "The Board shall have the power necessary to execute and carry out all of its duties specified in [Chapter 22.1]."[17] Further, § 45.1-361.15 provides that:

> B. Without limiting its general authority, the Board shall have the specific authority to issue rules, regulations or orders pursuant to the provisions of the Administrative Process Act (§§ 2.2-4000 et seq.) in order to:
>
> ….
>
> 12. Take such actions as are reasonably necessary to carry out the provisions of [Chapter 22.1].

The overriding goal of statutory interpretation is to discern and give full force and effect to the entire legislative intent.[18] The Act granted the Board considerable power. Such conclusion is supported by the detailed history associated with the passage of the Act in 1990.[19]

In addition to its broad general powers, the Board's specific duties include holding evidentiary hearings to consider applications to allow compulsory pooling of unleased interests in drilling units.[20] After ruling on such pooling applications, the Board issues

written orders setting out its rulings and findings.[21] Another of the Board's specific duties is to promulgate regulations to enter pooling orders and establish drilling units.[22] One of the Board's regulations governs compulsory pooling orders: "[w]here there are conflicting royalty claims to coalbed methane gas, the unit operator of a forced pooled coalbed methane gas unit shall deposit *proceeds in accordance with § 45.1-361.22 of the Code of Virginia, to be determined at the wellhead*."[23]

Section 45.1-361.22(4) provides that "[t]he coalbed methane gas well operator shall deposit into the escrow account *one-eighth of all proceeds attributable to the conflicting interests* plus all proceeds in excess of ongoing operational expenses as provided for under § 45.1-361.21 and the order of the Board attributable to a participating or nonparticipating operator." (Emphasis added.)

Section 45.1-361.22(4) reflects the traditional definition of the resource owner's royalty as being one-eighth of production.[24] However, it does not establish the point source at which the one-eighth royalty is measured. Such distinction is important because one-eighth of the proceeds "at the wellhead" would be an amount significantly different from one-eighth measured at the point of ultimate sale or at an interim point in the transfer from well to market. Thus, the Board promulgated a regulation to specifically provide that the measurement is to be made "at the wellhead."[25]

The source of the "at the wellhead" language developed from industry practice where common carriers regularly purchased the gas at the well, *i.e.*, the point where the gas entered the pipeline stream.[26] When such practice developed, it provided an easy point of reference for computing royalty interests. There is considerable case law in jurisdictions where the gas and oil industry developed earlier than in Virginia and where energy resource case law is extensive that interprets "at the wellhead" language in other states.[27]

Additionally, there is another important factor to consider. Traditionally, "at the well" or "wellhead" has been used to describe not only *location* but also *quality*. In many jurisdictions, "at the well" describes a cruder product with a market value that is not yet enhanced in value by processing and transportation to far-reaching retail markets.

One of a series of such cases in Mississippi stated unequivocally, "that 'at the well' refers to gas in its natural state, before the gas has been processed or transported from the well."[28] Similarly, in an early Louisiana case involving "wet gas," the court was faced with reconstructing a value for the one-eighth royalty and reasoned that

> in determining market value costs which are essential to make a commodity worth anything or worth more must be borne proportionately by those who benefit. To put it another way: in the analytical process of reconstructing a market value where none otherwise exists with sufficient definiteness, all increase in the ultimate sales value attributable to the expenses incurred in

> transporting and processing the commodity must be deducted. The royalty owner shares only in what is left over, whether stated in terms of cash or an end product.[29]

Likewise, in a case where the gas operator installed a compressor to move the gas from two wells with insufficient wellhead pressure to reach a nearby gathering line, that court examined the "net proceeds"[30] language:

It is well settled that the phrase "at the well received," or similar terminology, establishes the "point" at *the mouth of the well* …. [Royalty owners] are entitled to receive one-eighth (1/8) of the total gas delivered (produced) to the mouth of the well or the market value thereof. Accordingly, the royalty is free of all costs (e.g. exploration, drilling, operation, etc.) up to this point.

Further, "net proceeds" clearly suggests that certain costs are deductible. "Net proceeds" is typically defined as the sum remaining from gross proceeds of sale after payment of expenses.[31]

> "Regardless of whether the gas is sold on or off the leased premises, royalty is based on the value of all gas produced at the mouth of the well. Cost incurred prior to production are to be borne by the operator, while costs incurred subsequent to production (those necessary to render the gas marketable) are to be borne on a pro rata basis between operating and nonoperating interests."[32]

Based on the foregoing cases, there is no inconsistency between the one-eighth royalty and the net proceeds computation set out in the standard Board order. That standard order language simply calculates the "at the wellhead" royalty under today's market conditions by using the net-back[33] method.

Substantial differences in language can be found in case law defining the basis upon which payment should be made.[34] Generally speaking, where the royalty is referred to in terms of market "price," an actual sale is envisioned. By contrast, reference to market "value" usually supports a distinction between actual sales in the vicinity and market value that may be established by opinion evidence. The concept of "proceeds"[35] traditionally looks to the receipts from the sales of the gas, wherever made.

The Board, in using the language about which you inquire, has taken this last approach. The royalty computation is made on the basis of the sales price ultimately received for the gas less the cost of marketing, transportation, and treatment.[36] Under this formula, as usually applied, the lack of actual sales in the field at the wellhead or other evidence, such as expert opinion testimony, becomes irrelevant.

Not dispositive, but certainly indicative of the reasonableness of the Board's approach, is the federal regulation that defines the "net-back method (or work-back method)" for computing royalties that is very similar to the Board's standard order language.[37]

The federal net-back method[38] deducts the costs for transportation, processing, or manufacturing of the gas from the proceeds received at the first point reasonable value may be determined by an arm's-length contract or by comparison to other sales of similar products.[39]

Finally, it should be noted that much of the case law regarding royalty payments involves the interpretation of contracts, as opposed to the construction of statutes. The Board's language in the orders in question only deals with *unleased* owners, and the Board does not interpret private lease contracts between any parties. Private contracts are a matter for judicial resolution.[40]

The Board has implemented its statutory authority and regulations using the standard compulsory pooling order language about which you inquire for more than fifteen years. During that time, the Board consistently has applied the same interpretation in issuing its orders. Such practice is not arbitrary or capricious. An agency's interpretation and application of its regulations in matters within its specialized competence is entitled to deference.[41]

A compulsory pooling order also is in effect a guidance document[42] as that term is defined in the Administrative Process Act.[43] Guidance documents, while not having the force and effect of law, serve to advise the agency's staff and the public of the agency's interpretation of its regulations.[44] Courts generally will give such "interpretative" rules persuasive effect.

> [A]n agency "has incidental powers which are reasonably implied as a necessary incident to its expressly granted powers for accomplishing [its] purposes." This includes the adoption of interpretative rules. Since such rules do not undergo the same scrutiny as do formally promulgated regulations, they "do not purport to be a substitute for the statute." "[T]hey do not have the force of law." In spite of this, interpretative rules carry persuasive effect. We give "great deference to an administrative agency's interpretation of the regulations it is responsible for enforcing" for "it is inappropriate for a court to second-guess the manner in which an agency responds to its responsibility of carrying out the Commonwealth's policy when those means are not prohibited."[45]

The interpretation given to a statute by the agency charged with its administration is entitled to great weight.[46] The General Assembly is presumed to be cognizant of the agency's construction of a particular statute and when such construction continues without legislative alteration, the legislature will be presumed to have acquiesced in it.[47]

CONCLUSION

Accordingly, it is my opinion that the Virginia Gas and Oil Board may issue compulsory pooling orders that permit deduction of post-production costs downstream of the wellhead when computing gas owners' one-eighth royalty interests.

[1]Although the term "compulsory pooling" is not defined in the *Code*, it is a term of art in the gas and oil industry and for purposes of this opinion, the term means the pooling of interests within a drilling unit pursuant to § 45.1-361.21 or § 45.1-361.22. The federal government provides for a "compulsory unitization" and may require "lessees to unitize operations … if unitized operations are required" to prevent waste, conserve natural resources, or protect correlative rights. *See* 30 C.F.R. § 250.1301(b) (2008); *see also* E.H. Shopler, Annotation, *Validity of compulsory pooling or unitization statute or ordinance requiring owners or lessees of oil and gas lands to develop their holdings as a single drilling unit and the like*, 37 A.L.R.2D 434, 435 (1954) (defining "compulsory pooling" as "[a] statute under which owners of small or irregularly shaped tracts can be required to develop their lands as a single drilling unit for conservation purposes").

[2]*See* VA. CODE ANN. § 45.1-361.13(A) (2002) (establishing Board).

[3]*See* Ohio Oil Co. v. Indiana (No. 1), 177 U.S. 190, 209 (1900); Tex. Am. Energy Corp. v. Citizens Fid. Bank & Trust Co., 736 S.W.2d 25, 26 (Ky. 1987).

[4]*Id.*

[5]Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1, 13 (Tex. 2008).

[6]"[T]he owner of a tract of land acquires title to the oil and gas *which he produces* from wells on his land, though part of the oil or gas may have migrated from adjoining lands. He may thus appropriate the oil and gas that have flowed from adjacent lands without the consent of the owner of those lands, and without incurring liability to him for drainage." Elliff v. Texon Drilling Co., 210 S.W.2d 558, 561-62 (Tex. 1948) (emphasis added).

[7]*Id.* at 562; *see also* § 45.1-361.1 (2002) (defining "correlative rights" as "the right of each gas or oil owner having an interest in a single pool to have a fair and reasonable opportunity *to obtain and produce* his just and equitable share of production of the gas or oil in such pool or its equivalent without being required to drill unnecessary wells or incur other unnecessary expenses to recover or receive the gas or oil or its equivalent") (emphasis added).

[8]Couch v. Clinchfield Coal Corp., 148 Va. 455, 460, 139 S.E. 314, 315 (1927).

[9]*See* Hunter Co. v. McHugh, 320 U.S. 222, 227 (1943).

[10]*See* 1990 Va. Acts ch. 92, at 150, 150-69; tit. 45.1, ch. 22.1, §§ 45.1-361.1 to 45.1-361.44 (2002 & Supp. 2008). Prior to 1990, the Gas and Oil Act provided for drilling units and compulsory pooling, but did not define coalbed methane or include provisions regarding coalbed methane in the drilling unit or compulsory pooling statutes. *See* Elizabeth A. McClanahan, *Coalbed Methane Myths, Facts, and Legends of Its History and the Legislative and Regulatory Climate into the 21st Century*, 48 OKLA. L. REV. 3, 471, 540 n.532 (1995).

[11]I note that the predecessor act, the Virginia Oil and Gas Act, also made significant changes to the common law treatment of oil and gas in Virginia. *See* §§ 45.1-286 to 45.1-361 (1989).

[12]*See* REPORT OF VA. COAL & ENERGY COMM'N, THE STUDY OF THE REGULATION OF INDEPENDENT POWER PRODUCERS AND THE OIL AND GAS ACT, H. DOC. NO. 79 (1990) [hereinafter "H. DOC. NO. 79"]. The Coal and Energy Commission held five meetings between the 1989 and 1990 Sessions of the General Assembly, and the Commission's Oil and Gas Subcommittee and Energy Preparedness Subcommittee also held meetings. *Id.* at 1. The Commission allowed public comment at each of its meetings and solicited written comments throughout the process. *Id.* at 2. After extensive review of the comments and consideration of draft proposals, the Commission unanimously recommended that the General Assembly enact the Gas and Oil and Act. *Id.* at 1.

[13]*See* § 45.1-361.22 (Supp. 2008).

[14]*See* § 45.1-361.8 (2002).

[15]*See* § 45.1-161.5 (Supp. 2008) (including Division of Gas and Oil within Department of Mines, Minerals and Energy); § 45.1-361.13 (2002) (establishing Board with statewide jurisdiction).

[16]Section 45.1-361.13.

[17]Section 45.1-361.14(B) (2002).

[18]Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983); Vollin v Arlington Co. Electoral Bd., 216 Va. 674, 678-79, 222 S.E.2d 793, 797 (1976).

[19]*See supra* note 12.

[20]*See* § 45.1-361.20 (2002) (governing field rules and drilling units), § 45.1-361.21 (Supp. 2008) (governing pooling of interests in drilling units); § 45.1-361.22 (governing pooling of interests for coalbed methane gas wells; conflicting claims to ownership); *see also* VA. CODE ANN. 2005 UPL Op. 209 (Supp. 2008) (acknowledging authority of Board to carry out its duties and conduct its hearings).

[21]*See* § 45.1-361.19(C) (Supp. 2008); §§ 45.1-361.20, 45.1-361.22.

[22]*See* § 45.1-361.15(B)(3)-(4) (2002).

[23]4 VA. ADMIN. CODE § 25-160-100(B) (Supp. 2008) (emphasis added).

[24]"The term 'Royalty' in the oil and gas industry is commonly and ordinarily understood to be that share or part of production reserved or to be paid during the life of a lease; courts will take judicial notice that the usual royalty in an oil and gas lease is one-eighth of the oil and gas produced." Badger v. King, 331 S.W.2d 955, 958 (Tex. App. 1959).

[25]4 VA. ADMIN. CODE § 25-160-100(B).

[26]*See generally* Interstate Natural Gas Co. v. Fed. Power Comm'n, 331 U.S. 682 (1947); Phillips Petroleum Co. v. Wisconsin, 347 U.S. 672 (1954) (holding that Federal Power Commission must regulate producers' wellhead gas sales to interstate pipelines).

[27]*See infra* notes 28, 31-32 and accompanying text.

[28]Piney Woods Country Life Sch. v. Shell Oil Co., 726 F.2d 225, 242 (5th Cir. 1984).

[29]Freeland v. Sun Oil Co., 277 F.2d 154, 159 (5th Cir. 1960).

[30]For purposes of this opinion, the methods discussed herein as "net proceeds," "net-back method," and "proceeds" essentially are the same for purposes of determining royalty payments. Different courts use terminologies standard within their jurisdictions, but there is no distinct difference in the outcome of the royalty calculation based on these methods.

[31]Martin v. Glass, 571 F. Supp. 1406, 1411 (N.D. Tex. 1983).

[32]*Id.* at 1411-12 (citation omitted).

[33]*See supra* notes 31-32 and accompanying text; *see also* infra note 37 and accompanying text.

[34]*See, e.g.*, La Fitte Co. v. United Fuel Gas Co., 284 F.2d 845 (6th Cir. 1960) ("gross income received"); Armstrong v. Skelly Oil Co., 55 F.2d 1066 (5th Cir. 1932) ("market value"); Clear Creek Oil & Gas Co. v. Bushmiaer, 264 S.W. 830 (Ark. 1924) ("market price at the well"); Gilmore v. Superior Oil Co., 388 P.2d 602 (Kan. 1964) ("proceeds at the well"); Warfield Natural Gas Co. v. Allen, 88 S.W.2d 989 (Ky. 1935) ("proceeds from the sale"); Wall v. United Gas Public Serv. Co., 152 So. 561 (La. 1934) ("market price"); Katschor v. Eason Oil Co., 63 P.2d 977 (Okla. 1936) ("market value at the well"); Cotiga Dev. Co. v. United Fuel Gas Co., 128 S.E.2d 626 (W. Va. 1962) ("rate received by lessee"); Natural Gas Distrib. Corp. v. Williams, 355 S.W.2d 194 (Tex. App. 1962) ("net proceeds at the well"). Although these terms seem similar, courts have reached very different results when considering these from time to time. Conversely, at other times the decisions have treated these as distinctions without a difference.

[35]*See supra* note 30.

[36]This method is similar to the definition of "market value" adopted in *Piney Woods*. *See* 726 F.2d at 242.

[37]*Cf.* 30 C.F.R. § 206.151 (2008) (providing that for federal gas leases "costs of transportation, processing, or manufacturing are deducted from the proceeds received for the gas … or from the value of the gas … at the first point at which reasonable values for any such products may be determined by a sale pursuant to an arm's-length contract or comparison to other sales of such products, to ascertain value at the lease").

[38]*See supra* note 30.

[39]*See supra* note 37.

[40]*See* § 45.1-361.11(C) (2002); *see also* § 45.1-361.18(B) (2002) (providing that voluntary pooling agreements are valid in Commonwealth). This becomes an important distinction in cases where contrary holdings were made on the basis of rules of contract interpretation. *See, e.g.*, Estate of Tawney v. Columbia Natural Res., LLC, 633 S.E.2d 22 (W.Va. 2006) (concluding that lease language calling for royalty "at the wellhead" was ambiguous). In relying on the general rules of contract interpretation, the court concluded that the lease should be construed against the party who drafted the document and did not allow the deduction of costs incurred between the wellhead and the point of sale from the lease royalties. *Id.* at 273-74. Similarly, some case decisions have denied deduction of post-production costs from royalty interests on the basis that a duty to market the gas produced should be implied in the lease contract. *See, e.g.*, Rogers v. Westerman Farm Co., 29 P.3d 887, 901 (Colo. 2001); Garman v. Conoco, Inc., 886 P.2d 652, 659 (Colo. 1994) (noting that implied covenant to market obligates lessee to incur post-production costs to place gas in condition for market). While implied duties such as a duty to market a product can be ascribed to the parties of a contract by a court interpreting a lease, that is not appropriate in the present context.

[41]*See infra* note 45 and accompanying text.

[42]VA. CODE ANN. § 2.2-4001 (2008) (defining "guidance document" as "any document developed by a state agency or staff that provides information or guidance of general applicability to the staff or public to interpret or implement statutes or the agency's rules or regulations, excluding agency minutes or documents that pertain only to the internal management of agencies").

[43]Sections §§ 2.2-4000 to 2.2-4031 (2008).

[44]As noted, the General Assembly has charged the Board, like all administrative agencies, with the interpretation and application of its regulations. *See* § 45.1-361.15. Reviewing courts will afford varying degrees of deference to the decision of an administrative agency. If the issue to be resolved falls within the specialized competence of the agency, the latter's decision is entitled to special weight. *See* Johnston-Willis, Ltd. v. Kenley, 6 Va. App. 231, 243-44, 369 S.E.2d 1, 8 (1988). An agency interpretation will not be reversed unless it is arbitrary and capricious. *See* Va. Real Estate Bd. v. Clay, 9 Va. App. 152, 159-60, 384 S.E.2d 622, 626 (1989). The Board's interpretation of its regulations in the present situation would be such an issue.

[45]NRV Real Estate, LLC v. Va. Dep't of Health, 51 Va. App. 514, 526-27, 659 S.E.2d 527, 533 (2008) (alterations in original) (citations omitted), *rev'd on other grounds*, Va. Dep't of Health v. NRV Real Estate, LLC, 278 Va. 181, 2009 Va. LEXIS 74 (2009).

[46]*See, e.g.*, Forst v. Rockingham Poultry Mktg. Coop., 222 Va. 270, 276, 279 S.E.2d 400, 403 (1981).

[47]1990 Op. Va. Atty. Gen. 231, 232. Legislation to amend the Act to remove the Board's authority to provide for deduction of post-production costs in its orders failed in the 2009 Session of the General Assembly. *See* 2009 S.B. 1204, *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?ses=091&typ=bil&val=sb1204; 2009 H.B. 2518, *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?ses=091&typ=bil&val=hb2518. Thus, the General Assembly clearly is aware of the provision about which you inquire and chose not to enact a change.

OP. NO. 09-023

MINES AND MINING: THE VIRGINIA GAS AND OIL ACT – GAS AND OIL CONSERVATION.

CONSTITUTION OF VIRGINIA: BILL OF RIGHTS (DUE PROCESS; TAKING OF PRIVATE PROPERTY).

Virginia Gas and Oil Board is authorized and, in fact, is mandated to issue compulsory pooling orders to deem that unleased interests are leased when gas owners fail to elect to participate in operation of well; such action is valid exercise of Commonwealth's police power, is in public's best interest, promotes common good, and does not constitute taking pursuant to Virginia Constitution. Gas and Oil Act is constitutional; Act and Board provide

appropriate protection of due process rights of gas owners in context of compulsory pooling hearings and orders. There is no right to jury trial associated with administrative proceedings under compulsory pooling provisions of Act.

THE HONORABLE CLARENCE E. "BUD" PHILLIPS
MEMBER, HOUSE OF DELEGATES
JUNE 10, 2009

ISSUES PRESENTED

You ask several questions regarding the authority of the Virginia Gas and Oil Board[1] ("the Board") to issue compulsory pooling orders pursuant to the Virginia Gas and Oil Act[2] (the "Act").

QUESTION 1

You present a situation in which a gas owner fails to make an election under a compulsory pooling order[3] of the Board. You ask whether the Board's authority to deem that the gas owner has leased his interest in the gas to the unit operator, a private entity, arises out of the Commonwealth's police power. If so, you ask whether the Board's action is a valid exercise of such police power.

APPLICABLE LAW AND DISCUSSION

The Act has an extensive history that was outlined in an opinion of this Office issued contemporaneously herewith.[4] The "deemed leased" language in the Board's pooling orders is mandated by the General Assembly. It is not an exercise of the Board's general discretionary authority to carry out its duties under the Act. Section 45.1-361.21(E) provides that "[a]ny person who does not make an election under the pooling order *shall be deemed to have leased* his gas or oil interest to the gas or oil well operator as the pooling order may provide." (Emphasis added.) Further, § 45.1-361.22(6) provides that "[a]ny person who does not make an election under the pooling order *shall*[5] *be deemed … to have leased* his gas or oil interest to the coalbed methane gas well operator as the pooling order may provide." (Emphasis added.)

The Board has no discretionary power to alter the legislative mandate of the General Assembly. Therefore, the Board must include such options and language in its orders. Such a mandate is a valid exercise of the general police powers of the Commonwealth. The police power of a state is that broad authority not ceded to the federal government to protect the public interest.[6] It is the power retained by the individual states "to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, *develop its resources*, and add to its wealth and prosperity."[7]

The General Assembly may enact any law or take any action "not prohibited by express terms, or by necessary implications, by the State Constitution or the Constitution of the United States."[8] Such vast power is inherent in the legislature.[9] While there is no exact definition for police power, this power is expansive and a necessary and intrinsic attribute of a state.[10] "The police power of the Commonwealth to regulate the affairs of corporations, the same as individuals, shall never be abridged."[11]

A presumption of validity attaches to every statute enacted into law by the General Assembly.[12] Since all acts of the General Assembly are presumed to be constitutional,[13] such presumption would include the "deemed leased" language in §§ 45.1-361.21(E) and 45.1-361.22(6). A general summary of the Board's duties includes:

> With respect to oil and gas, the Virginia Gas and Oil Board and the [Department of Mines, Minerals and Energy], through its Division of Gas and Oil, are responsible for administering the statutory provisions directed to prevention of waste in exploration and production, prevention of pollution of state waters, protection of rights of adjacent owners, restoration of disturbed sites, and protection of mining and public safety.[14]

These regulatory duties and powers of the Board and of the Division of Gas and Oil, both of which are agencies of the Commonwealth, are in conformity with the broad definition of "police power."[15]

The extensive listing of duties and responsibilities cataloged in § 45.1-361.15 enumerates powers that not only allow the Board to take this action, but arguably would require it to do so:

> A. In executing its duties under [Chapter 22.1], the Board shall:
>
> 1. Foster, encourage and promote the safe and efficient exploration for and development, production and conservation of the gas and oil resources located in the Commonwealth;
>
> 2. Administer a method of gas and oil conservation for the purpose of maximizing exploration, development, production and utilization of gas and oil resources;
>
> 3. Administer procedures for the recognition and protection of the rights of gas or oil owners with interests in gas or oil resources contained within a pool;
>
> 4. Promote the maximum production and recovery of coal without substantially affecting the right of a gas owner proposing a gas well to explore for and produce gas; and
>
> 5. Hear and decide appeals of Director's decisions and orders issued under Article 3 of [Chapter 22.1].
>
> B. Without limiting its general authority, the Board shall have the specific authority to issue rules, regulations or orders pursuant to the provisions of the Administrative Process Act (§ 2.2-4000 et seq.) in order to:
>
> 1. Prevent waste through the design spacing, or unitization of wells, pools, or fields.

> 2. Protect correlative rights.
>
> 3. Enter spacing and pooling orders.
>
> 4. Establish drilling units.
>
> 5. Establish maximum allowable production rates for the prevention of waste and for the protection of correlative rights.
>
> 6. Provide for the maximum recovery of coal.
>
> 7. Classify pools and wells as gas, oil, gas and oil, or coalbed methane gas.
>
> ….
>
> 12. Take such actions as are reasonably necessary to carry out the provisions of [Chapter 22.1].

Therefore, it is my opinion that the Board is authorized and, in fact, is mandated to issue compulsory pooling orders to deem that unleased interests are leased when gas owners fail to elect to participate in the operation of the well. Further, it is my opinion that such action by the Board is a valid exercise of the Commonwealth's police power.

QUESTION 2

You ask whether a compulsory pooling order of the Board would constitute a taking under Article I, § 11, of the Constitution of Virginia ("Article I, § 11") when the order deems the interest of a gas owner leased to the unit operator, after the owner fails to make a statutory election.

APPLICABLE LAW AND DISCUSSION

The Supreme Court of the United States has affirmed the constitutional power of individual states "to regulate production of oil and gas so as to prevent waste and to secure equitable apportionment among landholders of the *migratory gas* and oil underlying their land, fairly distributing among them the costs of production and of the apportionment."[16] This ruling comports with the significant power held by the states pursuant to their retained police power.[17]

The Fifth Amendment of the Constitution of the United States provides that private property shall not "be taken for public use, without just compensation."[18] This restriction applies to the states through the Fourteenth Amendment.[19] Additionally, Article I, § 11, provides that no "private property shall be taken or damaged for public uses, without just compensation, the term 'public uses' to be defined by the General Assembly."[20]

However, "[a]ll citizens hold property subject to the proper exercise of the police power for the common good."[21] Valid exercises of police power are not "takings" within the meaning of the state or federal constitutions; such is the case even when the state's exercise of the police power results in regulation that imposes some economic

burden or loss upon property.[22] Even where such exercise results in substantial diminution of property values, an owner has no right to compensation for legislation which, in the judgment of the legislature, was of greater value to the public.[23]

The United States Supreme Court has held that no taking occurs in circumstances related to the promotion of the general welfare, unless the regulation interferes with all reasonable beneficial uses of the property taken as a whole.[24] In situations similar to the one you present, courts have found that regulation of gas production is in the best interest of the overall public good.[25]

The regulation of the production of gas does not interfere "with rights in the parcel as a whole."[26] Further, gas owners are compensated with a guaranteed royalty interest in the gas produced.[27] This is a change from the owner's situation at common law where the "rule of capture" did not provide any compensation or remedy when a neighbor's legal well drained an entire pool of underlying migratory gas.[28] Additionally, pursuant to the statutorily-mandated elections and as reflected in the Board's orders, each owner within the unit has the option to participate in the operation of the well.[29] This right of election represents another right or protection that gas owners did not have at common law.

In the seminal regulatory "takings" case, the United States Supreme Court has determined that a compensable taking exists when state regulations compel property owners "to suffer a physical 'invasion' of [their] property" or when regulatory action "denies all economically beneficial or productive use of land."[30] The Court addressed the issue of regulatory taking within the context of the Fifth Amendment to the United States Constitution.[31] The Supreme Court of Virginia, in interpreting Virginia's constitutional takings provision, cited *Lucas* and reviewed cases that involved takings under the Fifth Amendment.[32] The Board's compulsory pooling orders do not involve a permanent physical invasion of an owner's property or any action that would deny all other economically beneficial or productive use of the property included in the unit. There has been no taking or damage to private property for public use.[33] The Board merely follows its statutory mandate to regulate the recovery of energy resources.

Also, a property owner may seek redress for a categorical taking only when the state is exercising regulatory power over the "bundle of rights" that the owner acquired when first obtaining title to the property.[34] Since the "rule of capture" did not provide a right to compensation when a neighbor's legal well drained an entire pool of migratory gas, the right to compensation was not part of the "bundle of rights" held by an owner.[35]

As noted by the Virginia Supreme Court, the Commonwealth previously followed the common law "rule of capture": "[t]he courts are practically unanimous in holding that a landowner, under whose land there is oil, gas, or water, cannot complain of a neighbor who in pumping on his own property drains the oil, gas, or water from his lands."[36] In view of the common law "rule of capture" applicable to gas ownership

prior to the passage of the state's earliest Gas and Oil Act, gas owners did not acquire the right to unilaterally prevent lawful production of the gas in their original "bundle of rights."[37]

To address any inequity under the "rule of capture" and protect correlative rights of others in the same pool, as well as to eliminate the race to drill unnecessary competing wells and to maximize the recovery of the Commonwealth's natural resources to meet growing energy needs, the 1990 Session of the General Assembly enacted the current Virginia Gas and Oil Act[38] that allows compulsory pooling and has established the Board with statewide jurisdiction.

The issuance of a land use permit determines only the rights of an applicant in relation to the Commonwealth and the public.[39] Such a decision of this nature is not a determination of the rights of the parties *inter se*.[40] This analysis equally is applicable to a compulsory pooling order issued by the Board in conjunction with a gas operator's permit.

Therefore, it is my opinion that absent an election by the owner, a Board order that deems the interest of a gas owner leased to the unit operator does not constitute a taking pursuant to Article I, § 11.

QUESTION 3

In the event a Board order that deems the interest of an owner to be leased does not constitute a taking under Article I, § 11, you ask whether the Act is unconstitutional because it fails to provide due process to such gas owners. Specifically, you ask whether the Act fails to guarantee these gas owners the right to a jury trial to determine the fair market value of their gas.

APPLICABLE LAW AND DISCUSSION

As previously noted, acts of the General Assembly are presumed to be constitutional.[41] Further, the General Assembly is presumed to know what legislation it has passed and its effect.[42] Consequently, there is a presumption that the omission of a right to a jury trial in proceedings under the Act is both intentional and constitutional.

The Virginia Constitution guarantees that a jury will resolve disputed facts.[43] The resolution of disputed facts has been the sole function of juries from the adoption of the Constitution to the present time.[44] However, administrative matters generally are not actions for which jury trials are available or appropriate.[45] The technical rules for the exclusion of evidence that are applicable in jury trials do not apply in administrative proceedings.[46] For example, hearsay evidence usually is allowed in administrative proceedings, but normally would be considered too unreliable for a jury and not appropriate in a judicial setting for a jury's consideration.[47]

Historically, actions at law have included a right to jury trial, while actions in equity have not provided such rights. It is axiomatic that one must look to the original basis for the suit to determine if there exists a right to a trial by jury.[48] Administrative actions were unknown at common law. "The Constitution guarantees the right of trial

by jury, however, only in those cases where the right existed when the Constitution initially was adopted."[49] Since their inception, administrative proceedings have been considered actions in equity.[50]

Likewise, Board hearings are proceedings before an administrative tribunal "pursuant to the formal litigated issues hearing provisions of the Administrative Process Act" and are on the record.[51] The Gas and Oil Act itself provides for specific notice provisions.[52] The orders and decisions of the Board are subject to appeal to the circuit court and beyond.[53] The Board's administrative process and judicial review procedures provide due process for anyone having standing to challenge an action of the Board.[54]

Article I, § 11, provides, in pertinent part, "[t]hat 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." Again, § 11 is not applicable to proceedings in which there was no right under the common law to a jury trial when the Constitution was adopted, such as ordinary suits in chancery, even though it is clearly applicable to common law actions seeking to recover damages.[55]

Additionally, the doctrine of sovereign immunity continues to be "alive and well" in Virginia.[56] As an agency of the Commonwealth, the Board enjoys the privileges of sovereign immunity.[57] The Commonwealth may waive sovereign immunity; however, the "[s]tatutory language granting consent to suit must be explicitly and expressly announced."[58] Any action challenging an order of the Board is an action against an agency of the Commonwealth. Therefore, such action requires strict compliance with all statutes, rules, or regulations supporting any waiver of the Commonwealth's sovereign immunity.[59]

Historically, Virginia law has waived the Commonwealth's sovereign immunity from suit only for very specific actions such as: (1) recovery on claims of breach of contract against the Commonwealth;[60] (2) awards for tort claims against the Commonwealth;[61] (3) payment of compensation for property condemnations by the Commonwealth or its agencies;[62] and (4) review of state administrative agency case decisions.[63]

While any appeal of a decision of the Board would fall within the waiver of immunity in cases seeking review of administrative agency case decisions, strict compliance with the procedural requirements precedent to such an action is mandated, which would include the Rules of the Virginia Supreme Court pertaining to appeals of administrative proceedings under the Administrative Process Act.[64] Part Two A of the Rules makes no provision for jury trials. The Board has the duty to conduct hearings on compulsory pooling applications.[65] However, I find no statutory authority under the Gas and Oil Act to conduct jury trials.

Therefore, it is my opinion that the Act is constitutional, and the Act and the Board provide appropriate protection of the due process rights of gas owners in the context

of the compulsory pooling hearings and orders. Further, it is my opinion that there is no right to a jury trial associated with administrative proceedings under the compulsory pooling provisions of the Act.

[1]*See* VA. CODE ANN. § 45.1-361.13(A) (2002) (establishing Virginia Gas and Oil Board).

[2]*See* tit. 45.1, ch. 22.1, §§ 45.1-361.1 to 45.1-361.44 (2002 & Supp. 2008).

[3]Although the term "compulsory pooling" is not defined in the *Code*, it is a term of art in the gas and oil industry and for purposes of this opinion, the term means the pooling of interests within a drilling unit pursuant to § 45.1-361.21 or § 45.1-361.22. The federal government provides for a "compulsory unitization" and may require "lessees to unitize operations … if unitized operations are required" to prevent waste, conserve natural resources, or protect correlative rights. *See* 30 C.F.R. § 250.1301(b) (2008); *see also* E.H. Shopler, Annotation, *Validity of compulsory pooling or unitization statute or ordinance requiring owners or lessees of oil and gas lands to develop their holdings as a single drilling unit and the like*, 37 A.L.R.2D 434, 435 (1954) (defining "compulsory pooling" as "[a] statute under which owners of small or irregularly shaped tracts can be required to develop their lands as a single drilling unit for conservation purposes").

[4]*See* 2009 Op. Va. Att'y Gen. 94, 95-96; *see also* REPORT OF VA. COAL & ENERGY COMM'N, THE STUDY OF THE REGULATION OF INDEPENDENT POWER PRODUCERS AND THE OIL AND GAS ACT, H. DOC. NO. 79 (1990) (discussing current Act); Elizabeth A. McClanahan, *Coalbed Methane Myths, Facts, and Legends of Its History and the Legislative and Regulatory Climate into the 21st Century*, 48 OKLA. L. REV. 3, 471 (1995) (including discussion of Act and comparison of Act to federal legislation, which was based on Virginia's Act).

[5]The word "shall" as used in a statute ordinarily implies that its provisions are mandatory. *See, e.g.*, Schmidt v. City of Richmond, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965) (noting that statute using "shall" required court to summon nine disinterested freeholders in condemnation case); *see also* 2006 Op. Va. Att'y Gen. 19, 23 (noting that "shall" generally is construed to be mandatory); *but see* Harris v. Commonwealth, 52 Va. App. 735, 744, 667 S.E.2d 809, 814 (2008) (finding that criminal statute using "shall" was directory and procedural, rather than mandatory and jurisdictional). It is my opinion that in the context of §§ 45.1-361.21(E) and 45.1-361.22(6), "shall" is mandatory rather than permissive.

[6]*See* City of Roanoke v. Elliott, 123 Va. 393, 406, 96 S.E. 819, 824 (1918) (noting legislative powers of General Assembly are without limit).

[7]Barbier v. Connolly, 113 U.S. 27, 31 (1885) (emphasis added) (discussing police powers of states in context of due process clause of Fourteenth Amendment); *see also* Blue Cross of Va. v. Commonwealth, 221 Va. 349, 358, 269 S.E.2d 827, 833 (1980) (noting that police power "includes the power to prescribe regulations to promote the health, peace, morals, education and good order of the people").

[8]Kirkpatrick v. Bd. of Supvrs., 146 Va. 113, 126, 136 S.E. 186, 190 (1926).

[9]*Id.*

[10]*Blue Cross*, 221 Va. at 358, 269 S.E.2d at 833.

[11]VA. CONST. art IX, § 6, *quoted in Blue Cross*, 221 Va. at 358, 269 S.E.2d at 833.

[12]*See* Coleman v. Pross, 219 Va. 143, 153, 246 S.E.2d 613, 619 (1978); *Elliott*, 123 Va. at 406, 96 S.E. at 824. "[W]hen the constitutionality of a statute is challenged, we are guided by the principle that all acts of the General Assembly are presumed to be constitutional. Therefore, 'a statute will be construed in such a manner as to avoid a constitutional question wherever this is possible.'" Yamaha Motor Corp., U.S.A. v. Quillian, 264 Va. 656, 665, 571 S.E.2d 122, 126-27 (2002) (quoting Eaton v. Davis, 176 Va. 330, 339, 10 S.E.2d 893, 897 (1940)); *see also* Va. Soc'y for Human Life, Inc. v. Caldwell, 256 Va. 151, 157, 500 S.E.2d 814, 816-17 (1998) (noting statutes are narrowly construed to avoid constitutional questions where possible); Hess v. Snyder Hunt Corp., 240 Va. 49, 52-53, 392 S.E.2d 817, 820 (1990) (noting courts will declare act unconstitutional only when clearly repugnant to some provision of state or federal constitution).

[13]"A reasonable doubt as to the constitutionality of a legislative enactment must be resolved in favor of its validity. The courts will declare the legislative judgment null and void only when the statute is plainly repugnant to some provision of the state or federal constitution." *Blue Cross*, 221 Va. at 358, 269 S.E.2d at 832. "'To doubt is to affirm. The mere passage of a statute is an affirmance by the General Assembly of its constitutional power to adopt it…. These principles have been repeatedly announced by this court from a very early date.'" Harrison v. Day, 201 Va. 386, 397, 111 S.E.2d 504, 511 (1959) (quoting *Elliott*, 123 Va. at 406, 96 S.E. at 824).

[14]4 Va. Admin. Code 25 Agcy. Sum. (2005); *see also* §§ 45.1-361.14(B), 45.1-361.15 (2002) (outlining powers and duties of Board).

[15]*See supra* notes 6-11 and accompanying text.

[16]Hunter Co. v. McHugh, 320 U.S. 222, 227 (1943) (emphasis added).

[17]*See id.*

[18]U.S. Const. amend. V.

[19]*Id.* amend. XIV; *see also, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 481 n.10 (1987) (noting Fifth Amendment is applicable to states through Fourteenth Amendment).

[20]*See* Va. Code Ann. § 1-219.1(A) (2008) (defining "public uses," as used in Article I, § 11, "to embrace only the acquisition of property where: (i) the property is taken for the possession, ownership, occupation, and enjoyment of property by the public or a public corporation; (ii) the property is taken for construction, maintenance, or operation of public facilities by public corporations or by private entities provided that there is a written agreement with a public corporation providing for use of the facility by the public; (iii) the property is taken for the creation or functioning of any public service corporation, public service company, or railroad; (iv) the property is taken for the provision of any authorized utility service by a government utility corporation; (v) the property is taken for the elimination of blight provided that the property itself is a blighted property; or (vi) the property taken is in a redevelopment or conservation area and is abandoned or the acquisition is needed to clear title where one of the owners agrees to such acquisition or the acquisition is by agreement of all the owners").

[21]Commonwealth v. County Utilities Corp., 223 Va. 534, 542, 290 S.E.2d 867, 872 (1982).

[22]*See* Miller v. Schoene, 276 U.S. 272, 279-80 (1928) (noting that "where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property"; justifying act that provided for cutting of ornamental cedar trees on private property to prevent spread of plant disease); *see also* Bowman v. Va. State Entomologist, 128 Va. 351, 362, 105 S.E. 141, 145 (1920) (noting that when enforcement of police power regarding public welfare submits owner to inconvenience or loss, he must sustain such loss without remedy).

[23]*County Utilities*, 223 Va. at 542, 290 S.E.2d at 872.

[24]Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 130-31 (1978). "The constitutional inquiry, however, is not whether the remaining uses are economically feasible *to the owner*. The loss of the ability to develop or use the land as originally intended is not a categorical taking if another economic use for the land is available, even if the value of the use is less than the value attached to the owner's desired use. Thus, action which limits the ability to develop or use land as originally intended or in a manner producing the largest return on investment does not qualify as a categorical taking if another economic use for the land is available. The proper inquiry is whether the action complained of stripped *the land* of all economic uses." Bd. of Supers. v. Omni Homes, Inc., 253 Va. 59, 67-68, 481 S.E.2d 460, 464 (1997) (emphasis in original); *see also* Bd. of Supvrs. v. Greengael, L.L.C., 271 Va. 266, 287, 626 S.E.2d 357, 369 (2006) (discussing regulatory taking in the context of three significant factors: (a) economic impact; (b) extent that regulation interferes with distinct investment-backed expectations; and (c) character of government action). The *Greengael* court determined that although the regulations in question were in place when the owner acquired the property, it did not preclude a regulatory taking claim. *Id.* at 288, 626 S.E.2d at ___. [Editor's note: The opinion for *Greengael* published in the South Eastern Reporter differs from the opinion published in the official Virginia reporter. Therefore, no page numbers for the South Eastern Reporter

are provided for the final two citations of this case. I note that the opinion is dated March 3, 2006, and was revised on May 26, 2006. *See* http://www.courts.state.va.us/opinions/opnscvwp/ 1050461.pdf (footnote 1)]. Further, the court noted that such a challenge must assert that the "'State's regulatory power is so unreasonable or onerous as to compel compensation.'" *Id.* (quoting Palazzolo v. Rhode Island, 533 U.S. 606, 627 (2001)). In the situation you present, the owner is deemed to have leased his gas to the unit operator. Further, the owner is compensated with a royalty payment, and the use of his land is not so severely restricted to be considered unreasonable or onerous.

[25]In all courts that have considered the constitutionality of compulsory pooling statutes or ordinances, even though the challenges were based on a variety of legal arguments, the laws have been upheld. *See* Superior Oil Co. v. Foote, 59 So. 2d 85, 93 (Miss. 1952); *see also* Shopler, *supra* note 3, at 435 (noting that all courts addressing compulsory pooling statutes or ordinances have upheld them as valid); *id.* at 435-48; 35-37 A.L.R.2d Supp. 434-448, pp. 400-04 (1954-2002) (containing extensive listing of cases and discussion regarding validity of compulsory pooling statutes/ordinances, concerns regarding due process, and constitutional objections).

[26]*Penn Central*, 438 U.S. at 130-31.

[27]*See* §§ 45.1-361.21, 45.1-361.22 (Supp. 2008). "The term 'Royalty' in the oil and gas industry is commonly and ordinarily understood to be that share or part of production reserved or to be paid during the life of a lease; courts will take judicial notice that the usual royalty in an oil and gas lease is one-eighth of the oil and gas produced." Badger v. King, 331 S.W.2d 955, 958 (Tex. App. 1959).

[28]"[T]he owner of a tract of land acquires title to the oil and gas *which he produces* from wells on his land, though part of the oil or gas may have migrated from adjoining lands. He may thus appropriate the oil and gas that have flowed from adjacent lands without the consent of the owner of those lands, and without incurring liability to him for drainage." Elliff v. Texon Drilling Co., 210 S.W.2d 558, 561-62 (Tex. 1948) (emphasis added). With the "rule of capture," there was no taking and no protection of correlative rights of others in the pool. *Id.* at 562; *see also* § 45.1-361.1 (2002) (defining "correlative rights" as "the right of each gas or oil owner having an interest in a single pool to have a fair and reasonable opportunity *to obtain and produce* his just and equitable share of production of the gas or oil in such pool or its equivalent without being required to drill unnecessary wells or incur other unnecessary expenses to recover or receive the gas or oil or its equivalent") (emphasis added).

[29]*See* § 45.1-361.21(C)(7) (establishing statutory elections); *see also* § 45.1-361.22 (applying elections established in § 45.1-361.21 to Board orders pooling interests in coalbed methane gas drilling units).

[30]Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992) (discussing regulations in context of Fifth Amendment).

[31]*Id.*

[32]*See* Va. Beach v. Bell, 255 Va. 395, 400, 498 S.E.2d 414, 416-17 (1998) (citing *Lucas*, 505 U.S. at 1015; Va. Beach v. Va. Land Inv., 239 Va. 412, 417, 389 S.E.2d 312, 314 (1990); *County Utilities*, 223 Va. at 542, 290 S.E.2d at 872).

[33]*See supra* note 20.

[34]*Lucas*, 505 U.S. at 1027; *see also Bell*, 255 Va. at 400, 498 S.E.2d at 417 (citing *Lucas*, 505 U.S. at 1015).

[35]Conversely, even if such had been the right of the fee property owner at common law, it is unlikely that such right would now be considered a taking. "[W]here an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking because the aggregate must be viewed in its entirety.'" *Keystone*, 480 U.S. at 497 (quoting Andrus v. Allard, 444 U.S. 51, 65-66 (1979)).

[36]Couch v. Clinchfield Coal Corp., 148 Va. 455, 460, 139 S.E. 314, 315 (1927).

[37]*Id.* at 460-61, 139 S.E. at 315; *see also Lucas*, 505 U.S. at 1027; *Keystone*, 480 U.S. at 480-81 (discussing property owners' "bundle of rights" relating to "takings" jurisprudence).

[38]*See* 1990 Va. Acts ch. 92, at 150, 150-69 (codified at §§ 45.1-361.1 to 45.1-361.44). Prior to 1990, the Gas and Oil Act provided for drilling units and compulsory pooling, but did not define coalbed methane

or include provisions regarding coalbed methane in the drilling unit or compulsory pooling statutes. *See* McClanahan, *supra* note 4, at 540 n.532.

[39]Zappulla v. Crown, 239 Va. 566, 570-71, 391 S.E.2d 65, 68 (1990).

[40]*Id.*

[41]*See supra* notes 12-13 and accompanying text.

[42]1975-1976 Op. Va. Att'y Gen. 130, 131.

[43]Va. Const. art. I, § 11.

[44]Speet v. Bacaj, 237 Va. 290, 296, 377 S.E.2d 397, 400 (1989); *see also* Etheridge v. Med. Ctr. Hosps., 237 Va. 87, 95, 376 S.E.2d 525 529 (1989) (noting resolution of facts is jury's sole function).

[45]*See generally* Va. Code Ann. §§ 2.2-4000 to 2.2-4031 (2008) (Administrative Process Act).

[46]Opp Cotton Mills, Inc. v. Administrator, 312 U.S. 126, 155 (1941); *see also* Rosedale Coal Co. v. Director, 247 F.2d 299, 305 (4th Cir. 1957) (noting that strict rules of evidence observed in courts of law may be somewhat relaxed in administrative hearings).

[47]*See* Jones v. West, 46 Va. App. 309, 341 n.8, 616 S.E.2d 790, 807 n.8 (2005) (McClanahan, J., concurring in part and dissenting in part); Carter v. Gordon, 28 Va. App. 133, 141, 502 S.E.2d 697, 701 (1998) (noting that hearsay evidence is admissible at administrative hearing conducted in accordance with Administrative Process Act).

[48]*See* Stanardsville Vol. Fire Co. v. Berry, 229 Va. 578, 583, 331 S.E.2d 466, 469 (1985); *Bowman*, 128 Va. at 372, 105 S.E. at 148 (noting that constitution does not guarantee right to jury trial when right did not exist prior to adoption of constitution).

[49]*Speet*, 237 Va. at 295, 377 S.E.2d at 400.

[50]Va. Sup. Ct. R. 2A:5.

[51]Section 45.1-361.19(C) (Supp. 2008); *see also* Va. Code Ann. 2005 UPL Op. 209 (Supp. 2008) (acknowledging authority of Board to carry out its duties and conduct its hearings).

[52]*See, e.g.*, § 45.1-361.19(A)-(B) (providing that notice of Board hearings are to be given by certified mail and by publication in newspaper); *see also* Tulsa Prof'l Collection Servs., Inc. v. Pope, 485 U.S. 478, 484 (1988); Combs v. Winchester, 25 Va. Cir. 207, 217-18 (1991) (noting that state action affecting property must generally be accompanied by notification of that action; fundamental requirement of due process in any proceeding to be accorded finality is notice to apprise interested parties and afford them opportunity to present objections).

[53]*See* § 45.1-361.9(A) (2002).

[54]*See supra* note 52; *see also* § 45.1-361.19(C) (providing that "any person to whom notice is required to be given … shall have standing to be heard at the hearing").

[55]*Berry*, 229 Va. at 583, 331 S.E.2d at 469.

[56]Wiecking v. Allied Med. Supply Corp., 239 Va. 548, 551, 391 S.E.2d 258, 260 (1990) (quoting Messina v. Burden, 228 Va. 301, 307, 321 S.E.2d 657, 660 (1984)).

[57]*Id.*

[58]Elizabeth River Tunnel Dist. v. Beecher, 202 Va. 452, 457, 117 S.E.2d 685, 689 (1961) (noting that such waiver cannot be implied from general statutory language or by implication).

[59]*See* Pearsall v. Va. Racing Comm'n, 26 Va. App. 376, 383, 494 S.E.2d 879, 883 (1998); Va. Bd. of Med. v. Va. Physical Therapy Ass'n., 13 Va. App. 458, 465, 413 S.E.2d 59, 63 (1991).

[60]Va. Code Ann. §§ 8.01-192 to 8.01-195 (2007).

[61]Sections 8.01-195.1 to 8.01-195.9 (2007).

[62]Section 8.01-187 (2007).

[63]*See* §§ 2.2-4000 to 2.2-4031 (Administrative Process Act).

[64] *Id.*; V. SUP. CT. R. pt. 2A ("Appeals Pursuant to the Administrative Process Act").

[65] *See generally* §§ 45.1-361.15(B), 45.1-361.19(C).

OP. NO. 08-104

MOTOR VEHICLES: ABANDONED, TRESPASSING, ETC., VEHICLES – TRESPASSING VEHICLES, PARKING, AND TOWING.

Fairfax County may exercise specific authority provided by § 46.2-1222 to regulate parking on roads in secondary system of highways within its boundaries; such authority is not limited by §§ 46.2-1222.1 and 46.2-1224(B)-(C).

THE HONORABLE DAVID L. BULOVA
MEMBER, HOUSE OF DELEGATES

THE HONORABLE MARK D. SICKLES
MEMBER, HOUSE OF DELEGATES
FEBRUARY 11, 2009

ISSUE PRESENTED

You ask whether Fairfax County is subject to §§ 46.2-1222.1 and 46.2-1224(B)-(C) regarding regulation of parking on roads in the secondary systems of highways or whether it may exercise the authority provided by § 46.2-1222.

RESPONSE

It is my opinion that Fairfax County may exercise the specific authority provided by § 46.2-1222 to regulate parking on roads in the secondary system of highways within its boundaries. The County is not limited by §§ 46.2-1222.1 and 46.2-1224(B)-(C) in the exercise of such authority.

BACKGROUND

You advise that Fairfax County officials are hesitant to exercise the authority provided by § 46.2-1222 to regulate parking on secondary roads within the County. You relate that such officials are concerned that their authority is limited by §§ 46.2-1222.1 and 46.2-1224(B)-(C). You note that the County operates under the urban county executive form of government and has a population in excess of 500,000; thus, the County may meet the eligibility guidelines of §§ 46.2-1222.1 and 46.2-1224(B)-(C).

APPLICABLE LAW AND DISCUSSION

Section 46.2-1222 provides, in part, that:

> Notwithstanding any other provisions of law, the governing bod[y] of Fairfax … Count[y] by ordinance may (i) restrict or prohibit parking on any part of the state secondary system of highways within their respective boundaries, (ii) provide for classification of vehicles for the purpose of these restrictions and prohibitions, and (iii) provide that the violation of the ordinance shall constitute a traffic infraction and prescribe penalties therefor.

The express language of § 46.2-1222 specifically applies to Fairfax County and grants authority to the County to enact an ordinance regulating parking on secondary roads within its boundaries.

On the other hand, § 46.2-1222.1(A) permits "[a]ny county operating under the urban county executive form of government" to regulate or prohibit the parking of watercraft, boat trailers, motor homes, and camping trailers on any public highway. Additionally, § 46.2-1222.1(B) permits any such county to regulate or prohibit parking of trailers or semitrailers, vehicles with three or more axles, vehicles with a gross vehicle weight rating of 12,000 pounds or more, vehicles designed to transport sixteen or more passengers, and vehicles being used to transport hazardous materials "on any public highway in any residence district." Thus, § 46.2-1222.1 applies to any county with an urban county executive form of government and has a more general application than the authority contained in § 46.2-1222, which applies specifically to Fairfax County.[1]

Likewise § 46.2-1224(B) authorizes "counties with populations greater than 500,000" to regulate by ordinance the parking of certain "commercial vehicles"[2] on the highways in areas zoned for residential use. Further, § 46.2-1224(C) authorizes "counties with populations greater than 500,000" to regulate the parking of certain commercial vehicles[3] in areas zoned for commercial or industrial use on highways that "do not comply with the current geometric design standards of the Virginia Department of Transportation Road Design Manual or Subdivision Street Requirements."[4] Again, § 46.2-1224 provides a more general application than § 46.2-1222.

Generally, when there is an apparent conflict between several different statutes, the more specific statute prevails.[5] An accepted principle of statutory construction is that when it is not clear which of a number of statutes is applicable, the more specific prevails over the more general.[6] In this situation, § 46.2-1222 specifically names and authorizes Fairfax County to regulate parking of any type of vehicle on the secondary roads lying within its jurisdictional boundaries. Section 46.2-1222 specifically addresses parking on the state secondary system of highways as opposed to "highways" generally. While § 46.2-1222.1 does provide authority for counties operating under the urban county executive form of government or the county manager plan of government to regulate parking of certain vehicles on public highways within their boundaries, it is not meant to limit the operation of, or the authority granted by, § 46.2-1222 as applied to secondary highways in Fairfax County. Likewise, while § 46.2-1224(B)-(C) provides additional authority for Fairfax County to regulate parking on highways in certain zoning districts within its boundaries, it also does not limit the operation of § 46.2-1222. Therefore, any conflict between § 46.2-1222 and §§ 46.2-1222.1 and 46.2-1224(B)-(C) would be resolved in favor of § 46.2-1222, the statute specific to Fairfax County, which applies notwithstanding any other provision of law.

CONCLUSION

Accordingly, it is my opinion that Fairfax County may exercise the specific authority provided by § 46.2-1222 to regulate parking on roads in the secondary system of highways within its boundaries. The County is not limited by §§ 46.2-1222.1 and 46.2-1224(B)-(C) in the exercise of such authority

[1]The fact that Fairfax County is the only county in Virginia that presently utilizes the urban county executive form of government does not alter this conclusion.

[2]*See* VA. CODE ANN. § 46.2-1224(B) (Supp. 2008) (defining "commercial vehicles" for purposes of § 46.2-1224).

[3]*See id.*

[4]S*ee* § 46.2-1224(B)-(C) (2008).

[5]*See* Lynchburg Div. of Soc. Srvs. v. Cook, 276 Va. 465, 480-81, 666 S.E.2d 361, 368-69 (2008); *see also* Alliance to Save Mattaponi v. Commonwealth Dep't of Envtl. Quality *ex rel.* State Water Control Bd., 270 Va. 423, 439-40, 621 S.E.2d 78, 87 (2005).

[6]*See* 2003 Op. Va. Att'y. Gen. 6, 9.

OP. NO. 09-009

MOTOR VEHICLES: ABANDONED, TRESPASSING, ETC., VEHICLES – TRESPASSING VEHICLES, PARKING, AND TOWING – IMMOBILIZED AND UNATTENDED VEHICLES.

No authority under § 46.2-1209 for county to enact ordinance prohibiting persons from parking and leaving vehicles 'unattended' on public residential streets. Term 'unattended' should be given its ordinary meaning, 'lacking a guard, escort, caretaker, or other watcher' or 'unaccompanied.' Pursuant to § 46.2-1213, county may enact ordinances to provide for removal of certain vehicles that are: (1) left unattended on public highways or other public property that constitute traffic hazard; (2) illegally parked; (3) left unattended for more than ten days on public property; or (4) immobilized on public roadway by weather or other emergency conditions. Pursuant to § 46.2-1220, county may enact ordinance to regulate parking, stopping, and standing of vehicles within its jurisdictional limits, subject to limitations imposed in other sections of Article 3, Chapter 12 of Title 46.2.

THE HONORABLE RICHARD L. SASLAW
MEMBER, SENATE OF VIRGINIA

THE HONORABLE ROBERT D. HULL
MEMBER, HOUSE OF DELEGATES

THE HONORABLE JAMES M. SCOTT
MEMBER, HOUSE OF DELEGATES
APRIL 1, 2009

ISSUE PRESENTED

You ask whether § 46.2-1209 authorizes a county to prohibit persons from parking and leaving vehicles "unattended" on public residential streets. If so, you inquire concerning the appropriate legal definition of the word "unattended" as applied to such local restriction.

RESPONSE

It is my opinion that § 46.2-1209 does not authorize a county to enact an ordinance prohibiting persons from parking and leaving vehicles "unattended" on public

residential streets. However, pursuant to § 46.2-1213 a county may enact ordinances to provide for removal of certain vehicles that are: (1) left unattended on public highways or other public property that constitute a traffic hazard; (2) illegally parked; (3) left unattended for more than ten days on public property; or (4) immobilized on a public roadway by weather or other emergency conditions. It further is my opinion that pursuant to § 46.2-1220 a county may enact an ordinance to regulate parking, stopping, and standing of vehicles within its jurisdictional limits, subject to limitations imposed in other sections of Article 3, Chapter 12 of Title 46.2. Finally, it is my opinion that the term "unattended" should be given its ordinary meaning, "lacking a guard, escort, caretaker, or other watcher" or "unaccompanied."

BACKGROUND

You suggest that § 46.2-1209 provides enabling authority for "counties, cities, and towns to enact local ordinances providing for the removal of certain motor vehicles, trailers, semitrailers, and parts or combinations thereof that are left unattended." You also note that in Fairfax County persons sometimes park their motor vehicles and trailers on public residential streets for long periods and that while these vehicles bear valid inspection decals and current license plates, the vehicles are rarely moved or operated. You note that this often generates complaints from neighbors who feel that the owners of these vehicles have "expropriated a public street and made it into a storage facility for their private vehicles."

APPLICABLE LAW AND DISCUSSION

The power of a local governing body, unlike that of the General Assembly, "must be exercised pursuant to an express grant"[1] because the powers of a county "are limited to those conferred expressly or by necessary implication."[2] "If the power cannot be found, the inquiry is at an end."[3] The Dillon Rule requires a narrow interpretation of all powers conferred on local governments since they are delegated powers.[4] Therefore, any doubt as to the existence of power must be resolved against the locality.[5]

Article 2, Chapter 12 of Title 46.2, §§ 46.2-1209 through 46.2-1215, addresses removal of immobilized and unattended vehicles. Section 46.2-1209 provides, in relevant part, that:

> *No person shall leave any motor vehicle, trailer, semitrailer, or part or combination thereof immobilized or unattended on or adjacent to any roadway if it constitutes a hazard in the use of the highway. No person shall leave any immobilized or unattended motor vehicle, trailer, semitrailer, or part or combination thereof longer than twenty-four hours on or adjacent to any roadway outside the corporate limits of any city or town, or on an interstate highway or limited access highway, expressway, or parkway inside the corporate limits of any city or town*. Any law-enforcement officer may remove it or have it removed to a storage area for safekeeping and shall report the removal to the Department and to

> the owner of the motor vehicle, trailer, semitrailer, or combination as promptly as possible. Before obtaining possession of the motor vehicle, trailer, semitrailer, or combination, its owner or successor in interest to ownership shall pay to the parties entitled thereto all costs incidental to its removal or storage. In any violation of this section the owner of such motor vehicle, trailer, semitrailer or part or combination of a motor vehicle, trailer, or semitrailer, shall be presumed to be the person committing the violation; however, this presumption shall be rebuttable by competent evidence. [Emphasis added.]

Section 46.2-1209 merely provides authority for law-enforcement officers to remove or arrange for removal of the offending vehicles from specific roadways and highways, and does not authorize a county to enact an ordinance regarding such removal.

Although § 46.2-1209 does not authorize a county to adopt an ordinance to remove such unattended vehicles, the inquiry is not at an end. I note that § 46.2-1213(A) authorizes counties, cities, and towns to enact ordinances to provide for the removal of immobilized or unattended motor vehicles in certain instances:

> A. The governing body of any county, city, or town may by ordinance provide for the removal for safekeeping of motor vehicles, trailers, semitrailers, or parts thereof to a storage area if:
>
> 1. It is left unattended on a public highway or other public property and constitutes a traffic hazard;
>
> 2. It is illegally parked;
>
> 3. It is left unattended for more than ten days either on public property or on private property without the permission of the property owner, lessee, or occupant;
>
> 4. It is immobilized on a public roadway by weather conditions or other emergency situation.
>
> B. Removal shall be carried out by or under the direction of a law-enforcement officer. The ordinance, however, shall not authorize removal of motor vehicles, trailers, semitrailers, and parts thereof from private property without the written request of the owner, lessee, or occupant of the premises. The ordinance may also provide that the person at whose request the motor vehicle, trailer, semitrailer, or part of a motor vehicle, trailer, or semitrailer is removed from private property shall indemnify the county, city, or town against any loss or expense incurred by reason of removal, storage, or sale thereof. Any such ordinance may also provide that it shall be presumed that such motor vehicle, trailer, semitrailer, or part thereof is abandoned if it (i) lacks either a current license plate; or a current county, city or town license plate or sticker; or a valid

> state safety inspection certificate or sticker; and (ii) it has been in a specific location for four days without being moved. As promptly as possible, each removal shall be reported to a local governmental office to be designated in the ordinance and to the owner of the motor vehicle, trailer, or semitrailer. Before obtaining possession of the motor vehicle, trailer, semitrailer, or part thereof, the owner shall pay to the parties entitled thereto all costs incidental to its removal and storage and locating the owner. If the owner fails or refuses to pay the cost or if his identity or whereabouts is unknown and unascertainable after a diligent search has been made, and after notice to him at his last known address and to the holder of any lien of record with the office of the Department against the motor vehicle, trailer, semitrailer, or part of a motor vehicle, trailer, or semitrailer, the vehicle shall be treated as an abandoned vehicle under the provisions of Article 1 (§ 46.2-1200 et seq.) of [Chapter 12].

Thus, 46.2-1213(A) specifically authorizes a county to enact an ordinance to remove vehicles from public highways or other public property in certain situations, *i.e.*, when such unattended vehicles cause traffic hazards, are illegally parked, or are left unattended for more than ten days. Additionally, a county may enact an ordinance providing for removal of vehicles immobilized on a public roadway due to weather or other emergency conditions.

Additional statutes governing the regulation of parking are set forth in Article 3, Chapter 12 of Title 46.2, §§ 46.2-1216 through 46.2-1239 ("Article 3"). Article 3 provides localities with authority to enact ordinances regulating parking. Specifically, § 46.2-1220 provides that the "governing body of any county, city, or town may by ordinance provide for the regulation of parking, stopping, and standing of vehicles within its limits." Section 46.2-1220 further provides that such an ordinance may "determine the length of time a vehicle may be parked, and designate a department, official, or employee of the local government to administer the provisions of the ordinance." While § 46.2-1220 grants general authority to the governing bodies of counties, cities, and towns to enact ordinances relating to parking, Article 3 also provides additional authority, restrictions, or requirements that regulate parking that are based on various factors, including the locality, the nature or location of the roads, and the type of vehicle involved.[6] It is well established that statutes should not be read in isolation.[7] Statutes relating to the same subject should be considered *in pari materia*.[8] Moreover, statutes dealing with the same subject matter should be construed together to achieve a harmonious result, resolving conflicts to give effect to legislative intent.[9] Thus, while § 46.2-1220 provides general authority for localities to regulate parking, Article 3 must be read as a whole, to determine the extent to which a locality may regulate parking in residential districts or areas.

Section 46.2-1213(A) is the statute that governs the circumstances under which a locality may enact an ordinance providing for the removal of unattended vehicles

left on public streets in the enumerated situations. However, such removal must "be carried out by or under the direction of a law-enforcement officer."[10] On the other hand, § 46.2-1220 provides broad authority for a county to enact ordinances governing parking, including the length of time a vehicle may be parked, which authority is limited only to the extent dictated by other sections in Article 3. Therefore, a county may enact an ordinance governing parking, stopping, and standing of vehicles within its limits, which could include public residential streets, to the extent authorized in Article 3.

The inquiry then focuses upon the meaning of the term "unattended." I find no statutory definition of the term "unattended." When a particular word in a statute is not defined therein, it must be given its ordinary meaning.[11] The common or ordinary meaning of the word "unattended" is "lacking a guard, escort, caretaker, or other watcher" or "unaccompanied."[12] The term "unattended" also may refer to the condition of being "neglected" or "not cared for."[13] Such meaning could be attributed to the term when used in § 46.2-1213(A). However, the General Assembly, when referring to the condition of a vehicle in Title 46.2, utilizes other terms, such as "inoperable"[14] or "abandoned."[15] Accordingly, it is my opinion that the term "unattended" as used in §§ 46.2-1209 and 46.2-1213(A) means "lacking a guard, escort, caretaker, or other watcher" or "unaccompanied."

CONCLUSION

Accordingly, it is my opinion that § 46.2-1209 does not authorize a county to enact an ordinance prohibiting persons from parking and leaving vehicles "unattended" on public residential streets. However, pursuant to § 46.2-1213 a county may enact ordinances to provide for removal of certain vehicles that are: (1) left unattended on public highways or other public property that constitute a traffic hazard; (2) illegally parked; (3) left unattended for more than ten days on public property; or (4) immobilized on a public roadway by weather or other emergency conditions. It further is my opinion that pursuant to § 46.2-1220 a county may enact an ordinance to regulate parking, stopping, and standing of vehicles within its jurisdictional limits, subject to limitations imposed in other sections of Article 3, Chapter 12 of Title 46.2. Finally, it is my opinion that the term "unattended" should be given its ordinary meaning, "lacking a guard, escort, caretaker, or other watcher" or "unaccompanied."

[1] Nat'l Realty Corp. v. Va. Beach, 209 Va. 172, 175, 163 S.E.2d 154, 156 (1968).

[2] Bd. of Supvrs. v. Horne, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975) (noting corollary to Dillon Rule).

[3] Commonwealth v. County Bd., 217 Va. 558, 575, 232 S.E.2d 30, 41 (1977).

[4] *See* Bd. of Supvrs. v. Countryside Invest. Co., 258 Va. 497, 504-05, 522 S.E.2d 610, 613-14 (1999) (holding that county board of supervisors does not have unfettered authority to decide what matters to include in subdivision ordinance; must include requirements mandated by Land Subdivision and Development Act and may include optional provisions contained in act); Op. Va. Att'y Gen: 2002 at 77, 78; 1974-1975 at 403, 405.

[5]2A EUGENE MCQUILLEN, THE LAW OF MUNICIPAL CORPORATIONS § 10.19, at 369 (3d ed. 1996); *see also* Op. Va. Att'y Gen.: 2002 at 83, 84; 2000 at 75, 76.

[6]*See also, e.g.*, VA. CODE ANN. § 46.2-1222 (2005) (providing that "governing bodies of Fairfax, James City, Loudoun, Montgomery, Prince George, Prince William, and York counties by ordinance may (i) restrict or prohibit parking on any part of the state secondary system of highways within their respective boundaries; [and] (ii) provide for the classification of vehicles for the purpose of these restrictions and prohibitions"); § 46.2-1222.1(A)-(B) (2005) (providing that any county operating under urban county executive form of government or county manager plan of government and certain other adjacent localities may enact an ordinance to regulate or prohibit parking of certain vehicles on any public highway within their boundaries and parking of certain vehicles on public highways within residence districts).

[7]2B NORMAN J. SINGER & J.D. SHAMBIE SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 51:2 (West 7th ed. 2008); Op. Va. Att'y Gen.: 1999 at 22, 22; 1998 at 123, 124; *id.* at 19, 21; 1996 at 197, 198; 1995 at 146, 147; 1993 at 160, 162; *id.* at 135, 137; 1992 at 108, 112.

[8]*See* Prillaman v. Commonwealth, 199 Va. 401, 405-06, 100 S.E.2d 4, 7-8 (1957); 1996 Op. Va. Att'y Gen. 134, 135. "*In pari materia*" is the Latin phrase meaning "[o]n the same subject; relating to the same matter." BLACK'S LAW DICTIONARY 807 (8th ed. 2004).

[9]*See* 2A SINGER & SINGER, *supra* note 7 at § 46:5 (West 7th ed. 2008); 2000 Op. Va. Att'y Gen. 182, 185.

[10]Section 46.2-1213(B) (2005).

[11]*See* McKeon v. Commonwealth, 211 Va. 24, 27, 175 S.E.2d 282, 284 (1970).

[12]WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2482 (1993).

[13]*Id.*

[14]*See, e.g.*, § 46.2-734(C) (2005) (providing that hobbyist may store unlicensed operable or inoperable vehicles on his property with certain restrictions); § 46.2-1200 (2005) (including term "inoperable" within definition of "abandoned motor vehicle"); *see also* VA. CODE ANN. § 15.2-905 (2008) (providing that as used in this section "an 'inoperable motor vehicle' means any motor vehicle, trailer or semitrailer which is not in operating condition; or does not display valid license plates; or does not display an inspection decal that is valid or does display an inspection decal that has been expired for more than 60 days").

[15]"*'Abandoned motor vehicle'* means a motor vehicle, trailer, or semitrailer or part of a motor vehicle, trailer, or semitrailer that:
"1. Is inoperable and is left unattended on public property, other than an interstate highway or primary highway, for more than forty-eight hours, or
"2. Has remained illegally on public property for more than forty-eight hours, or
"3. Has remained for more than forty-eight hours on private property without the consent of the property's owner, regardless of whether it was brought onto the private property with the consent of the owner or person in control of the private property, or
"4. Is inoperable, left unattended, or both, on an interstate highway, or
"5. Is inoperable, left unattended, or both, on the shoulder of a primary highway."
Section 46.2-1200.

OP. NO. 08-084

MOTOR VEHICLES: ABANDONED, TRESPASSING, ETC., VEHICLES – TRESPASSING VEHICLES, PARKING, AND TOWING.

In interest of highway safety, local police department may adopt certain procedures for selecting private towing and recovery service companies to provide safe and efficient removal, storage, and safekeeping of vehicles involved in traffic accidents or other highway safety incidents; procedures may not infringe upon local government authority to regulate towing; only may address matters related to public safety. Whether procedures address public safety concerns is question of fact.

THE HONORABLE EMMETT W. HANGER JR.
MEMBER, SENATE OF VIRGINIA
FEBRUARY 2, 2009

ISSUE PRESENTED

You ask whether a local police department may enact regulatory guidelines for towing and recovery service companies absent the local governing body creating an advisory board and enacting an ordinance pursuant to § 46.2-1217.

RESPONSE

It is my opinion that in the interest of highway safety, a local police department may adopt certain procedures for selecting private towing and recovery service companies to provide safe and efficient removal, storage, and safekeeping of vehicles involved in traffic accidents or other highway safety incidents. However, such procedures may not infringe upon the authority of the local governing body to regulate towing and only may address matters related to public safety. Further, it is my opinion that whether such procedures address public safety concerns is a question of fact.[1]

APPLICABLE LAW AND DISCUSSION

Section 46.2-1217 provides, in pertinent part, that:

> The governing body of any county, city, or town by ordinance may regulate services rendered pursuant to police towing requests by any business engaged in the towing or storage of unattended, abandoned, or immobile vehicles. The ordinance may include delineation of service areas for towing services, the limitation of the number of persons engaged in towing services in any area, including the creation of one or more exclusive service areas, and the specification of equipment to be used for providing towing service. The governing body of any county, city, or town may contract for services rendered pursuant to a police towing request with one or more businesses engaged in the towing or storage of unattended, abandoned, or immobile vehicles. The contract may specify the fees or charges to be paid by the owner or operator of a towed vehicle to the person undertaking its towing or storage and may prescribe the geographical area to be served by each person providing towing services. The county, city, or town may establish criteria for eligibility of persons to enter into towing services contracts and, in its discretion, may itself provide exclusive towing and storage service for police-requested towing of unattended, abandoned, or immobile vehicles. Such criteria shall, for drivers of tow trucks and towing and recovery operators, be no less restrictive than those established pursuant to Chapter 28 (§ 46.2-2800 et seq.) of this title and regulations adopted pursuant thereto.
>
> Prior to adopting an ordinance or entering into a contract pursuant to this section, the local governing body shall appoint

> an advisory board to advise the governing body with regard to the appropriate provisions of the ordinance or terms of the contract. The advisory board shall include representatives of local law-enforcement agencies, towing and recovery operators, and the general public.

Section 46.2-1217 refers to criteria established pursuant to Chapter 28 of Title 46.2, §§ 46.2-2800 through 46.2-2828, for tow truck drivers and towing and recovery operators and mandates the criteria established by the locality "shall … be no less restrictive" than Chapter 28. Section 46.2-2826 provides that:

> The Board [for Towing and Recovery Operators] shall establish regulations required of Class A and Class B operators to provide public safety towing and recovery services. For the purposes of this section, "public safety towing and recovery services" shall be those towing and recovery and related services requested by a state or local law-enforcement agency. Such regulations shall establish minimum requirements, including qualifications, standards, necessary equipment, and public safety concerns necessary and appropriate to permit a Class A or Class B operator to provide public safety towing and recovery services. No operator shall provide public safety towing and recovery services unless they meet such criteria established by Board regulation applicable to public safety towing and recovery services. Upon submitting evidence to the Board of meeting such criteria, the Board shall maintain, on a timely basis, a list to be readily available to state and local law-enforcement agencies of Class A and Class B operators who meet the Board's criteria for providing public safety towing and recovery services.

The Board for Towing and Recovery Operators (the "Board") has not yet established such regulations or criteria because § 46.2-2809 provides that "[n]o regulation of the Board pertaining to public safety towing and recovery services, as provided in § 46.2-2826, shall become effective prior to July 1, 2010."[2]

Other statutory provisions apply to the authority of local and state law-enforcement officers to remove, store, and safeguard vehicles involved in accidents or other highway safety incidents. First, § 46.2-1212.1 provides:

> A. As a result of a motor vehicle accident or incident, the Department of State Police and/or local law-enforcement agency in conjunction with other public safety agencies may, without the consent of the owner or carrier, remove:
>
> 1. A vehicle, cargo, or other personal property that has been (i) damaged or spilled within the right-of-way or any portion of

a roadway in the state highway system and (ii) is blocking the roadway or may otherwise be endangering public safety; or

2. Cargo or personal property that the Department of Transportation, Department of Emergency Management, or the fire officer in charge has reason to believe is a hazardous material, hazardous waste or regulated substance as defined by the Virginia Waste Management Act (§ 10.1-1400 et seq.), the Hazardous Materials Transportation Act (49 U.S.C. § 1808 et seq.) or the State Water Control Law (§ 62.1-44.2 et seq.), if the Department of Transportation or applicable person complies with the applicable procedures and instructions defined either by the Department of Emergency Management or the fire officer in charge.

B. The Department of Transportation, Department of State Police, Department of Emergency Management, local law-enforcement agency and other local public safety agencies and their officers, employees and agents, shall not be held responsible for any damages or claims that may result from the failure to exercise any authority granted under this section provided they are acting in good faith.

C. The owner and carrier, if any, of the vehicle, cargo or personal property removed or disposed of under the authority of this section shall reimburse the Department of Transportation, Department of State Police, Department of Emergency Management, local law-enforcement agency, and local public safety agencies for all costs incurred in the removal and subsequent disposition of such property.

Next, § 46.2-1209 provides, in part, that:

No person shall leave any motor vehicle, trailer, semitrailer, or part or combination thereof immobilized or unattended on or adjacent to any roadway if it constitutes a hazard in the use of the highway. No person shall leave any immobilized or unattended motor vehicle, trailer, semitrailer, or part or combination thereof longer than twenty-four hours on or adjacent to any roadway outside the corporate limits of any city or town, or on an interstate highway or limited access highway, expressway, or parkway inside the corporate limits of any city or town. Any law-enforcement officer may remove it or have it removed to a storage area for safekeeping and shall report the removal to the Department [of Motor Vehicles] and to the owner of the motor vehicle, trailer, semitrailer, or combination as promptly as possible.

Finally, there is a federal law that relates to this issue. Federal authority over intrastate transportation is set out in 49 U.S.C. § 14501, which provides in pertinent part:

> **(c) Motor carriers of property.—**
>
> **(1) General rule.**—Except as provided in paragraphs (2) and (3), a State, political subdivision of a State, or political authority of 2 or more States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of any motor carrier (other than a carrier affiliated with a direct air carrier covered by section 41713(b)(4)) or any motor private carrier, broker, or freight forwarder with respect to the transportation of property.
>
> **(2) Matters not covered.**—Paragraph (1)—
>
> **(A)** shall not restrict the safety regulatory authority of a State with respect to motor vehicles, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle or the hazardous nature of the cargo, or the authority of a State to regulate motor carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization;
>
> ….
>
> **(C)** does not apply to the authority of a State or a political subdivision of a State to enact or enforce a law, regulation, or other provision relating to the price of for-hire motor vehicle transportation by a tow truck, if such transportation is performed without the prior consent or authorization of the owner or operator of the motor vehicle.
>
> ….
>
> [**(3)(C)**]**(5) Limitation on statutory construction.**—Nothing in this section shall be construed to prevent a State from requiring that, in the case of a motor vehicle to be towed from private property without the consent of the owner or operator of the vehicle, the person towing the vehicle have prior written authorization from the property owner or lessee (or an employee or agent thereof) or that such owner or lessee (or an employee or agent thereof) be present at the time the vehicle is towed from the property, or both.

Thus, regulation of the towing industry is addressed by both federal and state laws and, potentially, by local ordinances. Given that legal framework, the question becomes what authority is available to law-enforcement agencies regarding regulation of towing operations within their jurisdictions. This especially is true because the Board has not promulgated the regulations required by § 46.2-2826, and the local governing body has not enacted ordinances or entered into contracts with towing companies pursuant to § 46.2-1217.

You ask about specific procedures adopted by the Harrisonburg Police Department (the "Procedures").[3] The primary purpose of the Procedures appears to be a description of the process by which the Police Department will call towing companies to the scene of an accident or other incident requiring towing services. The Procedures describe a rotating list of qualified towing companies that will be called when such an incident occurs. Additionally, the Procedures require the call for a particular incident to go to the company at the top of the list. The remainder of the Procedures describe how a company is placed on or remains on the rotating list as a qualified company.

Most of the Procedures' requirements for becoming a qualified towing company on the rotating list relate to general safety concerns about the proper equipment needed to tow vehicles, to clean up accident scenes, and to communicate with law-enforcement, and the need for twenty-four-hour availability to clear accident scenes safely and expeditiously. Law-enforcement agencies have a general duty to provide for public safety on the highways, including the specific statutory duties set out in §§ 46.2-1209 and 46.2-1212.1. The Procedures generally appear to fit within law-enforcement public safety duties by utilizing private companies that are capable of providing safe and expeditious service.

However, there are provisions in the Procedures that may go beyond establishing a process for utilizing private companies to enforce the Harrisonburg Police Department's public safety duties to clear the highways. Some provisions may be construed to be regulatory in nature. An example is the requirement that a towing company must have at least two wreckers, one a "rollback" and the other a "crane recovery wrecker," to be a qualified operator. It is possible that in some localities such a requirement for two wreckers of the specified types might be justifiable on public safety grounds. However, the procedures that are justifiable on public safety grounds will vary from jurisdiction to jurisdiction.[4] Accordingly, there is a factual issue regarding whether such a requirement is essential solely based on public safety needs. Where a requirement regarding a "rollback" and "crane recovery wrecker" falls into the realm of regulation of towing companies, such regulation is permitted under federal and state law, but requires local adoption of ordinances or contractual arrangements following the appointment of an advisory board or by the Board pursuant to § 46.2-2826.

CONCLUSION

Accordingly, it is my opinion that in the interest of highway safety, a local police department may adopt certain procedures for selecting private towing and recovery service companies to provide safe and efficient removal, storage, and safekeeping of vehicles involved in traffic accidents or other highway safety incidents. However, such procedures may not infringe upon the authority of the local governing body to regulate towing and only may address matters related to public safety. Further, it is my opinion that whether such procedures address public safety concerns is a question of fact.[5]

[1]Attorneys General historically have declined to render official opinions when the request involves a question of fact rather than one of law. *See, e.g.*, Op. Va. Att'y Gen.: 1997 at 195, 196; 1996 at 207, 208.

[2]Prior to the adoption of regulations establishing the criteria mandated by § 46.2-2826, the 2008 Session of the General Assembly amended § 46.2-2809 by adding the quoted language, which defers the effective date of such regulations until July 1, 2010. *See* 2008 Va. Acts ch. 836, at 1762, 1763.

[3]A copy of the Procedures, "Harrisonburg Police Department Operational Guidelines and Equipment Requirements for Wrecker Companies," is on file with this Office. For purposes of this opinion, all references and information about the Procedures were derived from this document.

[4]"Prior to proceeding further with drafting of any public safety towing regulations, the Board of Towing and Recovery Operators shall hold four public meetings to receive comments and recommendations regarding the appropriate equipment, standards, training, safety and other factors related to providing public safety towing and recovery services." 2008 Va. Acts, *supra* note 2, at 1763 (quoting enactment clause 2).

[5]*See supra* note 1.

OP. NO. 08-102

MOTOR VEHICLES: MOTOR VEHICLE AND EQUIPMENT SAFETY – SAFETY BELTS.

No authority to issue summons for failure to use safety belt system based solely on checking detail or roadblock; when checking detail or roadblock reveals some other violation, officer may issue summons for such failure.

THE HONORABLE CHRISTOPHER K. PEACE
MEMBER, HOUSE OF DELEGATES
JANUARY 26, 2009

ISSUE PRESENTED

You ask whether a checking detail or roadblock allows a law-enforcement officer to issue a summons for failure to use a safety belt system.

RESPONSE

It is my opinion that a checking detail or roadblock alone does not permit the issuance of a summons for failure to use a safety belt system. However, it is my opinion that when the checking detail or roadblock reveals some other violation of law, an officer then may issue a summons for failure to use a safety belt system.

BACKGROUND

You seek clarification regarding the circumstances under which a law-enforcement officer may issue a summons for failure to comply with § 46.2-1094(A). Specifically, you are concerned with the legal significance of law-enforcement checking details regarding the status of a seat belt violation as a "secondary" violation. You note that there is a conflict among jurisdictions; in some, the judges dismiss summonses issued solely from such stops while others permit such summonses. You seek guidance regarding whether a checking detail constitutes the "primary offense" that would permit issuance of a summons for failure to use a safety belt system pursuant to § 46.2-1094(F).

APPLICABLE LAW AND DISCUSSION

Section 46.2-1094 requires passengers in the front seat of a motor vehicle to use safety belt systems,[1] establishes a fine for failure to comply, and authorizes officers to issue a uniform traffic summons for violations. Section 46.2-1094(F) provides that:

> No citation for a violation of this section shall be issued *unless* the officer issuing such citation has cause to stop or arrest the driver of such motor vehicle *for the violation of some other provision of this Code or local ordinance* relating to the operation, ownership, or maintenance of a motor vehicle or any criminal statute. [Emphasis added.]

Since § 46.2-1094(F) plainly limits the circumstances under which officers may issue citations for failure to use a safety belt system, the issue you present is a question of statutory construction.

When the language of a statute is unambiguous, that language is binding, and a construction is not permitted that amounts to concluding that the General Assembly did not mean what it actually has stated.[2] Moreover, penal statutes are strictly construed against the Commonwealth and in favor of the liberty of citizens.[3] "Additionally, 'every part of a statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary.'"[4]

Section 46.2-1094(F) plainly contemplates that summonses ordinarily will not be issued solely for a violation of § 46.2-1094(A). It is my opinion that to overcome the express limitation set forth therein, a law-enforcement officer must suspect the motorist has committed, is committing, or will commit some other offense. The express language of § 46.2-1094(F) permits a law-enforcement officer to issue a summons for failure to use a safety belt system only when the officer "has cause to stop or arrest" a motorist *for* some other violation of the *Code* or a local ordinance.[5] In other words, § 46.2-1094 looks to the officer's basis for detaining a motorist, not to the fact of detention itself. Checking details or roadblocks do not meet the statutory prerequisite established in § 46.2 1094(F) because the basis for such a stop is not a violation or suspected violation.

Law-enforcement checking details or roadblocks are constitutionally permissible under certain conditions,[6] which provide that checking details must be governed by "a plan embodying explicit, neutral limitations on the conduct of individual officers." This is true unless the officer suspects the individual subject to the stop of criminal activity.[7] It is the application of *neutral* criteria for stopping vehicles that legitimizes the checking detail.[8] Thus, while such stops do not violate the Fourth Amendment, they likewise do not flow from any "cause" to believe specific criminal activity, traffic infractions, or other violations are occurring. Therefore, it follows that checking details are not the necessary "cause" to stop or arrest a motorist within the contemplation of § 46.2-1094(F).

However, once a motorist has been stopped at a checking detail or a roadblock, should the law-enforcement officer determine that a violation of the *Code* or a local ordinance exists, the officer then has such "cause" to stop or arrest the motorist for that violation. Under those circumstances, the officer also may issue a summons for failure to use a safety belt system.

CONCLUSION

Accordingly, it is my opinion that a checking detail or roadblock alone does not permit the issuance of a summons for failure to use a safety belt system. However, it is my opinion that when the checking detail or roadblock reveals some other violation of law, an officer then may issue a summons for failure to use a safety belt system.

[1]The statute provides exemptions for certain classes of drivers and passengers that are not pertinent to your inquiry. *See* Va. Code Ann. § 46.2-1094(B) (Supp. 2008).

[2]Williams v. Commonwealth, 265 Va. 268, 271, 576 S.E.2d 468, 470 (2003).

[3]Berry v. Chesapeake, 209 Va. 525, 526, 165 S.E.2d 291, 292 (1969).

[4]Robinson v. Commonwealth, 274 Va. 45, 51-52, 645 S.E.2d 470, 473 (2007) (quoting Hubbard v. Henrico Ltd. P'ship, 255 Va. 335, 340, 497 S.E.2d 335, 338 (1998)).

[5]*See* § 46.2-1094(F).

[6]*See generally* Brown v. Texas, 443 U.S. 47 (1979); Delaware v. Prouse, 440 U.S. 648 (1979).

[7]*Brown*, 443 U.S. at 51, *quoted in* Lowe v. Commonwealth, 230 Va. 346, 350, 337 S.E.2d 273, 276 (1985).

[8]*See Lowe*, 230 Va. at 350, 337 S.E.2d at 276.

OP. NO. 08-089

NOTARIES AND OUT-OF-STATE COMMISSIONERS: POWERS AND DUTIES.

TRADE AND COMMERCE: UNIFORM ELECTRONIC TRANSACTIONS ACT.

COURTS OF RECORD: CLERK'S, CLERKS' OFFICES AND RECORDS – ELECTRONIC FILING.

Prior to July 1, 2008, electronic notarization of document by Virginia notary public would constitute valid notarial act, provided act was performed by valid and commissioned notary public in compliance with applicable laws and regulations. Current electronic notarial acts performed by Virginia notaries would constitute valid notarial acts under Uniform Electronic Transactions Act, provided such acts comply with all other applicable statutes and regulations.

THE HONORABLE JOHN T. FREY
CLERK OF THE CIRCUIT COURT FOR FAIRFAX COUNTY
FEBRUARY 2, 2009

ISSUE PRESENTED

You request guidance concerning electronic notarization of documents in Virginia. Specifically, you ask whether an electronic notarization of a document by a Virginia notary public prior to July 1, 2008, constitutes a valid notarial act in the Commonwealth of Virginia. You further inquire whether Virginia notaries have the authority to notarize documents electronically without the Secretary of the Commonwealth commissioning them as an electronic notary public.

RESPONSE

It is my opinion that prior to July 1, 2008, an electronic notarization of a document by a Virginia notary public would constitute a valid notarial act so long as the act was performed by a valid and commissioned notary public who complied with applicable laws and regulations. It further is my opinion that electronic notarial acts currently performed by Virginia notaries would constitute valid notarial acts under the Uniform Electronic Transactions Act, provided such acts comply with all other applicable statutes and regulations.

BACKGROUND

You relate that your office has been recording electronic documents signed and notarized by electronic signatures in reliance upon § 17.1-258.4 and its predecessors statutes and upon the Uniform Electronic Transactions Act[1] ("UETA"), specifically §§ 59.1-485 and 59.1-489. You explain that the Virginia Notary Act[2] (the "Act") authorizes the Secretary of the Commonwealth to commission electronic notaries public ("electronic notaries" or "electronic notary"), but no electronic notaries have been commissioned. You express concern that some may call into question the efficacy of previous electronic notarial acts. Further, you question the ability of notaries public to continue current and ongoing practices of notarizing electronic documents and performing electronic notarial acts until such time as the Secretary exercises the statutory authority to commission electronic notaries public.

APPLICABLE LAW AND DISCUSSION

Section 47.1-3 of the Act authorizes the Governor to appoint "as many notaries as to him shall seem proper." A 1978 Attorney General opinion recognized that the appointment of notaries is discretionary with the Governor.[3] Any person acting as a notary in the Commonwealth "shall register with and be commissioned by the Secretary of the Commonwealth" and must comply with all provisions of the Act.[4] The 2007 Session of the General Assembly amended the Act (the "Amendments") adding sections to provide for commissioning and governing the conduct of electronic notaries.[5] The Amendments were effective on July 1, 2008.[6] Electronic notaries are authorized to exercise the same duties as conventional notaries.[7] However, electronic notaries do so in the context of transactions involving electronic documents or signatures.[8]

To qualify for a specific commission as an electronic notary in the Commonwealth under Title 47.1, an applicant shall meet the requirements expected of all notaries.[9] Additionally, an electronic notary must submit a registration form established by the Secretary of the Commonwealth which shall include "[a] description of the technology or technologies the registrant will use to create an electronic signature in performing official acts[.]"[10] If the device used to create the applicant's electronic signature is issued or registered through a licensed authority, the applicant must also provide the name of that authority, the source of the license and additional information necessary to identify the source of the device and its status and other pertinent information.[11] Section 47.1-16(E) requires a notary's electronic signature and seal to conform "to generally accepted standards for secure electronic notarization."

The Amendments, which provide authority for and a system to commission electronic notaries, are prospective. There is nothing to suggest that the General Assembly intended to interfere with existing rights.[12] Therefore, electronic notarial acts performed prior to the effective date of the Amendments would still be effective and recognized by law, provided all other requirements were met.[13]

Article 4.1, Chapter 2 of Title 17.1, §§ 17.1-258.2 through § 17.1-258.5 ("Article 4.1"), governs electronic filing of records related to clerks of court. Section 17.1-258.3 permits circuit court clerks to "establish a system for electronic filing in civil or criminal actions." Further, § 17.1-258.3 requires clerks to establish certain procedures and security safeguards "as defined in [UETA],[14] for transmitting notarized documents." Section 17.1-258.4(B) provides that "[a]ny statutory requirement for a document to be notarized shall be deemed satisfied by the appropriately executed electronic signature of such notary pursuant to the Virginia Notary Act (§ 47.1-1 et seq.)."[15]

UETA is an act of general applicability and governs "electronic records and electronic signatures relating to transactions"[16] and "shall be construed and applied to … [f]acilitate electronic transactions consistent with other applicable law[.]"[17] UETA contains specific exceptions for laws governing the creation and execution of wills, codicils, or testamentary trusts[18] and certain provisions of Virginia's Uniform Commercial Code.[19] A transaction subject to UETA also is subject to other applicable substantive law.[20] Section 59.1-489 of UETA specifically addresses notarization and acknowledgment and provides that:

> If a law requires a signature or record to be notarized, acknowledged, verified, or made under oath, the requirement is satisfied if the electronic signature of the person authorized to perform those acts, together with all other information required to be included by other applicable law, is attached to or logically associated with the signature or record.

It would be consistent with UETA, Article 4.1, and the Act to recognize and accept electronic notarial acts performed by conventional notaries public if required safeguards are in place and followed. Notwithstanding the fact that the Secretary of the Commonwealth has not commissioned any electronic notaries, notarial acts performed by existing conventional notaries public may be valid if they conform with all other governing laws, regulations, and rules. Such laws would include UETA and Article 4.1.

In the context of filings with circuit courts, each clerk has the discretion to establish a system for electronic filing and security procedures consistent with UETA.[21] Such discretion also may include notarial acts performed by commissioned electronic notaries pursuant to the Act. Therefore, in my opinion, a circuit court clerk may choose to establish a system for electronic filings and may choose to accept electronic notarial acts that comply with Article 4.1 and UETA. Additionally, a clerk may require that notarial acts be performed by electronic notaries officially commissioned

by the Secretary of the Commonwealth under the Act. It is my opinion that either course of action would be a reasonable exercise of a clerk's discretion in establishing necessary security safeguards.

CONCLUSION

Accordingly, it is my opinion that prior to July 1, 2008, an electronic notarization of a document by a Virginia notary public would constitute a valid notarial act so long as the act was performed by a valid and commissioned notary public who complied with applicable laws and regulations. It further is my opinion that electronic notarial acts currently performed by Virginia notaries would constitute valid notarial acts under the Uniform Electronic Transactions Act, provided such acts comply with all other applicable statutes and regulations.

[1]*See* VA. CODE ANN. tit. 59.1, ch. 42.1, §§ 59.1-479 to 59.1-497 (2006).

[2]*See* VA. CODE ANN. tit. 47.1, §§ 47.1-1 to 47.1-30 (2005 & Supp. 2008).

[3]*See* 1977-1978 Op. Va. Att'y Gen. 279, 279.

[4]Section 47.1-3 (Supp. 2008).

[5]*See* 2007 Va. Acts chs. 269, 590, at 369, 369-75, 800, 800-06, respectively. Section 47.1-2 defines an "electronic notary public" or "electronic notary" as "a notary public who has been commissioned by the Secretary of the Commonwealth with the capability of performing electronic notarial acts under § 47.1-7 and has been sworn in by the clerk of the circuit court under § 47.1-9."

[6]*Id.* cl. 3, at 375, 806, respectively (mandating effective date).

[7]*See* § 47.1-2 (Supp. 2008) (defining "notary public" to include "an electronic notary except where expressly provided otherwise"); *see also* § 47.1-12 (Supp. 2008) (authorizing each notary to take acknowledgements, administer oaths and affirmations, certify copies of documents, certify witness affidavits and depositions, and perform other acts specifically permitted by law).

[8]Section 47.1-2 (defining "electronic notarial act" or "electronic notarization" as official act by notary under § 47.1-12 or as otherwise authorized by law involving electronic documents).

[9]*See* § 47.1-4 (Supp. 2008) (requiring that notary "be (i) at least eighteen years of age, (ii) a citizen of the United States, (iii) able to read and write the English language, (iv) shall never have been convicted of a felony under the laws of the United States, this Commonwealth, or any other state …; and, (v) shall otherwise be in compliance with the provisions of [Title 47.1]").

[10]Section 47.1-7(A)(2) (Supp. 2008).

[11]*See* § 47.1-7(A).

[12]Kesterson's Adm'r v. Hill, 101 Va. 739, 742, 45 S.E. 288, 289 (1903) ("The general rule, in reference to all statutes, is that they are to be so construed as to have a prospective effect merely, and will not be permitted to affect past transactions, unless such intention is clearly and unequivocally expressed."); *see also* § 47.1-2 (defining "electronic notarization" as official act by notary under § 47.1-12 "*or as otherwise authorized by law* that involves electronic documents" (emphasis added)); § 59.1-482 (applying UETA prospectively to any electronic signature "created, generated, sent, communicated, received, or stored on or after the effective date" of UETA). The 2000 Session of the General Assembly enacted UETA, which became effective July 1, 2000. *See* 2000 Va. Acts ch. 995, at 2216, 2222-27.

[13]*Id.*

[14]UETA defines a "security procedure" as "a procedure employed for the purpose of verifying that an electronic signature, record, or performance is that of a specific person or for detecting changes or errors in the information in an electronic record. The term includes a procedure that requires the use of algorithms or other codes, identifying words or numbers, encryption, or callback or other acknowledgment procedures." Section 59.1-480(14).

[15]It appears that the phrase "pursuant to the Virginia Notary Act" was added as a direct result of the Amendments. *See* 2008 Va. Acts chs. 823, 833, at 1565, 1568, 1757, 1760, respectively (amending § 17.1-258.4). I note that prior to the 2008 amendment to § 17.1-258.4, § 17.1-258.4(A)-(B) provided authority for electronic signatures of the signers of the document as well as those of the notaries.

[16]Section 59.1-481(a).

[17]Section 59.1-484.

[18]*See* § 59.1-481(b)(1).

[19]*See* § 59.1-481(b)(2) (excluding all of Titles 8.3A, 8.4, 8.4A, 8.5A, 8.6A, 8.7, 8.8A, 8.9A, 8.10, and 8.11 and all of Title 8.1A except § 8.1A-306).

[20]*See* § 59.1-481(d).

[21]*See* § 17.1-258.3. Section 59.1-497 provides that a public body adopting standards under UETA and the Secretary of Technology may encourage and promote consistency and interoperability among the public bodies of the Commonwealth. UETA recognizes that such "standards may specify differing levels of standards from which public bodies of the Commonwealth may choose in implementing the most appropriate standards for a particular application." Section 59.1-497.

OP. NO. 08-097

PROFESSIONS AND OCCUPATIONS: CONTRACTORS – REGULATION OF CONTRACTS.

HOUSING: UNIFORM STATEWIDE BUILDING CODE.

No exemption for business owners from requirement to secure certificates of occupancy following renovations and repairs to commercial structures used by such owners for their business. Virginia Uniform Statewide Building Code regulations permit approval of final inspection to serve as new certificate of occupancy for additions or alterations to existing commercial buildings.

HENRY A. THOMPSON SR.
SUSSEX COUNTY ATTORNEY
FEBRUARY 2, 2009

ISSUE PRESENTED

You ask whether § 54.1-1101(A)(9) exempts business owners from having to secure certificates of occupancy following renovations and repairs to commercial structures used by such owners for their businesses.

RESPONSE

It is my opinion that § 54.1-1101(A)(9) does not exempt business owners from the requirement to secure certificates of occupancy following renovations and repairs to commercial structures used by such owners for their businesses. However, the Virginia Uniform Statewide Building Code regulations[1] permit the approval of a final inspection to serve as a new certificate of occupancy for additions or alterations to existing commercial buildings.

BACKGROUND

You advise that Sussex County is experiencing an increase in renovations and repairs of commercial buildings by business owners who own and occupy such buildings. You relate that these business owners are conducting repairs and renovations to their

commercial buildings and occupying the buildings without obtaining certificates of occupancy. You further relate that in a particular situation, the owner of a commercial business obtained the requisite building, electrical, and related permits for a major renovation and repair of his existing commercial building on land that he owns and uses for his business operations. The owner hired several subcontractors to perform electrical and other work during such repair and renovation. You advise that one of the subcontractors is in a civil dispute with the owner and is alleging that his contractor's license may have been inappropriately used to obtain building and other permits from the County.

You relate that the owner asserts that he is not required to obtain a certificate of occupancy because he is exempted by § 54.1-1101(A)(9). The business owner asserts that he is a person who actually performed or supervised the repair and improvement of his commercial building for the use of his business as required by § 54.1-1101(A)(9).

You further relate that the affidavit for the required building permits contained language requiring the owner to swear or affirm that "he shall perform the commercial renovations and repairs or have a licensed contractor perform such work." You advise that based on the language of the affidavit, the business owner asserts that he may hire subcontractors to perform the repairs and renovation work at his commercial site and remain exempt from obtaining a certificate of occupancy.

Additionally, you advise that Sussex County maintains that a certificate of occupancy is required unless the business owner or his qualified employee personally performs the renovations, construction, and repairs. You conclude that § 54.1-1101(A)(9) does not exempt the business owner from the requirement to secure a certificate of occupancy because the business owner actually is managing the work of contractually retained subcontractors and not supervising his own employees in the renovations and repairs. You further conclude that managing such work implies supervision that involves the personal handling of all details; therefore, the owner does not qualify for the exemption from a certificate of occupancy under § 54.1-1101(A)(9).[2]

APPLICABLE LAW AND DISCUSSION

Section 54.1-1101 provides that:

> A. The provisions of [Chapter 11] shall not apply to:
>
> 9. Any person who performs or supervises the repair and improvement of industrial or manufacturing facilities, or a commercial or retail building, for his own use[.]

Chapter 11 of Title 54.1 pertains to the regulation of contractors in the Commonwealth. The purpose for requiring licensure and regulation of contractors is to protect the public from inexperienced, unscrupulous, irresponsible, or incompetent contractors, and in particular those who would enter into contracts with such contractors.[3] The Board

for Contractors is the agency of the Commonwealth responsible for regulation of the practice of contracting.[4] The plain meaning of the language[5] of § 54.1-1101(A)(9) clearly exempts from licensure and regulation by the Board anyone "who performs or supervises the repair or improvement of industrial or manufacturing facilities, or a commercial or retail building, for his own use."

Although persons may be exempt from licensure and regulation as a contractor by the Board for Contractors under § 54.1-1101(A)(9), they are required to comply with § 54.1-1101(C) of the Uniform Statewide Building Code,[6] which provides that:

> Any person who is exempt from the provisions of [Chapter 11] as a result of subdivision 7, 8, 9, 10, 11, or 12 of subsection A shall comply with the provisions of the Uniform Statewide Building Code (§ 36-97 et seq.).

The use of the word "shall" in § 54.1-1101(C) generally indicates that such requirements are intended to be mandatory.[7] Section 36-98 of the Uniform Statewide Building Code directs and empowers the Board of Housing and Community Development to adopt and promulgate a Uniform Statewide Building Code.[8] The primary purpose of the Virginia Uniform Statewide Building Code regulations ("Building Code Regulations" or "Regulations") is "to protect the health, safety and welfare of the residents of the Commonwealth."[9] The Regulations require a certificate of occupancy indicating completion of the work for which a permit is issued "shall be obtained prior to the occupancy of any building or structure, except as provided in this section generally and as specifically provided for in Section 113.8 [13 VAC § 5-63-130(L)] for additions or alterations."[10] The only exception in 13 VAC § 5-63-160(A) (§ 116.1) from the requirement to obtain a certificate of occupancy is for "an accessory structure as defined in the International Residential Code." With regard to additions or alterations, 13 VAC § 5-63-130(L) specifically provides:

> The approval of a final inspection shall be permitted to serve as the new certificate of occupancy required by Section 116.1 [13 VAC § 5-63-160(A)] in the case of additions or alterations to existing buildings or structures that already have a certificate of occupancy.

The clear provisions of 13 VAC § 5-63-130(L) permit a final inspection of additions or alterations to an existing building or structure that already has a certificate of occupancy to serve as a new certificate of occupancy.

CONCLUSION

Accordingly, it is my opinion that § 54.1-1101(A)(9) does not exempt business owners from the requirement to secure certificates of occupancy following renovations and repairs to commercial structures used by such owners for their business. However, the Virginia Uniform Statewide Building Code regulations[11] permit the approval of a final inspection to serve as a new certificate of occupancy for additions or alterations to existing commercial buildings.

[1]*See infra* note 8.

[2]Section 2.2-505(B) requires that an opinion request from a county attorney "shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions."

[3]*See* J.W. Woolard Mech. & Plumbing, Inc. v. Jones Dev. Corp., 235 Va. 333, 337, 367 S.E.2d 501, 503 (1988); *see also* Cohen v. Mayflower Corp., 196 Va. 1153, 1161, 86 S.E.2d 860, 864 (1955) (noting that licensure of contractors prohibits unqualified persons from entering into agreements).

[4]*See* VA. CODE ANN. § 54.1-1102(A) (Supp. 2008). The Board derives its authority from §§ 54.1-201 and 54.1-1102(A) and renders "case decisions" pursuant to the Administrative Process Act.

[5]*See* Earley v. Landsidle, 257 Va. 365, 370, 514 S.E.2d 153, 155 (1999) ("[W]hen the language in a statute is clear and unambiguous, the courts are bound by the plain meaning of that language.").

[6]*See* VA. CODE ANN. tit. 36, ch. 6, §§ 36-97 to 36-119.1 (2005 & Supp. 2008) (codified in scattered sections).

[7]*See* Andrews v. Shepherd, 201 Va. 412, 414, 111 S.E.2d 279, 281-82 (1959).

[8]The Board has adopted regulations entitled the "Virginia Uniform Statewide Building Code." *See* 13 VA. ADMIN. CODE ch. 63, §§ 5-63-10 to 5-63-550 (Supp. 2008).

[9]13 VA. ADMIN. CODE § 5-63-460(A); *see also* §§ 36-99(A), 36-103 (2005) (providing that building code regulations are to ensure protection of public health, safety, and welfare).

[10]13 VA. ADMIN. CODE § 5-63-160(A).

[11]*See supra* note 8.

OP. NO. 09-011

PROFESSIONS AND OCCUPATIONS: FUNERAL SERVICES – PRENEED FUNERAL CONTRACTS – BOARD OF FUNERAL DIRECTORS AND EMBALMERS.

'Burial' as used in § 54.1-2825 is not synonymous with funeral and must be construed narrowly as authorizing designee to make arrangements to dispose of decedent's remains. Section 54.1-2807(B) charges funeral home with statutory duty to inquire about desires of next of kin, as defined by § 54.1-2800, prior to accepting decedent's body. Directions of 'any next of kin' govern disposal of body. Nonhierarchical definition of next of kin includes any person designated pursuant to § 54.1-2825.

THE HONORABLE WILLIAM J. HOWELL
SPEAKER, HOUSE OF DELEGATES
JUNE 11, 2009

ISSUE PRESENTED

You ask whether the word "burial" relating to preneed funeral contracts in § 54.1-2825 is to be read narrowly, *i.e.*, as meaning "interment," or more broadly, as meaning "funeral." Further, you ask whether a person properly designated under § 54.1-2825 has priority over all of the decedent's next of kin in making the permitted arrangements or, by virtue of § 54.1-2800 and § 54.1-2807(B), is merely to be treated as any of the "next of kin."

RESPONSE

It is my opinion that the word "burial" in § 54.1-2825 is not synonymous with funeral and must be construed narrowly as authorizing the designee to make arrangements to dispose of a decedent's remains. It further is my opinion that pursuant to § 54.1-2807(B) a funeral home has a statutory duty to inquire about the

desires of the next of kin, as defined by § 54.1-2800, prior to accepting a decedent's body, and the directions of "any next of kin" govern disposal of the body. Included in the nonhierarchical definition of next of kin is "any person designated to make arrangements for the disposition of the decedent's remains upon his death pursuant to § 54.1-2825."

APPLICABLE LAW AND DISCUSSION

Section 54.1-2825, relating to preneed funeral contracts,[1] provides that "[a]ny person may designate in a signed and notarized writing, which has been accepted in writing by the person so designated, an individual who shall make arrangements for his burial or the disposition of his remains, including cremation, upon his death."

Section 54.1-2800 provides the following definitions for purposes of Chapter 28 ("Funeral Services") of Title 54.1, §§ 54.1-2800 through 54.1-2807.1 and §§ 54.1-2808.1 through 54.1-2825:

> *"Next of kin"* means any of the following persons, regardless of the relationship to the decedent: any person designated to make arrangements for the disposition of the decedent's remains upon his death pursuant to § 54.1-2825, the legal spouse, child over 18 years of age, custodial parent, noncustodial parent, siblings over 18 years of age, guardian of minor child, guardian of minor siblings, maternal grandparents, paternal grandparents, maternal siblings over 18 years of age and paternal siblings over 18 years of age, or any other relative in the descending order of blood relationship.
>
> *"Practice of funeral services"* means engaging in the care and disposition of the human dead, the preparation of the human dead for the funeral service, burial or cremation, the making of arrangements for the funeral service or for the financing of the funeral service and the selling or making of financial arrangements for the sale of funeral supplies to the public.

In the absence of a statutory definition, the plain and ordinary meaning of the term is controlling.[2] It is well settled that "[i]f the language of a statute is plain and unambiguous, and its meaning perfectly clear and definite, effect must be given to it."[3] The term "burial" means "the act or process of burying."[4] Further, the term "bury" means "to dispose of by depositing in or as if in the earth; *esp*: to inter with funeral ceremonies."[5] As such, the plain meaning of the term "burial" is the disposition of human remains through interment that may be, but need not be, part of a funeral. Further, while "care and disposition of the human dead" and "the preparation of the human dead for … burial" are part of the definition of "practice of funeral services,"[6] burial is not synonymous with funeral.[7]

The 1989 Session of the General Assembly enacted a new article authorizing the Board of Funeral Directors and Embalmers to regulate preneed contracts for funeral

services.[8] Section 54.1-2821 specifically exempts the preneed sale of cemetery services or supplies, including preneed burial contracts that are regulated by the Cemetery Board, from the laws applicable to preneed funeral services.[9] Section 54.1-2310 defines "interment" as "all forms of final disposal of human remains including, but not limited to, earth burial, mausoleum entombment and niche or columbarium inurnment."[10] Therefore, a preneed funeral services contract does not cover burial and disposal of remains. If an individual has not obtained a preneed burial contract, § 54.1-2825 permits that individual to designate another individual to make arrangements for his burial or the disposition of his remains, including cremation.

Section 54.1-2807(B) provides, in pertinent part, that:

> Except as provided in §§ 32.1-288 and 32.1-301, funeral service establishments shall not accept a dead human body from any public officer except a medical examiner, or from any public or private facility or person having a professional relationship with the decedent without having first inquired about the desires of the next of kin and the persons liable for the funeral expenses of the decedent. The authority and directions of any next of kin shall govern the disposal of the body.

"[T]he plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained construction."[11] Section 54.1-2807(B) prohibits a funeral home, except in limited circumstances, from accepting a corpse without "having first inquired about the desires of the next of kin" and provides that any next of kin may authorize and direct the disposal of the body.[12] The definition of "next of kin" in § 54.1-2800 creates a "broad and coequal" class of individuals.[13] Therefore, no member of the "next of kin" class listed in § 54.1-2800 has precedence over any other.

CONCLUSION

Accordingly, it is my opinion that the word "burial" in § 54.1-2825 is not synonymous with funeral and must be construed narrowly as authorizing the designee to make arrangements to dispose of a decedent's remains. It further is my opinion that pursuant to § 54.1-2807(B) a funeral home has a statutory duty to inquire about the desires of the next of kin, as defined by § 54.1-2800, prior to accepting a decedent's body, and the directions of "any next of kin" govern disposal of the body. Included in the nonhierarchical definition of next of kin is "any person designated to make arrangements for the disposition of the decedent's remains upon his death pursuant to § 54.1-2825."

[1] *See* VA. CODE ANN. §§ 54.1-2820 to 54.1-2825 (2005 & Supp. 2008).

[2] *See* 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); Op. Va. Att'y Gen.: 2006 at 204, 205; 1999 at 10, 11.

[3]Temple v. Petersburg, 182 Va. 418, 423, 29 S.E.2d 357, 358 (1944), *quoted in* Op. Va. Att'y Gen.: 2006, supra note 2, at 205; 2002 at 320, 320.

[4]Miriam Webster's Collegiate Dictionary 153 (10th ed. 2001).

[5]*Id*. at 154.

[6]Section 54.1-2800 (Supp. 2008).

[7]*See* Mazur v. Woodson, 191 F. Supp. 2d 676, 681 (E.D. Va. 2002) (holding "[t]hat disposition includes burial [which] is supported by the plain meaning of the word 'bury'").

[8]*See* 1989 Va. Acts ch. 684, at 1582, 1587-89 (adding Article 5, Chapter 28 of Title 54.1, §§ 54.1-2820 to 54.1-2825); *see also* § 54.1-2803(9) (Supp. 2008) (directing Board to regulate preneed funeral contracts). I note that present § 54.1-2825 is similar to the section enacted in 1989 with the exception of minor clarification regarding the notary requirement and the specific authority regarding the disposition of remains through cremation. *See* 1998 Va. Acts ch. 718, at 1702, 1708 (amending § 54.1-2825). Section 54.1-2825 is also referenced in certain other statutes. *See* § 2.2-713 (2008) (authorizing public guardian or conservator to make funeral, cremation, or burial arrangements if no one has been designated under § 54.1-2825); § 54.1-2818.1 (2005) (prohibiting cremation of dead human body without permission of medical examiner and visual identification of the deceased by certain persons, including person designated under § 54.1-2825, or specified waiting period); § 54.1-2973 (2005) (authorizing certain parties, including person designated under § 54.1-2825, to authorize and consent to postmortem examination and autopsy of decedent's body for specific purposes); *see also* § 57-27.3 (2007) (authorizing cemetery to accept notarized signature of one of next of kin of decedent for purpose of authorizing interment or entombment). The "next of kin" definition in § 57-27.3 is identical to that found in § 54.1-2800. *Compare* § 54.1-2800 (Supp. 2008) *with* § 57-27.3 (2007).

[9]*See* tit. 54.1, ch. 23.1, §§ 54.1-2310 to 54.1-2342 (2005).

[10]Columbarium inurnment refers to placement of urns containing human ash in a vault or similar structure. 1980-1981 Op. Va. Att'y Gen. 39, 40. I also note that a "preneed burial contract" is "a contract for the sale of property or services used in connection with interring or disposing of the remains … of a deceased human being." Section 54.1-2310 (2005).

[11]Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983), *quoted in* 2006 Op. Va. Att'y Gen. 180, 182.

[12]Siver v. Rockingham Mem'l Hosp., 48 F. Supp. 2d 608, 611 (W.D. Va. 1999).

[13]*Id.* at 612 "[T]he instant definition of 'next of kin' opens the class concurrently to *any* individual listed regardless of degree of relationship to the decedent so that there may be an orderly and expeditious internment by the funeral director. That other states establish a sequential hierarchy of relatives analogous to those for distribution of an estate has no relevance here because … the General Assembly of Virginia clearly has elected to fashion a class of individuals with rights to a body that are both broad and coequal. Any person within that class has the right to possess, preserve, or bury the dead body[.]" *Id*. at 611-12 (emphasis in original).

OP. NO. 09-034

PROFESSIONS AND OCCUPATIONS: PROFESSIONAL COUNSELING – GENERAL PROVISIONS.

General Assembly has designated Board of Counseling as responsible agency to interpret licensure requirements for persons employed by community-based citizen groups or organizations.

THE HONORABLE JOHN S. EDWARDS
MEMBER, SENATE OF VIRGINIA
SEPTEMBER 1, 2009

ISSUE PRESENTED

You ask whether a Virginia non-stock corporation that is a federal tax-exempt corporation qualifies as a community-based citizen group or organization so that persons employed by it to provide pastoral counseling services are exempt from the licensure requirements under § 54.1-3501(1).[1]

RESPONSE

It is my opinion that the General Assembly has designated the Board of Counseling as the responsible agency to interpret the licensure requirements for persons employed by community-based citizen groups or organizations.

BACKGROUND

You relate that an organization will be formed to provide pastoral counseling services in Southwest Virginia. The organization will be incorporated as a Virginia non-stock corporation and apply for a determination by the Internal Revenue Service that it is exempt from taxation under § 501(c)(3) of the Internal Revenue Code.

You advise that § 501(c)(3) requires that no part of the net earnings of the organization inure to the benefit of any private individual. Further, you relate that it is anticipated that the Articles of Incorporation of the organization likely will include the following provisions:

1. The corporation is to operate exclusively for such religious purposes as will qualify it as an exempt organization under Section 501(c)(3) of the Internal Revenue code of 1986, as amended, or the corresponding provision of any future United States tax code.
2. The corporation shall not take any action which would cause the corporation to be classified as a "private foundation" within the meaning of Section 509 of the Internal Revenue Code of 1986, as amended, or the corresponding provision of any future United States tax code.
3. A majority of the Board of Directors shall be comprised of persons who are not employees of the corporation or "disqualified person(s)" as that term is used in Internal Revenue Code §4958 or Treasury Regulation §53.4958-3, or the corresponding provision of any future United States tax law or regulation. No employee of the corporation who serves on the Board of Directors may vote on his or her compensation. All decision regarding compensation of employees shall be made by the Board of Directors.

You also relate that § 54.1-3501(4) contains an exemption from licensure for salaried employees of certain agencies sponsored or funded by a "community-based citizen group or organization." You note that there does not appear to be any court authority or administrative regulation that interprets § 54.1-3501(4).

You believe that if the corporation: (a) includes the above-quoted provisions in its Articles of Incorporation; (b) receives a determination letter from the Internal Revenue Service that it is exempt from taxation under § 501(c)(3); (c) is such that its foundations status is that provided in § 509(a)(2); and (d) operates in accordance with its Articles of Incorporation and its tax determination letter, it will qualify as a "community-based citizen group or organization" within the meaning of § 54.1-3501(4). Consequently, you believe the salaried employees of the corporation will be exempt from the licensure requirements of § 54.1-3506.

APPLICABLE LAW AND DISCUSSION

Chapter 35 of Title 54.1, §§ 54.1-3500 through 54.1-3515, governs the practice of counseling in the Commonwealth. Section 54.1-3506 requires that "[i]n order to engage in the practice of counseling … it shall be necessary to hold a license" issued by the Board of Counseling.[2] Section 54.1-3500 defines the "practice of counseling" to mean the "rendering or offering to render to individuals, groups, organizations, or the general public any service involving the application of principles, methods or procedures of the counseling profession, which shall include appraisal, counseling, and referral activities." The General Assembly has determined that the Board of Counseling "shall regulate the practice of counseling."[3]

The word "shall" used in a statute ordinarily, but not always, implies that its provisions are mandatory.[4] As a general rule, however, when the word "shall" is used in connection with the actions of a public official, its meaning is usually directory or permissive unless the statute manifests a contrary intent.[5] "'A statute directing the mode of proceeding by public officers is to be deemed directory, and a precise compliance is not to be deemed essential to the validity of the proceedings, unless so declared by statute.'"[6]

Section 54.1-3501 provides that the requirements for licensure are not applicable to:

> 1. Persons who render services that are like or similar to those falling within the scope of the classifications or categories in [Chapter 35] …, so long as the recipients or beneficiaries of such services are not subject to any charge or fee, or any financial requirement, actual or implied, and the person rendering such service is not held out, by himself or otherwise, as a person licensed under [Chapter 35].
>
> ….
>
> 3. The activities, including marriage and family therapy, counseling, or substance abuse treatment, of rabbis, priests, ministers or clergymen of any religious denomination or sect when such activities are within the scope of the performance of their regular or specialized ministerial duties, and no separate charge is made or when such activities are performed, whether with or

> without charge, for or under auspices or sponsorship, individually or in conjunction with others, of an established and legally cognizable church, denomination or sect, and the person rendering service remains accountable to its established authority.
>
> 4. Persons employed as salaried employees or volunteers … of a private, nonprofit organization or agency sponsored or funded, in whole or part, by a community-based citizen group or organization.… Any person who, in addition to the above enumerated employment, engages in an independent private practice shall not be exempt from the requirements for licensure.

The primary purpose of statutory construction "is to ascertain and give effect to legislative intent."[7] The General Assembly does not define the term "community-based citizen group or organization" in the context of § 54.1-3501 or in Title 54.1. The applicable rule of statutory construction requires that when the General Assembly does not define a term, it must be given its ordinary meaning,[8] "unless the word is a [term] of art."[9] It is my opinion that there is no ordinary meaning for "community-based citizen group or organization" because the term is not defined by any of the usual authorities. Thus, it also is my opinion that "community-based citizen group or organization," as used by the General Assembly in § 54.1-3501, is a term of art. Consequently, the determination regarding what constitutes a "community-based citizen group or organization" is a question of fact.[10] The meaning of the term must be determined by the agency the General Assembly has designated as having responsibility for the licensure of counselors, which is the Board of Counseling.[11]

The traditional role of this Office regarding requested opinions has been to interpret applicable statutes to the extent possible utilizing the pertinent rules of statutory construction and general application of the statutory provisions. However, Attorneys General historically have declined to render official opinions when the request: (1) requires the interpretation of a matter reserved to another entity; (2) does not involve a question of law; (3) involves a matter currently in litigation; or (4) involves a matter of purely local concern or procedure.[12] The General Assembly has designated the Board of Counseling as the agency responsible for the regulation of the practice of counseling. That Board must provide guidance in all matters pertaining to the licensure of counselors.

CONCLUSION

Accordingly, it is my opinion that the General Assembly has designated the Board of Counseling as the responsible agency to interpret the licensure requirements for persons employed by community-based citizen groups or organizations.

[1] *See* 26 U.S.C.S. § 501(c)(3) (2009) (exempting from taxation "[c]orporations … organized and operated exclusively for religious … purposes").

[2] *See* VA. CODE ANN. § 54.1-3503 (2005) (establishing Board).

[3]*Id.*

[4]*See, e.g.*, Schmidt v. City of Richmond, 206 Va. 211, 217-18, 142 S.E.2d 573, 578 (1965) (noting that statute using "shall" required court to summon nine disinterested freeholders in condemnation case). *Compare* Ladd v. Lamb, 195 Va. 1031, 1035-36, 81 S.E.2d 756, 758-59 (1954) (noting that statute providing that clerk of court "shall forward" copy of conviction to Commissioner of Department of Motor Vehicles within 15 days not mandatory but merely directory); *see also* 1986-1987 Op. Va. Att'y Gen. 210, 211 (noting use of "shall" usually is mandatory, but may be directory in specifying time in which public official is to act).

[5]*See* Commonwealth v. Wilks, 260 Va. 194, 199, 530 S.E.2d 665, 667 (2000) (noting that courts consistently have held that in statute requiring action by public official, use of "shall" is directory and not mandatory unless statute manifests contrary intent).

[6]Commonwealth v. Rafferty, 241 Va. 319, 324, 402 S.E.2d 17, 20 (1991) (quoting Nelms v. Vaughn, 84 Va. 696, 699, 5 S.E. 704, 706 (1888)).

[7]Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983).

[8]*See* McKeon v. Commonwealth, 211 Va. 24, 27, 175 S.E.2d 282, 284 (1970).

[9]Stein v. Commonwealth, 12 Va. App. 65, 69, 402 S.E.2d 238, 241 (1991).

[10]*See* 2008 Op. Va. Att'y Gen. 141, 144 n.14 and opinions cited therein (noting that Attorneys General historically have declined to render official opinions when request involves question of fact rather than one of law).

[11]*See* § 54.1-3503.

[12]*See, e.g.*, Op. Va. Att'y Gen.: 1999 at 90, 93; 1977-1978 at 31, 33.

OP. NO. 09-077

TAXATION.

SERVICEMEMBERS CIVIL RELIEF ACT OF 2003 (FEDERAL).

Constitutional amendment is not required to authorize federal exemption for jointly owned motor vehicle of nonresident military servicemember and his nonmilitary spouse. Constitutional amendment is not required for vehicle that is leased jointly by such servicemember and his spouse because they are not considered to be owners of such leased vehicle.

THE HONORABLE L. SCOTT LINGAMFELTER
MEMBER, HOUSE OF DELEGATES
NOVEMBER 16, 2009

ISSUES PRESENTED

You ask whether a constitutional amendment is required to provide a personal property tax exemption for the nonmilitary spouse of a nonresident military servicemember for a motor vehicle that is jointly titled in both names. You also ask whether a constitutional amendment is necessary to provide such an exemption for a vehicle leased by the nonmilitary spouse and the nonresident servicemember.

RESPONSE

It is my opinion that a constitutional amendment is not required to authorize the federal exemption for a jointly owned motor vehicle of a nonresident military servicemember and his nonmilitary spouse. It further is my opinion that a constitutional amendment

is not required for a vehicle that is leased jointly by such servicemember and his spouse because they are not considered to be the owners of a leased vehicle.

BACKGROUND

You relate that servicemembers are advised to title motor vehicles jointly with their spouses to avoid probate issues in the event of the servicemember's death. You note that this practice permits easier renewal of annual registrations. In addition, you advise that most servicemembers purchase vehicles on credit and title them jointly with their nonmilitary spouses. Once titled jointly, you note that numerous families discover that financial institutions will not remove the name of the nonmilitary spouse from the title as long as a lien exists and is noted on the vehicle's title. As a result, the vehicle is not titled solely in the servicemember's name, and the servicemember is unable to take advantage of the personal property tax exemption in Virginia.

APPLICABLE LAW AND DISCUSSION

Under 50 U.S.C. app. § 571(c)(1) of the Servicemembers Civil Relief Act of 2003[1] ("Servicemembers Act") "[t]he personal property of a servicemember shall not be deemed to be located or present in, or to have a situs for taxation in, the tax jurisdiction in which the servicemember is serving in compliance with military orders." Attorneys General consistently have concluded that a Virginia locality cannot tax motor vehicles owned by nondomiciliary servicemembers who are stationed by the military in the Commonwealth.[2] Further, 50 U.S.C. app. § 561(e) of the Servicemembers Act provides that it applies to all forms of "property described in subsection (a)[3] owned individually by a servicemember or jointly by a servicemember and a dependent or dependents." I note that a primary reason for Congress enacting § 561(e) was to "add an additional subsection clearly stating that this section applies to joint ownership of all forms of personal and real property by a servicemember and his or her dependents."[4] Furthermore, Congress has stated the purpose of § 561(e):

> This would relieve servicemembers from having to title property solely in their own name to ensure the protections of this section in a state where they live pursuant to military orders but are not state residents. Titling property solely in the servicemember's name for tax purposes also may create probate difficulties for servicemembers or their heirs if property is not jointly titled upon death. However, the most common difficulty is in the area of automobile titling. Separate titling of automobiles by servicemembers to avail themselves of the protections of the current provision, when they would prefer joint titling, undercuts the overall SSCRA policy objective of protecting the civil legal rights of servicemembers and their dependents.[5]

The Supremacy Clause of the Constitution of the United States provides that federal laws and treaties "shall be the supreme Law of the Land."[6] By virtue of this clause, federal law supersedes conflicting state law.[7] The preemption of state law by federal

law may occur by express statutory language or other clear indication that Congress intended to legislate exclusively in the area.[8] Even if Congress does not intend the enactment of a federal statutory scheme to preempt state law completely, congressional enactments in the same field override state laws with which they conflict.[9] It is necessary "to determine whether, under the circumstances of this particular case, [the State's] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."[10] This inquiry requires consideration of the relationship between state and federal laws as they are interpreted and applied, not merely as they are written.[11]

Congress has expressed that its purpose in enacting the Servicemembers Act is "to provide for, strengthen, and expedite the national defense through protection extended by this Act … to servicemembers of the United States to enable such persons to devote their entire energy to the defense needs of the Nation."[12] Therefore, it is my opinion that the federal exemption, as expressed in 50 U.S.C. app. §§ 561(e) and 571(c)(1) of the Servicemembers Act, preempts the laws of the Commonwealth related to taxation of motor vehicles owned by nonresident servicemembers and their nonmilitary spouses.

You also ask about vehicles jointly leased by a nonresident servicemember and his nonmilitary spouse. Under the definitions set forth in § 46.2-100 of the *Virginia Code*, the lessor of a motor vehicle is deemed to be the owner of a leased motor vehicle, and as such, is liable for the payment of personal property tax thereon. A prior opinion setting forth this conclusion remains valid.[13] Therefore, a constitutional amendment is not required since the lessor, *i.e.*, the owner of a leased vehicle, is not the servicemember or his nonmilitary spouse.

CONCLUSION

Accordingly, it is my opinion that a constitutional amendment is not required to authorize the federal exemption for a jointly owned motor vehicle of a nonresident military servicemember and his nonmilitary spouse. It further is my opinion that a constitutional amendment is not required for a vehicle that is leased jointly by such servicemember and his spouse because they are not considered to be the owners of a leased vehicle.

[1] *See* Pub. L. No. 108-109, 117 Stat. 2835.

[2] Op. Va. Att'y Gen: 1983-1984 at 393, 393; 1965-1966 at 196 (interpreting 50 U.S.C. app. § 574, predecessor to 50 U.S.C. app. § 571(c)(1)); *see also* 1981-1982 Op. Va. Att'y Gen. 370 (interpreting 50 U.S.C. app. § 574 and concluding that mobile home belonging to nondomiciliary serviceman is not subject to personal property tax).

[3] Subsection (a) of § 561 lists a servicemember's "personal property (including motor vehicles)."

[4] *See* H.R. Rep. No. 108-81, at 42, *as reprinted in* 2004 U.S.C.C.A.N. 2367, 2385.

[5] *Id.*

[6] U.S. Const. art. VI, cl. 2.

[7]*See* Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 210-11 (1824); *see also* Savage v. Jones, 225 U.S. 501, 533 (1912) (noting that state law that conflicts with federal law must yield to federal law).

[8]*See* Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); Op. Va. Att'y Gen.: 1984-1985 at 280, 282; 1973-1974 at 284, 285.

[9]*See Jones*, 430 U.S. at 525-26 (citing U.S. CONST. art. VI).

[10]Hines v. Davidowitz, 312 U.S. 52, 67 (1941); *accord* De Canas v. Bica, 424 U.S. 351, 363 (1976); Perez v. Campbell, 402 U.S. 637, 649 (1971).

[11]*De Canas*, 424 U.S. at 363-65; Swift & Co. v. Wickham, 230 F. Supp. 398, 408 (S.D.N.Y. 1964), *appeal dismissed*, 382 U.S. 111 (1965), *aff'd on further consideration*, 364 F.2d 241 (2d Cir. 1966), *cert. denied*, 385 U.S. 1036 (1967).

[12]50 U.S.C.S. app. § 502(1) (LexisNexis Supp. 2009).

[13]1967-1968 Op. Va. Att'y Gen. 274, 274 (interpreting § 46.1-1, predecessor to § 46.2-100). "Lessor (owner): The person or entity offering the use of a vehicle for twelve months or more in exchange for compensation." Va. Dep't of Motor Vehicles, *Leasing a Vehicle*, http://www.dmv.virginia.gov/webdoc/citizen/vehicles/leased.asp (last visited Nov. 9, 2009). "The leased vehicle will be titled in the name of the lessor (owner)." *Id.*

OP. NO. 09-080

TAXATION: ELECTRIC UTILITY CONSUMPTION TAX.

FEDERAL CREDIT UNIONS.

Federal credit unions are exempt from tax on consumers of electricity imposed by § 58.1-2900, including portion remitted to localities. Federally chartered credit union may be identified by its name, which is required to include words 'Federal Credit Union.'

THE HONORABLE MARK C. CHRISTIE
CHAIRMAN, STATE CORPORATION COMMISSION
DECEMBER 10, 2009

ISSUES PRESENTED

You ask whether 12 U.S.C. § 1768 exempts federally chartered credit unions from the tax on consumers of electricity imposed by § 58.1-2900 of the *Virginia Code*. If federal credit unions are exempt from the tax, you ask whether the exemption reaches the portion of the tax remitted to localities and how such exempted credit unions should be identified.

RESPONSE

It is my opinion that 12 U.S.C. § 1768 exempts federal credit unions from the tax on consumers of electricity imposed by § 58.1-2900, including the portion of the tax remitted to localities. It further is my opinion that a federally chartered credit union may be identified by its name, which is required to include the words "Federal Credit Union."

APPLICABLE LAW AND DISCUSSION

Section 58.1-2900(A) imposes "a tax on the consumers of electricity in the Commonwealth" and includes both a portion payable to the state and the applicable locality. Pursuant to 12 U.S.C. § 1768, Congress exempts federal credit unions from certain taxes:

> The Federal credit unions organized hereunder, 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.

A 1971 opinion of the Attorney General (the "1971 Opinion") considered whether a federal credit union is exempt from state and local taxes under § 1768.[1] The 1971 Opinion concluded that federal credit unions are subject only to real and personal property taxes.[2] A consumers' utility tax is not a tax upon property.[3] Therefore, I must conclude that Congress has exempted federal credit unions from the tax imposed by § 58.1-2900 on consumers of electricity, including both the state and local portions. This is consistent with a prior opinion of the Attorney General which concluded that federal credit unions are exempt from local utility taxes imposed on consumers of telephone services.[4]

Finally, you inquire concerning the identification of federal credit unions. I note that federal regulation requires a federally chartered credit union to identify its status by including the words "Federal Credit Union" in its name.[5]

CONCLUSION

Accordingly, it is my opinion that 12 U.S.C. § 1768 exempts federal credit unions from the tax on consumers of electricity imposed by § 58.1-2900, including the portion of the tax remitted to localities. It further is my opinion that a federally chartered credit union may be identified by its name, which is required to include the words "Federal Credit Union."

[1] *See* 1971-1972 Op. Va. Att'y Gen. 393.

[2] *Id.* at 393.

[3] *See* Op. Va. Att'y Gen.: 1972-1973 at 394, 395; 1971-1972 at 419, 420.

[4] *See* 1972-1973 Op. Va. Att'y Gen., *supra* note 3, at 395; *see also* 1984-1985 Op. Va. Att'y Gen. 327, 327 (concluding that federal credit unions may be subject to local real and personal property taxes, but not local business license taxes).

[5] *See* 12 C.F.R. Part 701, App. B, § VI (2009) (mandating that "[t]he last three words in the name of every credit union chartered by [the National Credit Union Administration] must be 'Federal Credit Union'").

OP. NO. 09-067

TAXATION: ENFORCEMENT, COLLECTION, REFUND, REMEDIES AND REVIEW OF STATE TAXES – COLLECTION OF STATE TAXES.

No authority for local treasurer collecting delinquent state taxes pursuant to agreement with Department of Taxation to recover from taxpayer twenty-percent commission in addition to delinquent state taxes collected on behalf of Department.

THE HONORABLE FRANCIS X. O'LEARY
ARLINGTON COUNTY TREASURER
NOVEMBER 3, 2009

ISSUE PRESENTED

You ask whether a local treasurer and the Department of Taxation (the "Department") may lawfully enter into an agreement whereby the treasurer would collect delinquent taxes owed to the Commonwealth of Virginia in exchange for a commission of twenty percent of the state taxes so collected, which the treasurer would recover from state taxpayers in addition to their past due state taxes.

RESPONSE

It is my opinion that a local treasurer collecting delinquent state taxes pursuant to an agreement with the Department of Taxation is not authorized to recover from the taxpayer a twenty-percent commission in addition to the delinquent state taxes collected on behalf of the Department.

BACKGROUND

You indicate that the Department and local treasurers may seek to enter into an agreement whereby local treasurers would collect past due tax debt owed the Commonwealth and receive a twenty-percent commission for their services, which fee would be added to the delinquent amounts collected. You assert that an agreement pursuant to these terms would be mutually beneficial to the Department and local treasurers; it would accelerate collection of delinquent state tax liabilities without committing additional state resources, and localities would derive additional revenues.

APPLICABLE LAW AND DISCUSSION

A threshold question raised by your request is whether the Department may compensate local treasurers for their efforts in collecting delinquent state taxes. Section 58.1-1803(A) provides that:

> The Department of Taxation may appoint a collector in any county or city, including the treasurer thereof, to collect delinquent state taxes that were assessed at least 90 days previously therein, or elsewhere in the Commonwealth, and may allow him a reasonable compensation, to be agreed on before the service is commenced. Where the appointed collector is a local government treasurer, any actions taken pursuant to this section shall be considered part of the official duties of such treasurer.

In the first sentence of § 58.1-1803(A), the General Assembly expressly authorizes the Department to compensate local treasurers for services that they perform in collecting delinquent state taxes and associated liabilities.[1] However, the second sentence of § 58.1-1803(A) specifically provides that a treasurer's actions to collect taxes and related charges on behalf of the Commonwealth constitute "part of the official duties of such treasurer." When the language of a statute is plain and unambiguous and

its meaning is clear and definite, it must be given effect.[2] In addition, the State and Local Government Conflict of Interest Act[3] (the "Conflict Act") clearly provides that it is unlawful for a local government official to "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."[4]

Consequently, a plain reading of § 58.1-1803(A) in conjunction with § 2.2-3103(1) of the Conflict Act yields an apparent inconsistency between these provisions that requires the application of certain principles of statutory construction.[5] The Supreme Court of Virginia has held that "'when two statutes seemingly conflict, they should be harmonized, if at all possible, to give effect to both.'"[6] In my opinion, the apparent inconsistency between the authority the General Assembly has granted to the Department in § 58.1-1803(A) to compensate local treasurers and the Conflict Act's prohibition against a local constitutional officer accepting remuneration for carrying out his official duties[7] may be reconciled by construing § 58.1-1803(A) to allow that such compensation be paid to the treasurer's locality, rather than to the treasurer personally. Such an interpretation comports with the purpose of the Conflict Act, which prohibits the private economic interests of governmental officers and employees from inappropriately influencing their official conduct.[8]

Applying this reasoning to your inquiry, the Department may compensate a locality for actions taken by its treasurer to collect state taxes pursuant to § 58.1-1803(A), provided the compensation is: (a) reasonable; (b) determined prior to the treasurer's undertaking of such actions; and (c) paid directly to the locality and not to the treasurer personally. Further, I am not aware of any provision of Virginia law that would prohibit the Department from allowing compensation to an appointed collector in the form of a percentage commission based on the amount of state taxes and associated charges collected. Therefore, a local treasurer's office may recoup a reasonable percentage commission for its collections on behalf of the Department.

The remaining question is whether a local treasurer may recover such commission from the delinquent taxpayers against whom the treasurer pursues such collection actions on behalf of the Department. You appear to suggest that this mode of collection is permissible under § 58.1-3916, which provides that "[t]he governing body [of any county, city, or town] … by ordinance … may provide for the recovery of reasonable attorney's fees or collection agency's fees actually contracted for, not to exceed 20 percent of the delinquent taxes and other charges so collected."

Section 58.1-1803(C) permits a local treasurer appointed by the Department to collect delinquent state taxes pursuant to Article 2,[9] which sets forth local treasurers' authority to enforce and collect local taxes. Therefore, if the governing body has exercised its authority to enact an ordinance to recover attorney's or collections agency's fees from delinquent local taxpayers, such locality would be authorized to recover such fees incurred in the collection of delinquent state taxes. However,

§ 58.1-3916 does not authorize a local treasurer to recover from the delinquent state taxpayers the flat twenty-percent commission about which you inquire. You propose that the Department and local treasurers would pursue collection of 120 percent of a delinquent state taxpayer's past due state taxes. In other words, the local treasurer would tender 100 percent of the taxpayer's debt to the Commonwealth and retain 20 percent for the treasurer's locality. Such a collection scheme is not the "reasonable attorney's or collection agency's fees actually contracted" permitted under § 58.1-3916 to be recovered from a delinquent taxpayer. Thus, it is my opinion that a treasurer may not lawfully recover a uniform twenty-percent commission on state taxes because Virginia law does not permit the treasurer to do so in conjunction with the collection of local taxes.

Virginia adheres to the Dillon Rule that "municipal corporations and counties possess and may exercise only those powers expressly granted by the General Assembly, powers necessarily or fairly implied from such express powers, and those powers that are essential and indispensable."[10] Section 58.1-3916 grants a locality the authority to adopt an ordinance to recover reasonable attorney's fees or collection agency's fees that the locality actually expends in pursuit of the taxpayer's debt to the locality; it does not, either expressly or impliedly, allow a locality to levy a flat, twenty-percent surcharge on delinquent local tax liabilities. Therefore, because a local treasurer's statutory authority in collecting delinquent state taxes pursuant to an appointment from the Department is derivative of that applicable to the treasurer's collection of local taxes,[11] such recovery is just as impermissible with respect to state taxes as it is in the context of local tax collections.

CONCLUSION

Accordingly, it is my opinion that a local treasurer collecting delinquent state taxes pursuant to an agreement with the Department of Taxation is not authorized to recover from the taxpayer a twenty-percent commission in addition to the delinquent state taxes collected on behalf of the Department.

[1]Section 58.1-1803(C) defines "the term 'state taxes' [to] include any penalty and interest" applicable to a state tax assessment, as well as "the local sales and use tax imposed under the authority of §§ 58.1-605 and 58.1-606 and any penalty and interest applicable thereto."

[2]Temple v. Petersburg, 182 Va. 418, 423, 29 S.E.2d 357, 358 (1944); 1997 Op. Va. Att'y Gen. 16, 17.

[3]*See* VA. CODE ANN. §§ 2.2-3100 to 2.2-3131 (2008 & Supp. 2009).

[4]Section 2.2-3103(1) (2008).

[5]*See* Boynton v. Kilgore, 271 Va. 220, 228, 228 n.11, 623 S.E.2d 922, 926, 926 n.11 (2006).

[6]Viking Enter. v. County of Chesterfield, 277 Va. 104, 110, 670 S.E.2d 741, 744 (2009) (quoting Commonwealth v. Zamani, 256 Va. 391, 395, 507 S.E.2d 608, 609 (1998) (alteration omitted)).

[7]*See* § 2.2-3103(1).

[8]*See* § 2.2-3100 (2008); § 2.2-3103.

[9]*See* VA. CODE ANN. tit. 58.1, ch. 39, art. 2, §§ 58.1-3910 to 58.1-3938 (2009) (codified in scattered sections).

[10]Logan v. City Council, 275 Va. 483, 494, 659 S.E.2d 296, 302 (2008).

[11]*See* § 58.1-1803(C).

OP. NO. 09-043

TAXATION: LICENSE TAXES.

BPOL tax exemption in § 58.1-3703(C)(18)(a) applies only to entity that qualifies as 'nonprofit charitable organization'; does not extend to wholly owned for-profit subsidiary.

THE HONORABLE NANCY J. HORN
ROANOKE COUNTY COMMISSIONER OF THE REVENUE
AUGUST 24, 2009

ISSUE PRESENTED

You ask whether a nonprofit charitable organization's exemption from the local business, professional, and occupational license ("BPOL") tax contained in Chapter 37 of Title 58.1, §§ 58.1-3700 through 58.1-3735, also applies to the nonprofit charitable organization's wholly owned, for-profit subsidiary.

RESPONSE

It is my opinion that the statutory exemption from the BPOL tax contained in § 58.1-3703(C)(18)(a) applies only to an entity that qualifies as a "nonprofit charitable organization" and would not extend to a wholly owned for-profit subsidiary that fails to meet the statutory definition of a "nonprofit charitable organization."

BACKGROUND

You indicate that a foundation organized for the purpose of providing housing and medical facilities to those who are elderly or have handicaps in Roanoke, Virginia (the "Foundation"), is exempt from federal income taxation pursuant to § 501(c)(3) of the Internal Revenue Code ("IRC"). Further, you state that the Foundation owns 100% of the stock of a for-profit corporation that provides various support functions to the Foundation, including administrative, human resources, financial, and marketing services. Finally, you note that the Internal Revenue Service requires the for-profit corporation to file annual federal corporate income tax returns, rather than exempt organization returns.

APPLICABLE LAW AND DISCUSSION

Section 58.1-3703(A) authorizes a local governing body to "levy and provide for the assessment and collection of county, city or town license taxes on businesses, trades, professions, occupations and callings and upon the persons, firms and corporations engaged therein with the county, city or town." However, a local governing body's authority to impose such BPOL taxes is subject to certain statutory limitations.[1] Among these exemptions are provisions barring the imposition of local BPOL taxes on certain receipts of charitable nonprofit organizations[2] and on receipts or purchases from members of affiliated entities.[3]

Section 58.1-3703(C)(18)(a) exempts from BPOL taxation the receipts of "charitable nonprofit organization[s]," that are "described in [IRC] § 501 (c) (3) and to which contributions are deductible by the contributor under [IRC] § 170."[4] Assuming that contributions to the Foundation are deductible by contributors pursuant to IRC § 170, this organization constitutes a "charitable nonprofit organization" for purposes of

§ 58.1-3703(C)(18)(a). Therefore, Roanoke County may not levy BPOL taxes on or measured by the Foundation's receipts, "except to the extent the organization has receipts from an unrelated trade or business the income of which is taxable under [IRC] § 511 et seq."[5]

I find no authority to support the proposition that a separate and taxable corporation that is wholly owned by a charitable nonprofit organization is entitled to the same treatment for purposes of BPOL taxes as is its parent organization. "'The manifest intention of the legislature, clearly disclosed by its language, must be applied.'"[6] Statutes that provide for tax exemptions and deductions are strictly construed against the taxpayer.[7] Pursuant to the clear language of § 58.1-3703(C)(18)(a), the exemption applies only to organizations meeting the federal criteria. Based on the facts you present, the subsidiary corporation would not fall within the description of exempt organizations in IRC § 170 or § 501(c)(3) since it is operated "for profit." This suggests that the Foundation's for-profit subsidiary would not meet the requirements of federal statutes which mandate that "no part of the net earnings of [the corporation] inures to the benefit of any private shareholder or individual."[8] You relate that the IRS treats the subsidiary corporation as a taxable corporation because the subsidiary is required to file annual income tax returns on forms applicable to taxable corporations and not those utilized by tax-exempt organizations. Therefore, I must conclude that the BPOL tax exemption applicable to a charitable nonprofit organization's receipts may not be imputed to a separately constituted organization that is not itself a charitable nonprofit organization as defined by § 58.1-3703(C)(18)(a).

Despite the inapplicability of the charitable nonprofit organization exemption to the Foundation's wholly owned subsidiary corporation, all or a portion of the subsidiary's receipts may be entitled to the exemption contained in § 58.1-3703(C)(10). Section 58.1-3703(C)(10) prohibits local governing bodies from levying BPOL taxes "[o]n or measured by receipts or purchases by an entity which is a member of an affiliated group of entities from other members of the same affiliated group." If the Foundation and its for-profit subsidiary are part of the same "affiliated group," as defined by § 58.1-3700.1,[9] the receipts derived by the subsidiary from its sales of various support services to the Foundation would be exempt from local BPOL taxation. Further, the receipts derived from other members of the affiliated group, if any, also would be exempt. However, § 58.1-3703(C)(10) does not necessarily afford the for-profit subsidiary a blanket exemption from all local BPOL taxes. Absent some other statutory exemption, the for-profit corporation would be subject to taxation on receipts or purchases from entities outside the affiliated group.[10]

CONCLUSION

Accordingly, it is my opinion that the statutory exemption from the BPOL tax contained in § 58.1-3703(C)(18)(a) applies only to an entity that qualifies as a "nonprofit charitable organization" and would not extend to a wholly owned for-profit subsidiary that fails to meet the statutory definition of a "nonprofit charitable organization."

[1]*See* VA. CODE ANN. § 58.1-3703(C) (Supp. 2008); § 58.1-3706(A) (Supp. 2008).

[2]Section 58.1-3703(C)(18)(a).

[3]Section 58.1-3703(C)(10).

[4]I note that the definition of "charitable nonprofit organization" in § 58.1-3703(C)(18) is narrower than that of IRC § 501(c)(3) relating to classification of organizations that are exempt from federal income taxation with respect to certain educational organizations. *Compare* § 58.1-3703(C)(18) *with* 26 U.S.C.S. § 501(c)(3) (LexisNexis 2009). This limitation is not relevant to the organizations about which you inquire.

[5]Section 58.1-3703(C)(18)(a).

[6]Barr v. Town & Country Props., 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990) (quoting Anderson v. Commonwealth, 182 Va. 560, 566, 29 S.E.2d 838, 841 (1944)), *quoted in* 2001 Op. Va. Att'y Gen. 179, 180.

[7]*See, e.g.*, Lynchburg v. English Constr. Co., 277 Va. 574, 582-83, 675 S.E.2d 197, 201 (2009); 2001 Op. Va. Att'y Gen., *supra* note 6 at 180.

[8]26 U.S.C.S. §§ 170(c)(2)(C), 501(c)(3) (LexisNexis 2009).

[9]*See also* 23 VA. ADMIN. CODE § 10-500-10 (defining "affiliated group"), *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?000+reg+23VAC10-500-10; 23 VA. ADMIN. CODE § 10-500-50 (defining and illustrating exemptions for affiliated groups), *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?000+reg+23VAC10-500-50. The regulations became effective on October 6, 2008. *See* 24 Va. Reg. Regs. 3250, 3250.

[10]*See* 23 VA. ADMIN. CODE § 10-500-50(B).

OP. NO. 08-113

TAXATION: LICENSE TAXES.

No authority for Buchanan County Coal and Gas Road Improvement Advisory Committee to budget for payment of salary and benefits for Commissioner of Revenue employee regardless of his primary responsibility.

THE HONORABLE PHILLIP P. PUCKETT
MEMBER, SENATE OF VIRGINIA
FEBRUARY 2, 2009

ISSUE PRESENTED

You ask whether § 58.1-3713 permits the Buchanan County Coal and Gas Road Improvement Advisory Committee to include in its budget the payment of salary and benefits for an employee of the Commissioner of the Revenue whose primary responsibility will be to audit the records of coal and gas companies to ensure that the proper license tax for severance of coal and gas from Buchanan County is being paid.

RESPONSE

It is my opinion that § 58.1-3713 does not permit the Buchanan County Coal and Gas Road Improvement Advisory Committee to include in its budget the payment of salary and benefits for an employee of the Commissioner of the Revenue regardless of his primary responsibility.

BACKGROUND

You observe that § 58.1-3713 establishes Coal and Gas Road Improvement Advisory Committees in localities in which coal and gas are severed from the earth. The section also provides for the creation of a Coal and Gas Road Improvement Fund (the "Fund") in each such locality and specifies how the Fund may be distributed. It is your view that the Fund generally may be used to improve public roads in such localities, to provide funding for water and sewer system lines, and to provide funding to the Virginia Coalfield Economic Development Authority. Although there is no specific provision for the payment of administrative costs of the Advisory Committee, you state that Buchanan County's Advisory Committee construes the statute to permit a budget providing for administrative expenses, including paying salary and benefits of the Committee's employees.

You further advise that the Buchanan County Commissioner of the Revenue recently approached the Advisory Committee with a request that the Committee fund a full- or part-time position in the Commissioner's office to assist in auditing the records of coal and gas companies.

APPLICABLE LAW AND DISCUSSION

The General Assembly enacted the Virginia Coalfield Economic Development Authority in 1988 "to enhance the economic base for the seven county and one city coalfield region of Virginia."[1] Section 15.2-6009 provides that

> [o]n September 1, 1988, and on the first day of each month thereafter, each county and city shall remit to the Virginia Coalfield Economic Development Fund twenty-five percent of the revenues collected during the next to last calendar month from the coal and gas road improvement tax pursuant to § 58.1-3713.

Section 58.1-3713(A) provides, in part, that:

> The moneys collected for each county or city from the tax imposed under authority of this section shall be paid into a special fund of such county or city to be called the Coal and Gas Road Improvement Fund of such county or city, and shall be spent for such improvements to public roads as the coal and gas road improvement advisory committee and the governing body of such county or city may determine as provided in subsection B of this section.

Additionally, § 58.1-3713(A) permits any county or city to impose a "license tax on every person engaging in the business of severing coal or gases from the earth." The tax is based on the producers' gross receipts from the sale of the coal and gas.[2] The monies collected from this tax are paid into a special county fund, the Fund.[3] Three-fourths of the revenue from such license tax must be paid to the Fund and spent only for improvements to public roads in the Southwest Virginia coalfield region,[4] and the

remaining one-fourth of the revenue must be paid to the Virginia Coalfield Economic Development Fund,[5] which is administered by the Authority.[6]

Section 58.1-3713(B) provides, in part, that:

> Any county or city imposing the tax authorized in this section shall establish a Coal and Gas Road Improvement Advisory Committee, to be composed of four members: (i) a member of the governing body of such county or city, appointed by the governing body, (ii) a representative of the Department of Transportation, and (iii) two citizens of such county or city connected with the coal and gas industry, appointed for a term of four years, initially commencing July 1, 1989, by the chief judge of the circuit court.

The power of a local governing body, and thus of a committee created by statute, unlike that of the General Assembly, "must be exercised pursuant to an express grant"[7] because the powers of a locality and a committee created by statute "are limited to those conferred expressly or by necessary implication."[8] "If the power cannot be found, the inquiry is at an end."[9] The Dillon Rule requires a narrow interpretation of all powers conferred on local governments, and in this case on the Coal and Gas Road Improvement Advisory Committee, since they are delegated powers.[10] Therefore, any doubt regarding the existence of power must be resolved against the locality.[11] In this case, such doubt must be resolved against the Coal and Gas Road Improvement Advisory Committee.

In ascertaining whether a power may be implied from a statutory grant of authority, the Supreme Court of Virginia has provided the following guidance:

> "In questions of implied power, the answer is to be found in legislative intent. To imply a particular power from a power expressly granted, it must be found that the legislature intended that the grant of the express also would confer the implied.
>
> "In determining legislative intent, the rule is clear that where a power is conferred and the mode of its execution is specified, no other method may be selected; any other means would be contrary to legislative intent and, therefore, unreasonable. A necessary corollary is that where a grant of power is silent upon its mode of execution, a method of exercise clearly contrary to legislative intent, or inappropriate to the ends sought to be accomplished by the grant, also would be unreasonable.
>
> "Consistent with the necessity to uphold legislative intent, the doctrine of implied powers should never be applied to create a power that does not exist or to expand an existing power beyond rational limits. Always, the test in application of the doctrine is reasonableness, in which concern for what is necessary to promote the public interest is a key element."[12]

Statutory language is ambiguous when it may be understood in more than one way.[13] An ambiguity also exists when statutory language lacks clarity and precision, or is difficult to comprehend.[14] "The province of [statutory] construction lies wholly within the domain of ambiguity, and that which is plain needs no interpretation."[15] But when statutory language is clear and unambiguous, the plain meaning and intent of the enactment will be given to it.[16] The language used in § 58.1-3713(A) is clear and unambiguous as the General Assembly directs that the moneys collected from this tax "*shall* be spent for … improvements to public roads." (Emphasis added.) The General Assembly clearly does not authorize the expenditure of such funds for any purpose other than for improvements to public roads. Thus, I cannot reasonably conclude that an implied authority exists to expend such funds to pay the salary and benefits of an employee, including one whose primary duty is to audit the records of coal and gas companies, based on the express grant of authority to establish a Coal and Gas Road Improvement Advisory Committee. This particularly is so because the Advisory Committee is tasked with developing "a plan for improvement of roads."[17]

CONCLUSION

Accordingly, it is my opinion that § 58.1-3713 does not permit the Buchanan County Coal and Gas Road Improvement Advisory Committee to include in its budget the payment of salary and benefits for an employee of the Commissioner of the Revenue regardless of his primary responsibility.

[1]VA. CODE ANN. § 15.2-6002 (2008); *see also* § 15.2-6001 (2008) (mandating that Authority is to assist the coal producing areas "to achieve some degree of economic stability").

[2]*See* VA. CODE ANN. § 58.1-3713(A) (Supp. 2008) (providing that methodology of measuring gross receipts in § 58.1-3712 applies to tax).

[3]*Id.* (designating that fund "be called the Coal and Gas Road Improvement Fund of such county").

[4]*Id.* "[H]owever, one-fourth of such revenue may be used to fund construction of new water and/or sewer systems and lines" in certain circumstances. *Id.*

[5]*See id.*; § 15.2-6009 (2008).

[6]Section 15.2-6010 (2008).

[7]Nat'l Realty Corp. v. Va. Beach, 209 Va. 172, 175, 163 S.E.2d 154, 156 (1968).

[8]Bd. of Supvrs. v. Horne, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975).

[9]Commonwealth v. County Bd., 217 Va. 558, 575, 232 S.E.2d 30, 41 (1977).

[10]*See* Bd. of Supvrs. v. Countryside Invest. Co., 258 Va. 497, 504, 522 S.E.2d 610, 613 (1999) (holding that county board of supervisors does not have unfettered authority to decide what matters to include in subdivision ordinance; must include requirements mandated by Land Subdivision and Development Act, and may include optional provisions contained in Act); Op. Va. Att'y Gen: 2002 at 77, 78; 1974-1975 at 403, 405.

[11]2A EUGENE MCQUILLEN, THE LAW OF MUNICIPAL CORPORATIONS § 10.19, at 369 (3d ed. rev. 1996); *see also* Op. Va. Att'y Gen.: 2002 at 83, 84; 2000 at 75, 76.

[12]Arlington County v. White, 259 Va. 708, 720, 528 S.E.2d 706, 712-13 (2000) (citation omitted).

[13]Supinger v. Stakes, 255 Va. 198, 205, 495 S.E.2d 813, 817 (1998); Va.-Am. Water Co. v. Prince William County Serv. Auth., 246 Va. 509, 514, 436 S.E.2d 618, 621 (1993); Va. Dep't of Labor & Indus. v. Westmoreland Coal Co., 233 Va. 97, 101, 353 S.E.2d 758, 762 (1987).

[14]*Supinger*, 255 Va. at 205, 495 S.E.2d at 817; Lee-Warren v. Sch. Bd., 241 Va. 442, 445, 403 S.E.2d 691, 692 (1991).

[15]Winston v. City of Richmond, 196 Va. 403, 408, 83 S.E.2d 728, 731 (1954).

[16]Brown v. Lukhard, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985).

[17]Section 58.1-3713(B) (Supp. 2008).

OP. NO. 09-066

TAXATION: MISCELLANEOUS TAXES – ADMISSION TAX.

Fairfax County may adopt ordinance requiring private corporation that manages George Mason University Patriot Center to collect admissions tax on persons who pay to attend non-university events held at Center.

THE HONORABLE DAVID L. BULOVA
MEMBER, HOUSE OF DELEGATES
OCTOBER 2, 2009

ISSUE PRESENTED

You ask whether Fairfax County may adopt an ordinance requiring the private corporation that manages the George Mason University Patriot Center to collect admissions tax on persons who pay to attend non-university events held at the Patriot Center.

RESPONSE

It is my opinion, based upon the facts you provide, that Fairfax County may adopt an ordinance requiring the private corporation that manages the George Mason University Patriot Center to collect admissions tax on persons who pay to attend non-university events.

BACKGROUND

You relate that George Mason University has a large multi-purpose facility on its Fairfax County campus known as the Patriot Center ("Center"). You advise that the Center is a successful venue that is the site of many university functions and is also used for non-university functions. You relate that non-university functions include musical concerts and various other entertainment shows. The Center is managed by a private corporation that also manages other multi-purpose venues.

APPLICABLE LAW AND DISCUSSION

Section 58.1-3818, entitled "[a]dmissions tax in certain counties," provides that:

> A. Fairfax … Count[y is] hereby authorized to levy a tax on admissions charged for attendance at any event. The tax shall not exceed 10 percent of the amount of charge for admission to any such event. Notwithstanding any other provisions of law, the

> governing bodies of such counties shall prescribe by ordinance the terms, conditions and amount of such tax and may classify between events conducted for charitable and those conducted for noncharitable purposes.

Thus, § 58.1-3818(A) authorizes Fairfax County to levy a tax on admissions charged for attendance at any event. Further, the County is authorized to prescribe the terms, conditions, and amount of such admissions tax. Finally, § 58.1-3817 divides events into six classes:

> In accordance with the provisions of Article X, Section 1 of the Constitution of Virginia, events to which admission is charged shall be divided into the following classes for the purposes of taxation:
>
> 1. Admissions charged for attendance at any event, the gross receipts of which go wholly to charitable purpose or purposes.
>
> 2. Admissions charged for attendance at public and private elementary, secondary, and college school-sponsored events, including events sponsored by school-recognized student organizations.
>
> 3. Admissions charged for entry into museums, botanical or similar gardens, and zoos.
>
> 4. Admissions charged to participants in order to participate in sporting events.
>
> 5. Admissions charged for entry into major league baseball games and events at any major league baseball stadium which has seating for at least 40,000 persons.
>
> 6. All other admissions.

In a prior opinion ("2001 Opinion"), the Attorney General considered whether the City of Norfolk could require Norfolk State University to collect and remit the admission tax imposed by ordinance by the City of Norfolk.[1] The 2001 Opinion concludes that the Norfolk ordinance, which purports to impose a duty on the Commonwealth or its instrumentalities to collect an admission tax, is *ultra vires*.[2] In a similar vein, another opinion ("1983 Opinion") considered whether the Town of Blacksburg could impose upon the officers and employees of a state university the obligation to collect the town meals tax for the meals sold by the university.[3] The 1983 Opinion also concluded that the town has no authority to impose on the university the duty to collect and report the local meals tax.[4]

Finally, a 1997 opinion ("1997 Opinion") considered whether the City of Harrisonburg may require James Madison University or a private company that provides management services to the University to collect the city meals tax on the meals the University sells to its students through its dining services.[5] Because the private company did not manage the University's dining facilities, the city could not

impose a tax collection duty on the private company.[6] The 1997 Opinion also noted that whether the private company has assumed responsibility for the operation of the University's dining system was a question of fact.[7]

In the situation you present, you advise that the Center also is used for a number of popular non-university functions, such as musical concerts and various other entertainment shows. Whether the private corporation that manages the Center has assumed responsibility for such non-university functions also is a question of fact. For purposes of this opinion, I assume that the private management corporation does, in fact, have contractual responsibility for the complete management of the Center for all non-university functions. Based upon that assumption, Fairfax County would be authorized to adopt an ordinance to levy a tax on the admissions charged by the private corporation for attendance at non-university functions.

CONCLUSION

Accordingly, it is my opinion, based upon the facts you provide, that Fairfax County may adopt an ordinance requiring the private corporation that manages the George Mason University Patriot Center to collect admissions tax on persons who pay to attend non-university events.

[1] *See* 2001 Op. Va. Att'y Gen. 184.

[2] *Id.* at 185 (citing 1983-1984 Op. Va. Att'y Gen. 381, 383).

[3] *See* 1983 Op. Va. Att'y Gen., *supra* note 2, at 381.

[4] *Id.* at 383.

[5] *See* 1997 Op. Va. Att'y Gen. 184.

[6] *Id.* at 185.

[7] *Id.*

OP. NO. 09-042

TAXATION: REAL PROPERTY TAX – REASSESSMENT/ASSESSMENT (VALUATION) PROCEDURE AND PRACTICE.

Based on facts presented, private landowner who constructs boat pier on land owned by political subdivision is owner for purposes of real property taxation; pier may be assessed and taxed separately from adjoining land of private landowner.

THE HONORABLE LORI K. STEVENS
DINWIDDIE COUNTY COMMISSIONER OF THE REVENUE
AUGUST 27, 2009

ISSUES PRESENTED

You inquire concerning ownership for purposes of real property taxation of a boat pier constructed by a private land owner on land owned by a political subdivision. Further, should the private landowner be determined to be the owner of the boat pier for purposes of real property taxation, you ask whether the pier may be assessed and taxed separately from the adjoining land of such private landowner.

RESPONSE

It is my opinion, based on the facts you present,[1] that a private landowner who constructs a boat pier on land owned by a political subdivision is the owner for purposes of real property taxation. Further, it is my opinion that the pier may be assessed and taxed separately from the adjoining land of such private landowner.

BACKGROUND

You advise that Lake Chesdin constitutes the northern boundary of Dinwiddie County. The Lake is owned by the Appomattox River Water Authority ("ARWA"), a political subdivision of the Commonwealth of Virginia, to the 164th degree contour of the body of water.

You note that ARWA provides a construction and use permit agreement that allows for the construction and use of certain types of facilities on ARWA-owned property. You relate that a taxpayer living in the Lake Chesdin area entered into an agreement with ARWA to construct a boat pier. Further, you state that the boat pier is attached to the property located below the 164th degree contour, which is wholly owned by ARWA. You relate that your office has assessed the pier as real property, and the taxes on the pier are assessed against the taxpayer. You consider the taxpayer to be the owner of the boat pier since you interpret the agreement between the taxpayer and ARWA as a lease for the pier as contemplated by § 58.1-3282. However, the taxpayer contends that since the property on which the pier is located is wholly owned by ARWA, he should not be assessed for the real estate taxes on the structure.

You provide a copy of a "Construction and Use Permit Agreement" that outlines the agreement between the taxpayer and ARWA (the "Agreement"), which provides, in part, that:

> 8. All structures erected by you on [ARWA] property shall constitute structures appurtenant to your real property. You shall be exclusively responsible for their maintenance, proper repair and upkeep.…
>
> 9. The structure constructed pursuant to this agreement, shall not be sold separate from the real property to which it is appurtenant. In the event your property is sold, the purchaser shall assume in writing, all conditions and responsibilities of this agreement. This will be done by the purchaser completing a new agreement with [ARWA]. In the event a subsequent purchasere [sic] should not accept the terms of this agreement, [ARWA] may elect to remove any structure erected pursuant to this agreement, and/or restore [ARWA] property to its approximate original condition at your expense.

APPLICABLE LAW AND DISCUSSION

Section 58.1-3282 provides that:

> When a public service corporation or a political subdivision of the Commonwealth does not own both a tract, piece or parcel of land and the improvements thereon, including leasehold improvements owned by the lessee which are to be removed by the lessee at the end of the lease term, the land and such improvements may be assessed separately.

Statutory language is ambiguous when it may be understood in more than one way.[2] An ambiguity also exists when statutory language lacks clarity and precision, or is difficult to comprehend.[3] "The province of [statutory] construction lies wholly within the domain of ambiguity, and that which is plain needs no interpretation."[4] But when statutory language is "clear and unambiguous," "the plain meaning and intent of the enactment will be given to it."[5] It is my opinion that § 58.1-3282 is free of any ambiguity. The General Assembly unambiguously provides that when a political subdivision does not own both a tract of land and the improvements on that tract of land, the improvements may be separately assessed. Furthermore, the Agreement with ARWA clearly provides that any structure erected by the taxpayer on ARWA property "shall constitute structures appurtenant to [the taxpayer's] property." The term "appurtenant" is commonly understood to mean "[a]nnexed to a more important thing."[6] Therefore, under the terms of the Agreement, the taxpayer has voluntarily agreed that the boat pier is annexed to his property.

CONCLUSION

Accordingly, it is my opinion, based on the facts you present,[7] that a private landowner who constructs a boat pier on land owned by a political subdivision is the owner for purposes of real property taxation. Further, it is my opinion that the pier may be assessed and taxed separately from the adjoining land of such private landowner.

[1] *See infra* "Background."

[2] Supinger v. Stakes, 255 Va. 198, 205, 495 S.E.2d 813, 817 (1998); Va.-Am. Water Co. v. Prince William County Serv. Auth., 246 Va. 509, 514, 436 S.E.2d 618, 621 (1993); Va. Dep't of Labor & Indus. v. Westmoreland Coal Co., 233 Va. 97, 101, 353 S.E.2d 758, 762 (1987).

[3] *Supinger*, 255 Va. at 205, 495 S.E.2d at 817; Lee-Warren v. Sch. Bd., 241 Va. 442, 445, 403 S.E.2d 691, 692 (1991).

[4] Winston v. City of Richmond, 196 Va. 403, 408, 83 S.E.2d 728, 731 (1954).

[5] Brown v. Lukhard, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985).

[6] Black's Law Dictionary 118 (9th ed. 2009).

[7] *See supra* "Background."

OP. NO. 09-008

TAXATION: REAL PROPERTY TAX – REASSESSMENT/ASSESSMENT (VALUATION) PROCEDURE AND PRACTICE – REASSESSMENT RECORD/LAND BOOK, COMMUNICATION OF DOCUMENTS TO COMMISSIONER OF REVENUE.

County board of supervisors may not prevent statutorily appointed professional assessor for general reassessment from complying with § 58.1-3300 on sole basis that board disagrees with reassessment results.

JOHN C. BLAIR II
DINWIDDIE COUNTY ATTORNEY
MARCH 19, 2009

ISSUE PRESENTED

You ask whether a county board of supervisors may prevent an assessor for a general reassessment from complying with § 58.1-3300, which governs reassessment records, on the sole basis that the board of supervisors disagrees with the results of such general reassessment.

RESPONSE

It is my opinion that a county board of supervisors may not prevent a statutorily appointed professional assessor for a general reassessment from complying with § 58.1-3300 on the sole basis that the board disagrees with the results of such reassessment.

BACKGROUND

You state that the Dinwiddie County (the "County") performed a general reassessment of real estate during the 2004 calendar year, which became effective January 1, 2005. Further, you advise that the County issued a request for proposal ("RFP") for a general reassessment of all County real estate to be conducted during fall of 2007 and calendar year 2008, with the effective date to be January 1, 2009 (the "2008 Reassessment"). You relate that the RFP contained the following language:

> In accordance with § 58.1-3252 of the Code of Virginia, 1950, as amended, the County requires that all real estate undergo an independent, general and uniform reassessment every four years. Such reassessment shall include all taxable and tax-exempt properties with the improvements and buildings thereon, if any, and shall be based upon Fair Market Value. All manufactured housing/mobile homes must be appraised in the same manner as real estate. The reassessment of all properties shall begin in the Fall of 2007 and be completed by the end of December, 2008 to become effective January 1, 2009.

You note the County reviewed the RFP submissions, interviewed the candidates, and by resolution dated October 1, 2007, the Dinwiddie County Board of Supervisors awarded the contract to perform the 2008 Reassessment. The contract, by reference, incorporated the provisions of the RFP. By resolution dated August 19, 2008, the

Board appointed the project supervisor of the firm that received the contract as the County's assessor for the 2008 Reassessment. On December 23, 2008, that assessor certified the land book and filed it with the clerk of the circuit court. You relate that the Board does not agree with the result, generally believing that the assessments are too high. Therefore, you ask whether the Board may prevent the assessor from complying with § 58.1-3300.

APPLICABLE LAW AND DISCUSSION

The power of a local governing body, unlike that of the General Assembly, "must be exercised pursuant to an express grant"[1] because the powers of a county "are limited to those conferred expressly or by necessary implication."[2] "If the power cannot be found, the inquiry is at an end."[3] The Dillon Rule requires a narrow interpretation of all powers conferred on local governments since they are delegated powers.[4] Therefore, any doubt as to the existence of power must be resolved against the locality.[5]

Chapter 32 of Title 58.1, §§ 58.1-3200 through 58.1-3389, comprehensively governs the assessment and reassessment of real estate for local taxation. Under Chapter 32, a local governing body has the option to provide for the assessment and reassessment of real estate by appointing a real estate assessor or a board of assessors.[6] The assessor ascertains and assesses the fair market value of all assessable lands and lots.[7] The assessor is required to complete the general reassessment no later than December 31 of the year of the reassessment.[8] Section 58.1-3300 requires that:

> As soon as the persons, or officers, designated under the provisions of Article 6 (§ 58.1-3270 et seq.) herein have completed the reassessment, they shall make two copies of such record, in the form in which the land books are made out, and shall certify on oath that no assessable real estate is omitted and that there is no error on the face of such record. Such persons, or officers, designated as aforesaid shall then file the original of such reassessment in the office of the circuit court clerk of the city or county, who shall preserve the same in his office; and he or they shall deliver one copy of such reassessment to the commissioner of the revenue of the city or county and one copy to the local board of equalization of such city or county. For cities having an additional court for the recordation of deeds, one extra copy of such reassessment, embracing real estate the conveyance of which is required to be recorded in the clerk's office of such additional court, shall be made and filed in such circuit court clerk's office.
>
> Such persons or officers shall at the same time forward to the Department of Taxation a copy of the recapitulation sheets of such reassessment.
>
> In lieu of complying with the foregoing provisions of this section, the person or persons appointed by the governing body to

> perform the annual or biennial reassessment of real estate set forth in §§ 58.1-3251 and 58.1-3253 shall sign the land book attesting to the valuations contained therein resulting from such assessment.

The General Assembly has not authorized a county to appoint an assessor to begin to undertake the general reassessment process and then prevent such assessor from complying with the requirements of § 58.1-3300 because the county's board of supervisors disagrees with the reassessment results. Prior opinions of the Attorney General similarly conclude that a board of supervisors has no power to change the assessment of real property as ascertained by the assessor during a general reassessment and has no authority to raise or lower the ratio of assessment of real property.[9]

The application of the Dillon Rule in the Commonwealth requires a narrow interpretation of all powers conferred on local governments because any such powers are delegated powers.[10] Therefore, I must conclude that a county board of supervisors is without statutory authority to prevent the completion of an initiated general reassessment based on such board's disagreement with the assessment results.

CONCLUSION

Accordingly, it is my opinion that a county board of supervisors may not prevent a statutorily appointed professional assessor for a general reassessment from complying with § 58.1-3300 on the sole basis that the board disagrees with the results of such reassessment.

[1]Nat'l Realty Corp. v. Va. Beach, 209 Va. 172, 175, 163 S.E.2d 154, 156 (1968).

[2]Bd. of Supvrs. v. Horne, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975) (noting corollary to Dillon Rule).

[3]Commonwealth v. County Bd., 217 Va. 558, 575, 232 S.E.2d 30, 41 (1977).

[4]*See* Bd. of Supvrs. v. Countryside Invest. Co., 258 Va. 497, 504-05, 522 S.E.2d 610, 613-14 (1999) (holding that county board of supervisors does not have unfettered authority to decide what matters to include in subdivision ordinance; must include requirements mandated by Land Subdivision and Development Act and may include optional provisions contained in act); Op. Va. Att'y Gen: 2002 at 77, 78; 1974-1975 at 403, 405.

[5]2A Eugene McQuillen, The Law of Municipal Corporations § 10.19, at 369 (3d ed. 1996); *see also* Op. Va. Att'y Gen.: 2002 at 83, 84; 2000 at 75, 76.

[6]*See* Va. Code Ann. § 58.1-3253(A) (Supp. 2008) (discussing role of full-time real estate appraiser or assessor relating to biennial reassessment); § 58.1-3271 (Supp. 2008) (authorizing appointment of board of real estate assessors or real estate appraiser to conduct annual or biennial assessment); 1984-1985 Op. Va. Att'y Gen. 304, 304 (interpreting § 58-778.1, predecessor to § 58.1-3253, and concluding that governing body may establish real estate assessment department to conduct biennial assessment); *id.* at 305, 306 n.1, (interpreting § 58-778.1 and concluding that governing body may employ full-time appraiser or assessor to conduct biennial assessment).

[7]*See generally* §§ 58.1-3280 to 58.1-3295 (2004 & Supp. 2008).

[8]*See* § 58.1-3257(A) (Supp. 2008).

[9]Op. Va. Att'y Gen.: 1975-1976 at 374, 375; 1973-1974 at 395, 396; 1963-1964 at 17, 17; *see also* 1975-1976 Op. Va. Att'y Gen. 375, 377-78 (concluding that commissioner of revenue cannot change

value of real estate ascertained at general reassessment; locality may not increase tax rate applicable to public service corporation property absent enabling legislation).

[10] *See supra* note 4 and accompanying text.

OP. NO. 09-064

TAXATION: REAL PROPERTY TAX – REASSESSMENT RECORD/LAND BOOK, COMMUNICATION OF DOCUMENTS TO COMMISSIONER OF REVENUE – SPECIAL ASSESSMENT FOR LAND PRESERVATION.

Commissioner of revenue must include entire farm as being in county although portion of farm is within incorporated town; commissioner should proportionally assess portion of farm located within such town as separate line item on land book. For purposes of county's use value program, entire farm receives use assessment; when town within such county does not have use value ordinance, that portion of farm within town is subject to town taxes.

THE HONORABLE ANNE G. SAYERS
NORTHAMPTON COUNTY COMMISSIONER OF THE REVENUE
OCTOBER 20, 2009

ISSUE PRESENTED

You ask, when preparing a land book, whether a commissioner of the revenue ("commissioner") is authorized to divide proportionally a farm that is situated in a county and in a town within the county and enter the farm as two separate line items. Further, when such county has a use value program for which the farm qualifies and the town does not have a use value ordinance, you ask whether the entire farm receives the use assessment or only the portion of the farm situated within the county.

RESPONSE

It is my opinion that, when preparing a land book, a commissioner of the revenue must assess the entire farm parcel as being in the county even though a portion of such farm is within an incorporated town. Further, the commissioner should assess that portion of the farm located within the town as a separate line item entry on the land book. It is my opinion that for purposes of the county's use value program for which such farm qualifies, the entire farm receives the use assessment for purposes of taxation by the county. Finally, when the town within such county does not have a use value ordinance, it is my opinion the portion of the farm that is within the town is subject to taxation by the town.

BACKGROUND

You relate that Northampton County, which includes within its boundaries five incorporated towns, has an Agricultural Forest District Program.[1] You note that several tracts or parcels of land in the County have small portions that are also within the geographic boundaries of one of these towns. You relate that it has been the practice of Northampton County for purposes of real property taxation to assess separately the portion of such larger tracts of land that lie within an incorporated town.

You question whether the practice of assessing the parcel as two line items on the tax rolls is the correct way to handle these properties. Therefore, you seek guidance concerning whether the assessment of such a parcel as two entries on the tax rolls is appropriate and authorized by statute.

APPLICABLE LAW AND DISCUSSION

Section 58.1-3301(A) provides that "[t]he Department of Taxation shall prescribe the form of the land book to be used by the commissioner of the revenue" for a county. Under this authority, the Department of Taxation (the "Department") has prescribed forms that provide for the listing of basic information concerning each parcel of property, including the name and address of the owner, a description of the property, the value of land and improvements, and the amount of tax due.[2] Further § 58.1-3302 provides that the commissioner shall enter each town lot separately in the land book, and shall set forth, among other things, the name and address of the owner, a description of the property, its value and "the amount of tax at the legal rate." Section 58.1-3310 requires "[e]ach commissioner of the revenue [to] retain in his office the original land book" and to deliver a copy to the Department and to the treasurer and the clerk of the circuit court for his county.

Statutory language is ambiguous when it may be understood in more than one way.[3] An ambiguity also exists when statutory language lacks clarity and precision, or is difficult to comprehend.[4] "The province of [statutory] construction lies wholly within the domain of ambiguity, and that which is plain needs no interpretation."[5] When statutory language is clear and unambiguous, however, the plain meaning and intent of the enactment must be given to it.[6] It is my opinion that §§ 58.1-3301 and 58.1-3302 are free of any ambiguities. A commissioner is required as a part of his duties to prepare a land book which separately states the town property.[7]

Successive Virginia constitutions have contained provisions requiring "uniformity" in property taxation.[8] The Constitution of Virginia currently requires uniformity of taxation in Article X, § 1, which provides, in pertinent part, that:

> All property, except as hereinafter provided, shall be taxed. All taxes shall be levied and collected under general laws and shall be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, except that the General Assembly may provide for differences in the rate of taxation to be imposed upon real estate by a city or town within all or parts of areas added to its territorial limits, or by a new unit of general government, within its area, created by or encompassing two or more, or parts of two or more, existing units of general government. [Emphasis added.]

The Supreme Court of Virginia has held that §§ 1 and 2 of Article X relating to property assessments must be construed together.[9] These sections constitute the

twin principles of property taxation in the Commonwealth.[10] In pertinent part, § 2 provides that:

> All assessments of real estate and tangible personal property shall be at their fair market value, to be ascertained as prescribed by law. The General Assembly may define and classify real estate devoted to agricultural, horticultural, forest, or open space uses, and may by general law authorize any county, city, town, or regional government to allow deferral of, or relief from, portions of taxes otherwise payable on such real estate if it were not so classified, provided the General Assembly shall first determine that classification of such real estate for such purpose is in the public interest for the preservation or conservation of real estate for such uses.

The net result of "these provisions is to distribute the burden of taxation, so far as is practical, evenly and equitably."[11] In addition, the Virginia Supreme Court has held that "where it is impossible to secure both the standard of the true value and the uniformity and equality required by law, the latter requirement is to be preferred as the just and ultimate purpose of the law."[12] Thus, uniformity is viewed as the paramount objective of the taxation of property.[13]

Pursuant to Article X, § 2 and Article 4, Chapter 32 of Title 58.1, §§ 58.1-3229 through 58.1-3244,[14] localities may adopt an ordinance providing that land devoted to agricultural, horticultural, forest and open-space use be assessed at a lower value, based on its use.[15] The purpose of the land use assessment statutes is to create a financial incentive to encourage the preservation of land for preferred uses.[16]

> The settled construction placed upon [Article X, § 1] is that uniform taxation requires uniformity not only in the rate of taxation, and in the mode of assessment upon the taxable valuation, but the uniformity must be co-extensive with the territory to which it applies. If a tax is imposed by the State, it must be uniform over the whole State; if by a county, city, town, or other subordinate district, the tax must be uniform throughout the territory to which it is applicable.[17]

As noted in a 1970 opinion of the Attorney General, the constitutional requirement of uniformity of taxation "forbids exemption from county taxes of property located in a town."[18] Property located in an incorporated town within a county is subject to taxation by both the county and town.[19] Consequently, the acreage of the entire farm, which qualifies for the Northampton County Agricultural Forestal District Program, must be listed on the county land book as exempt from county taxation. Although exempt from county taxation by the Program, the portion of that same property situate within the town must be listed as a separate line item entry in the land book and is subject to taxation by the town.

CONCLUSION

Accordingly, it is my opinion that, when preparing a land book, a commissioner of the revenue must include the entire farm parcel as being in the county even though a portion of such farm is within an incorporated town. Further, the commissioner should proportionally assess the portion of the farm located within the incorporated town for entry as a separate line item on the land book. It is my opinion that for purposes of the county's use value program for which such farm qualifies, the entire farm receives the use assessment for purposes of taxation by the county. Finally, when the town within such county does not have a use value ordinance, it is my opinion that the portion of the farm within the town is subject to taxation by the town.

[1]*See* Northampton County, Va., Code of Ordinances § 33.010 (2009), Agricultural and Forestal Districts Program, *available at* http://www.amlegal.com/nxt/gateway.dll/Virginia/northampton_co_va/titleiiiadministration/ chapter33financeandtaxation?f=templates$fn=altmain-nf.htm$3.0#JD_33.010.

[2]1992 Op. Va. Att'y Gen. 173, 174.

[3]Supinger v. Stakes, 255 Va. 198, 205, 495 S.E.2d 813, 817 (1998); Va.-Am. Water Co. v. Prince William County Serv. Auth., 246 Va. 509, 514, 436 S.E.2d 618, 621 (1993); Va. Dep't of Labor & Indus. v. Westmoreland Coal Co., 233 Va. 97, 101, 353 S.E.2d 758, 762 (1987).

[4]*Supinger*, 255 Va. at 205, 495 S.E.2d at 817; Lee-Warren v. Sch. Bd., 241 Va. 442, 445, 403 S.E.2d 691, 692 (1991).

[5]Winston v. City of Richmond, 196 Va. 403, 408, 83 S.E.2d 728, 731 (1954).

[6]Brown v. Lukhard, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985).

[7]1970-1971 Op. Va. Att'y Gen. 62, 62.

[8]*See* 2 A.E. Dick Howard, Commentaries on the Constitution of Virginia, 1037-40 (1974).

[9]*See, e.g.*, Bd. of Supvrs. v. Leasco Realty, Inc., 221 Va. 158, 166, 267 S.E.2d 608, 613 (1980) (noting that Article X, §§ 1 and 2 must be read and construed together); R. Cross, Inc. v. Newport News, 217 Va. 202, 207, 228 S.E.2d 113, 117 (1976) (noting that first two sections of Article X must be construed together); Smith v. City of Covington, 205 Va. 104, 108, 135 S.E.2d 220, 222 (1964) (construing Article XIII, §§ 168 and 169 of 1902 Virginia Constitution, predecessors to Article X, §§ 1 and 2 of 1971 Virginia Constitution); Tuckahoe Women's Club v. City of Richmond, 199 Va. 734, 738, 101 S.E.2d 571, 574 (1958) (noting that §§ 168 and 169 must be read together); Skyline Swannanoa, Inc. v. Nelson County, 186 Va. 878, 881, 44 S.E.2d 437, 439 (1947) (noting that §§ 168 and 169 must be construed together); Lehigh Portland Cement Co. v. Commonwealth, 146 Va. 146, 152, 135 S.E. 669, 671 (1926) (noting that §§ 168 and 169 must be construed together).

[10]*See R. Cross*, 217 Va. at 207, 228 S.E.2d at 117 (noting that principles of taxation required by Virginia Constitution are fair market value and uniformity clauses of Article X).

[11]*See Skyline Swannanoa*, 186 Va. at 881, 44 S.E.2d at 439 (construing Article XIII, §§ 168 and 169); *see also* S. Ry. Co. v. Commonwealth, 211 Va. 210, 214, 176 S.E.2d 578, 581 (1970) (noting that courts in resolving disputes regarding fair market value versus uniformity seek to enforce equality in burden of taxation by insisting upon uniformity in mode of assessment and rate of taxation).

[12]*See, e.g.*, *Women's Club*, 199 Va. at 738, 101 S.E.2d at 574.

[13]*Id.*

[14]Article 4 was enacted under the constitutional authority of Article X, § 2. Article 4 authorizes localities to enact ordinances providing for the use value assessment and taxation of constitutionally permitted classes of property and details the procedures for the assessment and taxation of such property. *See* 1997 Op. Va. Att'y Gen. 199, 199.

[15] *Id.* at 199-00 (stating that General Assembly intended use value to be lower than fair market value).

[16] *Id.* at 200.

[17] Day v. Roberts, 101 Va. 248, 251, 43 S.E. 362, 363 (1903), *quoted in* Moss v. County of Tazewell, 112 Va. 878, 883, 72 S.E. 945, 946 (1911).

[18] 1970-1971 Op. Va. Att'y Gen. 386, 386 (interpreting § 168 of 1902 Constitution.)

[19] *Id.*

OP. NO. 09-085

TAXATION: REAL PROPERTY TAXATION – SPECIAL ASSESSMENT FOR LAND PRESERVATION.

Contiguous parcels of real estate, titled in same owner, may be combined to form tracts of at least twenty acres devoted to forest use and at least five acres devoted to agricultural use and are eligible for use value assessment. Parcel with mixed use may qualify for land use assessment provided each use acreage meets required minimum acreage.

THE HONORABLE DEBORAH F. WILLIAMS
SPOTSYLVANIA COUNTY COMMISSIONER OF THE REVENUE
DECEMBER 10, 2009

ISSUES PRESENTED

You ask whether contiguous parcels of real estate with identical ownership may be combined to form tracts that contain at least twenty acres devoted to forest use and five acres devoted to agricultural use to be eligible for use value assessment. You also ask whether a parcel that has a mixed use such as part forest and part agriculture can qualify for use value assessment when the use acreage does not meet the minimum requirement.

RESPONSE

It is my opinion that contiguous parcels of real estate that are titled in the same owner may be combined to form tracts of at least twenty acres devoted to forest use and at least five acres devoted to agricultural use and are eligible for use value assessment. It further is my opinion that a parcel with mixed use may qualify for a land use assessment provided the use acreage meets the required minimum acreage for each land use.

BACKGROUND

You relate that Spotsylvania County allows contiguous parcels with identical ownership to receive the deferral as long as the total acreage of all parcels meets or exceeds the five acre minimum for agricultural use and twenty acre minimum for forestal use.

APPLICABLE LAW AND DISCUSSION

Article 4, Chapter 32 of Title 58.1, § 58.1-3229 (not set out), §§ 58.1-3230 through 58.1-3244, provides for the special assessment of real property for land preservation. In general, to qualify for land use assessment and taxation: (1) agricultural or horticultural property must consist of a minimum of five acres; (2) forest property must consist of a minimum of twenty acres; and (3) open-space property must consist

"of a minimum of five acres or such greater minimum acreage as may be prescribed" by the locality.[1] Section 58.1-3233(2) provides that "[t]he minimum acreage requirements for special classifications of real estate shall be determined by adding together the total area of contiguous real estate excluding recorded subdivision lots recorded after July 1, 1983, titled in the same ownership."

A 2004 opinion of the Attorney General concludes that the aggregation of parcels does not defeat the purposes underlying the land use program as long as the real estate that is divided into parcels remains under common ownership and is large enough that the division is not subject to the locality's subdivision ordinance.[2] Further, as long as the aggregated parcels otherwise satisfy § 58.1-3233(2), the purpose of the land use program is satisfied.[3] Therefore, it is my opinion that parcels may be aggregated for purposes of meeting minimum acreage requirements for land use taxation established by § 58.1-3233(2). Furthermore, other opinions of the Attorney General conclude that § 58.1-3233(2) authorizes the combination of contiguous parcels of real estate for the purpose of satisfying the minimum acreage requirement of the statute only when the contiguous parcels are titled in the same ownership.[4] I concur in these prior opinions. It also is my opinion that contiguous parcels of real estate being titled in the same ownership may be combined to form tracts that contain at least twenty acres devoted to forest use and five acres devoted to agricultural use to be eligible for use value assessment.

Prior opinions of the Attorney General tangentially answer your second inquiry.[5] A commissioner of the revenue should make the factual determination regarding whether a parcel meets the criteria for participation in the land use taxation and assessment program.[6] To qualify for the special assessment, the land must be devoted to agricultural, horticultural, forest or open-space uses, and must satisfy the minimum acreage requirement specified in § 58.1-3233.[7] In addition, I note that the separation of lots that do not meet the minimum acreage requirements triggers the application of roll-back taxes.[8] Therefore, it is my opinion that a parcel with mixed use, *i.e.*, part forest and part agriculture, cannot qualify for use value assessment unless each such use acreage meets the required acreage by itself.

CONCLUSION

Accordingly, it is my opinion that contiguous parcels of real estate that are titled in the same owner may be combined to form tracts of at least twenty acres devoted to forest use and at least five acres devoted to agricultural use and are eligible for use value assessment. It further is my opinion that a parcel with mixed use may qualify for a land use assessment provided the use acreage meets the required minimum acreage for each land use.

[1] VA. CODE ANN. § 58.1-3233(2) (2009).

[2] *See* 2004 Op. Va. Att'y Gen. 201, 203.

[3] *Id.*

[4]*See* Op. Va. Att'y Gen.: 1989 at 325, 326; 1987-1988 at 138, 140.

[5]*See infra* notes 6-8 and accompanying text.

[6]*See* 2008 Op. Va. Att'y Gen. 141, 143.

[7]*See* Op. Va. Att'y Gen: 2002 at 318, 319; *id.* at 315, 316; 1997 at 193, 194.

[8]*See* Op. Va. Att'y Gen.: 1990 at 245, 246; 1986-1987 at 306, 306-07; 1985-1986 at 305, 306; 1982-1983 at 545, 545; 1979-1980 at 339, 340.

OP. NO. 09-040

TAXATION: RETAIL SALES AND USE TAX — LOCAL OFFICERS – TREASURERS.

County treasurer may not refund payments erroneously made to towns under § 58.1-605(H) pursuant to § 58.1-605(F); distributions to town based on incorrect school census data does not constitute 'error made in any such payment' under § 58.1-605(F). Section 58.1-3133(A) permits treasurer to deduct overpayments as 'other charges' to recoup those amounts.

C. ERIC YOUNG
TAZEWELL COUNTY ATTORNEY
SEPTEMBER 1, 2009

ISSUES PRESENTED

You ask whether payments erroneously made to towns by the county treasurer under § 58.1-605(H) may be refunded to such county pursuant to § 58.1-605(F). You also ask whether the distribution by the county treasurer to a town based on incorrect school census data constitutes an "error made in any such payment" pursuant to § 58.1-605(F).

RESPONSE

It is my opinion that payments erroneously made to towns by the county treasurer under § 58.1-605(H) may not be refunded to Tazewell County pursuant to § 58.1-605(F). Further, it is my opinion that the distribution by the county treasurer to a town that was based on incorrect school census data does not constitute an "error made in any such payment" under § 58.1-605(F). However, it is my opinion that § 58.1-3133(A) permits the treasurer to deduct the overpayments as "other charges" to recoup those amounts.

BACKGROUND

You advise that the treasurer of Tazewell County, as directed by § 58.1-605(H), has distributed sales tax revenues to the incorporated towns in the County based on the school age populations in each town. You advise that it appears the school division did not provide the treasurer with the correct or most recent school census data. Consequently, one town received less funds while three other towns received more funds than would have been due had the correct data been used to calculate the distributions.

You conclude that future allocations to the three towns may be decreased as a refund of amounts paid in error as provided in § 58.1-605(F), in which case you conclude the county treasurer would be acting as an agent of the Comptroller of Virginia.[1]

APPLICABLE LAW AND DISCUSSION

The power of a local governing body, unlike that of the General Assembly, "must be exercised pursuant to an express grant"[2] because the powers of a county "are limited to those conferred expressly or by necessary implication."[3] "If the power cannot be found, the inquiry is at an end."[4] The Dillon Rule requires a narrow interpretation of all powers conferred on local governments since they are delegated powers.[5] Therefore, any doubt as to the existence of power must be resolved against the locality.[6]

The Dillon Rule of strict construction is applicable to local constitutional officers.[7] Article VII, § 4 of the Constitution of Virginia creates the office of treasurer and provides that a treasurer's duties "shall be prescribed by general law or special act."[8] The powers and duties of a local treasurer are set out generally in Article 2, Chapters 31[9] and 39[10] of Title 58.1. A county treasurer is responsible for collecting taxes and other revenues payable into the treasury of the locality he serves.[11]

Sections 58.1-603 and 58.1-604 impose a tax on the retail sale or consumption of tangible personal property within the Commonwealth. Pursuant to § 58.1-606, cities and counties may also impose sales and use taxes to be collected with the state tax imposed under §§ 58.1-603 and 58.1-604.

In the context of the question that you present, § 58.1-605(F) provides that:

> As soon as practicable after the local sales tax moneys have been paid into the state treasury in any month for the preceding month, the Comptroller shall draw his warrant on the Treasurer of Virginia in the proper amount in favor of each city or county entitled to the monthly return of its local sales tax moneys, and such payments shall be charged to the account of each such city or county under the special fund created by this section. If errors are made in any such payment, or adjustments are otherwise necessary, whether attributable to refunds to taxpayers, or to some other fact, the errors shall be corrected and adjustments made in the payments for the next six months as follows: one-sixth of the total adjustment shall be included in the payments for the next six months. In addition, the payment shall include a refund of amounts erroneously not paid to the city or county and not previously refunded during the three years preceding the discovery of the error. A correction and adjustment in payments described in this subsection due to the misallocation of funds by the dealer shall be made within three years of the date of the payment error.

Section 58.1-605(H) provides, in pertinent part, that:

> One-half of such payments to counties are subject to the further qualification …, that in any county wherein is situated any incorporated town not constituting a separate special school

> district which has complied with its charter provisions providing for the election of its council and mayor for a period of at least four years immediately prior to the adoption of the sales tax ordinance, the county treasurer shall pay into the town treasury of each such town for general governmental purposes the proper proportionate amount received by him in the ratio that the school age population of each such town bears to the school age population of the entire county, based on the latest statewide school census.

Generally, the object of statutory construction is the ascertainment of legislative intent.[12] Section 58.1-605(F) clearly provides that the Comptroller of Virginia is to pay over to the county the monthly return of its local sales tax moneys. Furthermore, the General Assembly provides that all errors are to be "corrected and adjustments made in the payments for the next six months."[13] The statutory reference to the Comptroller of Virginia making payments to the county and correction of errors made in such payments must be viewed within the context of the statutory provision, rather than isolated from the rest of the text of the statute.[14] Applying the plain language of the statute to mean that a county treasurer acts as an agent of the Comptroller when making payments into the town treasury under § 58.1-605(H) would be a result that is not supported by the plain language of the statute.[15]

Section 58.1-3133(A) relates to the duties of a local treasurer:

> In the payment of any warrants lawfully drawn, the treasurer paying such warrants may first deduct all taxes and other charges due from the party in whose favor the warrant is drawn. If such warrant is insufficient to pay the entire amount due, then such treasurer shall credit the bill for such taxes or other charges by the amount of the warrant.

A 1987 opinion of the Attorney General ("1987 Opinion") interpreted the language of § 58.1-3133 in effect at that time as it related to the authority of a treasurer to deduct funds from the regular paycheck of a regional jail employee, a county resident who owed taxes to the county.[16] In 1987, the first sentence of § 58.1-3133 did not include the phrase "and other charges."[17] The 1987 Opinion concludes that § 58.1-3133 should be construed to permit only the setoff of delinquent county or city taxes against county or city warrants drawn in favor of the taxpayer.[18] The 2001 Session of the General Assembly amended the first sentence of § 58.1-3133(A) to add the phrase "and other charges."[19] When the General Assembly amends existing legislation by adding new provisions, a presumption arises that it "acted with full knowledge of, and in reference to, the existing law upon the same subject and the construction placed upon it by the courts."[20] Further, it is presumed that the General Assembly purposefully acted with the intent to change existing law.[21] The common or ordinary meaning of the term "party" is "[o]ne who takes part in a transaction."[22] The towns that you describe certainly are parties to the transaction of receiving payments

made by the county treasurer pursuant to § 58.1-605(H). Therefore, it is my opinion that § 58.1-3133(A) authorizes a county treasurer to deduct "other charges due" from the towns from future warrants drawn by the county treasurer for payment into the town treasury of funds received from the Comptroller under § 58.1-605(F).

In conclusion, the treasurer relied on incorrect school census figures to make an incorrect deposit that was not authorized by law. Likewise, the towns receiving the amounts paid by the county treasurer clearly were not entitled to receive such funds and did so without statutory authority because the deposit was based upon the incorrect data. Accordingly, the towns receiving the incorrect amount must return the overages to the county. If they do not do so voluntarily, § 58.1-3133(A) permits the treasurer to deduct all "other charges" due from the party "in whose favor the warrant is drawn." Accordingly, the county treasurer may deduct such overages as "other charges" due from the towns in subsequent warrants drawn pursuant to § 58.1-605(H).

CONCLUSION

Accordingly, it is my opinion that payments erroneously made to towns by the county treasurer under § 58.1-605(H) may not be refunded to Tazewell County pursuant to § 58.1-605(F). Further, it is my opinion that the distribution by the county treasurer to a town that was based on incorrect school census data does not constitute an "error made in any such payment" under § 58.1-605(F). However, it is my opinion that § 58.1-3133(A) permits the treasurer to deduct the overpayments as "other charges" to recoup those amounts.

[1]Section 2.2-505(B) requires that an opinion request from a county attorney "shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney's legal conclusions."

[2]Nat'l Realty Corp. v. Va. Beach, 209 Va. 172, 175, 163 S.E.2d 154, 156 (1968).

[3]Bd. of Supvrs. v. Horne, 216 Va. 113, 117, 215 S.E.2d 453, 455 (1975) (noting corollary to Dillon Rule).

[4]Commonwealth v. County Bd., 217 Va. 558, 575, 232 S.E.2d 30, 41 (1977).

[5]*See* Bd. of Supvrs. v. Countryside Inv. Co., 258 Va. 497, 504-05, 522 S.E.2d 610, 613-14 (1999) (holding that county board of supervisors does not have unfettered authority to decide what matters to include in subdivision ordinance; must include requirements mandated by Land Subdivision and Development Act and may include optional provisions contained in act); Op. Va. Att'y Gen: 2002 at 77, 78; 1974-1975 at 403, 405.

[6]2A Eugene McQuillen, The Law of Municipal Corporations § 10.19, at 369 (3d ed. 1996); *see also* Op. Va. Att'y Gen.: 2002 at 83, 84; 2000 at 75, 76.

[7]*See, e.g.*, Op. Va. Att'y Gen.: 2006 at 200, 201; 1984-1985 at 284, 284.

[8]*See also* Va. Code Ann. § 15.2-1600(A) (2008) (parallel statute).

[9]Va. Code Ann. §§ 58.1-3123 to 58.1-3172.1 (2004) (codified in scattered sections). For purposes of Chapter 31 of Title 58.1, the term "treasurer" applies to city, county, and town treasurers and to directors of finance and any other officers who perform the duties of a treasurer, unless the context indicates otherwise. *See* § 58.1-3123.

[10]Sections 58.1-3910 to 58.1-3938 (2004 & Supp. 2008) (codified in scattered sections). Chapter 39 of Title 58.1, §§ 58.1-3900 through 58.1-3993, addresses the collection of local taxes. Chapter 39 does not define the term "treasurer." Some sections within Chapter 39 refer to "county and city treasurer" while others refer to "treasurer" without apparent distinction.

[11]Sections 58.1-3127(A); 58.1-3910 (2004).

[12]*See* Vollin v. Arlington County Electoral Bd., 216 Va. 674, 678-79, 222 S.E.2d 793, 797 (1976) ("It is the intention of the lawmaker that constitutes the law."); *see also* London Bros. v. Nat'l Exchange Bank, 121 Va. 460, 466-67, 93 S.E. 699, 700 (1917); Kain v. Ashworth, 119 Va. 605, 608, 89 S.E. 857, 858 (1916) (noting that legislative intent is to be gathered from words used unless literal interpretation leads to manifest absurdity). "The ascertainment of legislative intention involves appraisal of the subject matter, purposes, objects and effects of the statute, in addition to its express terms." *Vollin*, 216 Va. at 679, 222 S.E.2d at 797.

[13]Section 58.1-605(F) (Supp. 2008).

[14]Turner v. Commonwealth, 226 Va. 456, 460, 309 S.E.2d 337, 339 (1983) (noting that maxim, *noscitur a sociis*, provides that meaning of word must be determined in relation to surrounding language and must be read in harmony with its context). Furthermore, it is well established that statutes should not be read in isolation. *See, e.g.*, 2B Norman J. Singer & J.D. Shambie Singer, Sutherland Statutory Construction § 51:2 (West 7th ed. 2008); Op. Va. Att'y Gen.: 2008 at 16, 18; 1999 at 22, 22; 1998 at 123, 124; 1996 at 197, 198; 1992 at 108, 112.

[15]*See London Brothers*, 121 Va. at 466-67, 93 S.E. at 700; *Kain*, 119 Va. at 608, 89 S.E. at 858 (noting that legislative intent to be gathered from words used unless literal interpretation leads to manifest absurdity).

[16]*See* 1986-1987 Op. Va. Att'y Gen. 290, 290.

[17]*See* 2001 Va. Acts ch. 801, at 1094, 1094 (adding phrase "and other charges" to first sentence of § 58.1-3133); *see also* § 58.1-3133 (1984) (providing that "[i]n the payment of any warrants lawfully drawn, the treasurer paying such warrants may first deduct all taxes due from the party in whose favor the warrant is drawn").

[18]*See* 1986-1987 Op. Va. Att'y Gen., *supra* note 16, at 292.

[19]*See supra* note 17.

[20]City of Richmond v. Sutherland, 114 Va. 688, 693, 77 S.E. 470, 472 (1913).

[21]Cape Henry Towers, Inc. v. Nat'l Gypsum Co., 229 Va. 596, 600, 331 S.E.2d 476, 479 (1985); Wisniewski v. Johnson, 223 Va. 141, 144, 286 S.E.2d 223, 224-25 (1982); *Sutherland*, 114 Va. at 693, 77 S.E. at 472.

[22]Black's Law Dictionary 1231 (9th ed. 2009). When a particular word in a statute is not defined therein, it must be given its ordinary meaning. *See* McKeon v. Commonwealth, 211 Va. 24, 27, 175 S.E.2d 282, 284 (1970).

OP. NO. 08-086

TAXATION: TANGIBLE PERSONAL PROPERTY, ETC. – SITUS FOR TAXATION.

Alternative situs provision of § 58.1-3511(A)(ii) is mandatory.

THE HONORABLE INGRID H. MORROY
ARLINGTON COUNTY COMMISSIONER OF REVENUE
JANUARY 26, 2009

ISSUE PRESENTED

You ask whether the alternative situs provision of § 58.1-3511(A)(ii) is mandatory or creates a voluntary taxpayer election.

RESPONSE

It is my opinion that the alternative situs provision of § 58.1-3511(A)(ii) is mandatory.

BACKGROUND

You advise that § 58.1-3511(A)(ii), absent the phrase in the last sentence beginning with "provided," clearly establishes the situs for vehicles with a weight of 10,000 pounds or less and used in a business. Such situs is the locality from which it is "directed or controlled and in which the owner's business has a definite place of business." However, you note that the final phrase of the last sentence appears to place a duty on the owner to show that he paid property taxes in such business locality. You observe that this phrase implies that the owner could choose not to file in the business locality and keep the situs of the vehicle in the jurisdiction where the vehicle normally is garaged.

You advise that at least one neighboring locality interprets the situs provision to be mandatory. You state the neighboring locality taxes vehicles garaged at the business location over the objections of the owners. Consequently, you ask for guidance.

APPLICABLE LAW AND DISCUSSION

Section 58.1-3511(A)(ii) provides that

> if the owner of a business files a return pursuant to § 58.1-3518[1] for any vehicle with a weight of 10,000 pounds or less registered in Virginia and used in the business with the locality from which the use of such vehicle is directed or controlled and in which the owner's business has a definite place of business, as defined in § 58.1-3700.1,[2] *the situs for such vehicles shall be such locality*, provided such owner has sufficient evidence that he has paid the personal property tax on the business vehicles to such locality. [Emphasis added.]

Under basic rules of statutory construction, the General Assembly's intent is determined from the plain and natural meaning of the words used.[3] When the language of a statute is unambiguous, the plain meaning of that language is controlling.[4] Thus, when the General Assembly has used words of a plain and definite import, I may not assign to them a construction that would amount to holding that the General Assembly meant something other than that which it actually expressed.[5]

The statutory language at issue is clear and unambiguous. For purposes of the local tangible personal property tax, all vehicles are assessed by the jurisdiction in which the vehicles normally are garaged, docked, or parked, whether they are personal vehicles or vehicles belonging to a business.[6] However, in some cases, a vehicle owned by and used for business may be kept by employees or owners in their own garages. These garages may be located in another jurisdiction having no nexus with the business. Section 58.1-3511(A)(ii) ensures that vehicles which are the property of a business are taxed by the jurisdiction in which the business is located and not where the employee or owner garages the vehicle. The statutory language mandates that the situs for business vehicles with a weight of 10,000 pounds or less registered

in Virginia and used in a business shall be the jurisdiction in which the owner of such business: (1) is required to file a tangible personal property tax return for any vehicle used in the business, and (2) has a definite place of business from which the use of the business vehicle is directed or controlled.[7] In addition, the owner must have sufficient evidence that he has paid the personal property tax to such jurisdiction. The use of the word "shall" in statutes generally indicates that the procedures are intended to be mandatory.[8]

CONCLUSION

Accordingly, it is my opinion that the alternative situs provision of § 58.1-3511(A)(ii) is mandatory.

[1]Section 58.1-3518 requires:

"Every taxpayer owning any of the property subject to taxation under [Chapter 35 (Tangible Personal Property)] on January 1 of any year shall file a return thereof with the commissioner of the revenue for his county or city on the appropriate forms; however, the commissioner of the revenue may elect not to require such a return from any taxpayer who owns such property which does not have sufficient value to generate a tax assessment. Every person who leases any of such property from the owner thereof on such date shall file a return with the commissioner of the revenue of the county or city wherein such property is located giving the name and address of the owner, except any person leasing a motor vehicle which is subject to the tax imposed under § 58.1-2402. Such returns shall be filed on or before May 1 of each year, except as otherwise provided by ordinance authorized by § 58.1-3916.

"Every fiduciary shall file the returns mentioned in [Chapter 35] with the commissioner of revenue having jurisdiction. Every taxpayer owning machinery and tools or business personal property, if requested by the commissioner of the revenue, shall include on his annual return of such property information as to the total of original cost by year of purchase. The cost should be the original capitalized cost or the cost that would have been capitalized if the expense deduction in lieu of depreciation was elected under § 179 of the Internal Revenue Code."

[2]Pursuant to § 58.1-3700.1, a "*definite place of business*" means "an office or a location at which occurs a regular and continuous course of dealing for thirty consecutive days or more. A definite place of business for a person engaged in business may include a location leased or otherwise obtained from another person on a temporary or seasonal basis and real property leased to another. A person's residence shall be deemed to be a definite place of business if there is no definite place of business maintained elsewhere and the person is not subject to licensure as a peddler or itinerant merchant."

[3]Britt Constr., Inc. v. Magazzine Clean, LLC, 271 Va. 58, 62, 623 S.E.2d 886, 888 (2006); W. Lewinsville Heights Citizens Ass'n v. Bd. of Supvrs., 270 Va. 259, 265, 618 S.E.2d 311, 314 (2005); Mozley v. Prestwould Bd. of Dirs., 264 Va. 549, 554, 570 S.E.2d 817, 820 (2002).

[4]Williams v. Commonwealth, 265 Va. 268, 271, 576 S.E.2d 468, 470 (2003); Woods v. Mendez, 265 Va. 68, 74-75, 574 S.E.2d 263, 266 (2003); Industrial Dev. Auth. v. Bd. of Supvrs., 263 Va. 349, 353, 559 S.E.2d 621, 623 (2002)

[5]*Britt Construction*, 271 Va. at 62-63, 623 S.E.2d at 888; Alliance to Save the Mattaponi v. Commonwealth, 270 Va. 423, 439, 621 S.E.2d 78, 87 (2005); *Williams*, 265 Va. at 271, 576 S.E.2d at 470.

[6]*See* Va. Code Ann. § 58.1-3511(A) (2004).

[7]*Id.*

[8]*See* Andrews v. Shepherd, 201 Va. 412, 414, 111 S.E.2d 279, 281-82 (1959); Op. Va. Att'y Gen.: 2004 at 168, 169; 1994 at 64, 68.

OP. NO. 08-109

TAXATION: TANGIBLE PERSONAL PROPERTY, ETC. – TANGIBLE PERSONAL PROPERTY TAX.

'Original cost' means acquisition cost of property from manufacturer or dealer, *i.e.*, original cost paid by original purchaser of such property from manufacturer or dealer.

THE HONORABLE EMMETT W. HANGER JR.
MEMBER, SENATE OF VIRGINIA
FEBRUARY 25, 2009

ISSUE PRESENTED

You inquire concerning the meaning of the term "original cost" as it is used in § 58.1-3503(A)(17).

RESPONSE

It is my opinion that the term "original cost" means the acquisition cost of property from the manufacturer or dealer, *i.e.*, the original cost paid by the original purchaser of such property from the manufacturer or dealer.

BACKGROUND

You inquire regarding the definition of the term "original cost" as it is used in § 58.1-3503(A)(17) when a taxpayer purchases used personal property employed in a trade or business from a seller who has been paying tax to the same jurisdiction for such personal property. You advise that in one case a taxpayer sold personal property employed in a trade or business to a new owner at a price much less than the initial purchase price.

You suggest that the original cost of personal property employed in a trade or business could be defined as either the price paid for the personal property when it originally was purchased from a manufacturer or dealer or the price paid by a subsequent purchaser. You observe that § 58.1-3503(A)(17) does not define "original cost."

APPLICABLE LAW AND DISCUSSION

Section 58.1-3503(A)(17) provides:

> A. Tangible personal property is classified for valuation purposes according to the following separate categories which are not to be considered separate classes for the rate purposes:
>
> 17. All tangible personal property employed in a trade or business other than that described in subdivisions 1 through 16 of this subsection, which shall be valued by means of a percentage or percentages of original cost.

The General Assembly has not provided a definition for the term "original cost" within the context of § 58.1-3503(A)(17). Statutory construction requires that words be given their ordinary meaning, given the context in which they are used.[1] This particularly is the case when the words are not expressly defined by statute.[2] Absent a statutory definition, the plain and ordinary meaning of the term is controlling.[3] The

term "cost" means the "amount paid or charged for something; price or expenditure."[4] "Original cost" or "acquisition cost" means "[a]n asset's net price; the original cost of an asset.—Also termed *historical cost*; *original cost*."[5]

Based on these definitions, the plain and ordinary meaning of the term "original cost" is the cost of the personal property employed in a trade or business paid by the owner who first purchased the personal property from either a manufacturer or dealer. In other words, the cost paid by the original, or first, purchaser of such personal property.

CONCLUSION

Accordingly, it is my opinion that the term "original cost" means the acquisition cost of property from the manufacturer or dealer, *i.e.*, the original cost paid by the original purchaser of such property from the manufacturer or dealer.

[1] Va. Beach v. Bd. of Supvrs., 246 Va. 233, 236, 435 S.E.2d 382, 384 (1993).

[2] *See* McKeon v. Commonwealth, 211 Va. 24, 27, 175 S.E.2d 282, 284 (1970).

[3] *See* 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).

[4] Black's Law Dictionary 371 (8th ed. 2004).

[5] *Id.* at 371 (defining "acquisition cost") (emphasis in original); *see id.* at 1133 (defining "original cost" by reference to "acquisition cost").

OP. NO. 09-044

TAXATION: TAX EXEMPT PROPERTY – PROPERTY EXEMPTED BY CLASSIFICATION OR DESIGNATION.

Based on information provided, certain real property and improvements used and occupied by NorthStar Church Network qualify for exemption from local taxation under § 58.1-3606(A)(5). Nonprofit property holding company that is organized for religious purposes retains same property tax exemption as its sole member incorporated church.

THE HONORABLE KEN CUCCINELLI II
MEMBER, SENATE OF VIRGINIA
AUGUST 3, 2009

ISSUES PRESENTED

You ask whether certain real property and improvements used and occupied by the NorthStar Church Network qualify for exemption from local taxation under § 58.1-3606(A)(5). You also ask whether a nonprofit property holding company that is organized for religious purposes retains the same property tax exemption as its sole member, an incorporated church.

RESPONSE

It is my opinion, based on the information provided, that the certain real property and improvements used and occupied by the NorthStar Church Network do qualify for

exemption from local taxation under § 58.1-3606(A)(5). It further is my opinion that a nonprofit property holding company that is organized for religious purposes retains the same property tax exemption as its sole member, an incorporated church.

BACKGROUND

You relate that NorthStar Church Network ("NorthStar") is a Southern Baptist association of church congregations in Northern Virginia connected to both the state and national Southern Baptist conventions. Among other ministries and religious support services, you note that NorthStar uses and operates a campus religious ministry program for George Mason University students.

You also relate that the property tax exemption issue relates to the ownership of the property that NorthStar exclusively uses and operates for religious purposes, which is owned in fee simple by the NorthStar Foundation ("Foundation"). The Foundation is an entity whose sole purpose is to provide real estate and other support activities to member congregations and NorthStar. You state that the Foundation has no other purpose or activities and is operated solely on a not-for-profit, charitable basis. Further, you note that the sole member of the Foundation, which is a religious nonprofit property holding company, is NorthStar. You provide us with a key provision of Article II, "Members," of the Foundation's bylaws:

> The Corporation shall have only one member – "NorthStar Church Network: An Association of Baptist Congregations" …, a Virginia nonprofit religious corporation which is a newly created organization formed when Mount Vernon Baptist Association and Potomac Baptist Association joined together for a broader and more effective ministry. The sole member shall have the right to elect and remove the directors and approve any amendments to the Articles and Bylaws of this corporation but shall have no voice or rights in the management, operation or day-to-day business of the corporation.

Further, you advise that while the Foundation holds the fee title to the property, NorthStar leases the property and exclusively operates and occupies the property as a campus ministry. The lease between the Foundation and NorthStar insulates the real estate from potential liability and provides centralized real property management support. NorthStar pays rent to the Foundation, which is calculated on the basis of the actual cost of owning the real estate. You relate that the Foundation receives no profit from the use or rental of the property or from any of NorthStar's activities. You state that the lease is an open-ended lease, and there is a direct connection between the two organizations. The operating nonprofit is the sole member of the holding company nonprofit. Thus, the long-term commitment is assumed since NorthStar controls the board appointments and major decisions of the Foundation under Article II of the Foundation bylaws.

APPLICABLE LAW AND DISCUSSION

Section 58.1-3606(A)(5) provides an exemption from taxation by classification for:

> Property belonging to and actually and exclusively occupied and used by the Young Men's Christian Associations and similar religious associations, including religious mission boards and associations, orphan or other asylums, reformatories, hospitals and nunneries, conducted not for profit but exclusively as charities (which shall include hospitals operated by nonstock corporations not organized or conducted for profit but which may charge persons able to pay in whole or in part for their care and treatment).

Statutory language is ambiguous when it may be understood in more than one way.[1] An ambiguity also exists when statutory language lacks clarity and precision, or is difficult to comprehend.[2] "The province of [statutory] construction lies wholly within the domain of ambiguity, and that which is plain needs no interpretation."[3] But when statutory language is clear and unambiguous, the plain meaning and intent of the enactment will be given to it.[4] It is my opinion that § 58.1-3606(A)(5) is free of any ambiguities.

A 1991 opinion of the Attorney General (the "1991 Opinion") considers whether certain real property and improvements used and occupied by the Northern Virginia Jewish Community Center, Inc., qualified for exemption from location taxation under § 58.1-3606(A)(5).[5] The 1991 Opinion noted that § 58.1-3606(A)(5) was based upon the exemption contained in Article X, § 6(a)(6) of the Constitution of Virginia.[6] Since the date of the 1991 Opinion, § 6(a)(6) has been amended to provide:

> Property used by its owner for religious, charitable, patriotic, historical, benevolent, cultural, or public park and playground purposes, as may be provided by classification or designation by ~~a three-fourths vote of the members elected to each house of the General Assembly~~ *an ordinance adopted by the local governing body* and subject to such restrictions and conditions as ~~may be prescribed~~ *provided by general law*.[7]

However, the Virginia Constitution "'is not a grant of legislative powers to the General Assembly, but is a restraining instrument only, and, except as to matters ceded to the federal government, the legislative powers of the General Assembly are without limit.'"[8] The General Assembly may enact any law or take any action "not prohibited by express terms, or by necessary implications by the State Constitution or the Constitution of the United States."[9] The amendment of § 6(a)(6) does not affect either the validity of § 58.1-3606(A)(5) or the construction of that provision by the Attorney General. Furthermore, the General Assembly has not altered the conclusion of the 1991 Opinion. "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."[10]

The 1991 Opinion concludes that the grant to the Jewish Community Center of a right of occupancy under a 99-year lease, renewable for an additional 99-year term, resulted in the property "belonging to" the Jewish Community Center within the meaning of § 58.1-3606(A)(5).[11] Therefore, the property qualified for the exemption from local taxation by Fairfax County.[12] In the facts you present, the terms of the lease from the Foundation to the NorthStar is an open-ended lease granting to NorthStar a perpetual right of occupancy. As previously noted, NorthStar pays rent to the Foundation calculated on the basis of the actual cost of owning the real estate. The Foundation receives no profit from the use or rental of the property. Both organizations are nonprofit religious organizations, and the Foundation's sole function is to hold legal title to the property leased by NorthStar.

The facts you present and the issues about which you inquire nearly are identical to the facts and the issue presented in the 1991 Opinion.[13] Therefore, I must conclude that the certain real property and improvements used and occupied by NorthStar do qualify for exemption from local taxation under § 58.1-3606(A)(5).

Furthermore, a church that was an unincorporated association which subsequently incorporates and transfers all of its real property to a nonprofit, property-holding company with the church corporation as its sole member does not present a situation significantly different from the facts relating to the phrase "belonging to" considered by the 1991 Opinion.[14] Thus, the nonprofit property holding company of its sole member church would retain the same property tax exemption as the church itself.

CONCLUSION

Accordingly, it is my opinion, based on the information provided, that the certain real property and improvements used and occupied by the NorthStar Church Network do qualify for exemption from local taxation under § 58.1-3606(A)(5). It further is my opinion that a nonprofit property holding company that is organized for religious purposes retains the same property tax exemption as its sole member, an incorporated church.

[1]Supinger v. Stakes, 255 Va. 198, 205, 495 S.E.2d 813, 817 (1998); Va.-Am. Water Co. v. Prince William County Serv. Auth., 246 Va. 509, 514, 436 S.E.2d 618, 621 (1993); Va. Dep't of Labor & Indus. v. Westmoreland Coal Co., 233 Va. 97, 101, 353 S.E.2d 758, 762 (1987).

[2]*Supinger*, 255 Va. at 205, 495 S.E.2d at 817; Lee-Warren v. Sch. Bd., 241 Va. 442, 445, 403 S.E.2d 691, 692 (1991).

[3]Winston v. City of Richmond, 196 Va. 403, 408, 83 S.E.2d 728, 731 (1954).

[4]Brown v. Lukhard, 229 Va. 316, 321, 330 S.E.2d 84, 87 (1985).

[5]*See* 1991 Op. Va. Att'y Gen. 303.

[6]*Id.* at 304-05.

[7]*See* 2001 Va. Acts ch. 786, at 1074, 1075 (proposing and agreeing to amend § 6(a)(6)); 2002 Va. Acts chs. 825, 630, at 1999, 2000, 895, 896, respectively (agreeing to amendment and submitting amendment to voters). The amendment was ratified on November 5, 2002, and became effective January 1, 2003. *See* VA. CONST. art. X, § 6, annot.

[8]Harrison v. Day, 201 Va. 386, 396, 111 S.E.2d 504, 511 (1959) (quoting Roanoke v. Elliott, 123 Va. 393, 406, 96 S.E. 819, 824 (1918)).

[9]Kirkpatrick v. Bd. of Supvrs., 146 Va. 113, 126, 136 S.E. 186, 190 (1926).

[10]Richard L. Deal & Assocs. v. Commonwealth, 224 Va. 618, 622, 299 S.E.2d 346, 348 (1983).

[11]*See* 1991 Op. Va. Att'y Gen., *supra* note 5, at 306.

[12]*Id.*

[13]*Id.* at 303-06.

[14]*Id.*

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