Opinions
of the
Attorney General
and
Report
to the
Governor of Virginia
2011

Commonwealth of Virginia
Office of the Attorney General
Richmond

CONTENTS

LETTER OF TRANSMITTAL iii

PERSONNEL OF THE OFFICE xxxviii

ATTORNEYS GENERAL OF VIRGINIA xlvii

CASES xlix

DECIDED IN THE SUPREME COURT OF VIRGINIA xlvi

PENDING IN THE SUPREME COURT OF VIRGINIA l

REFUSED BY THE SUPREME COURT OF VIRGINIA l

CASES IN THE SUPREME COURTOF THE UNITED STATES l

OPINIONS 1

NAME INDEX 202

SUBJECT INDEX 205

LETTER OF TRANSMITTAL

May 1, 2012

The Honorable Robert F. McDonnell
Governor of Virginia

Dear Governor McDonnell:

I am pleased to present to you the *Annual Report of the Attorney General* for 2011. The citizens of the Commonwealth of Virginia may be proud of the dedicated public servants who work for the Office of the Attorney General. I continue to enjoy working with the talented lawyers and staff who ensure the Commonwealth has the finest Department of Law representing the interests of the citizens of Virginia. 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 in all lower court appeals involving constitutional challenges to statutes or other high profile matters. In addition, the State Solicitor assists all Divisions of the Office with constitutional and appellate issues. In 2011, the United States Supreme Court decided *Virginia Office for Protection and Advocacy v. Stewart*, a case argued by the Solicitor General. Although the Commonwealth did not prevail, its position was supported in a dissent by Chief Justice Roberts and Justice Alito. Virginia's challenge to the federal health care law was argued and decided in the Fourth Circuit. Virginia's certiorari petition is being held by the Supreme Court pending a ruling in companion litigation.

Also in 2011, a bankruptcy sanction against the Virginia Department of Social Services was overturned by the Eleventh Circuit in *In re Diaz*, and a challenge to the State Water Control Board's issuance of a permit for the North Anna Nuclear Power Plant was defeated in *Blue Ridge Environmental Defense League, Inc. v. Commonwealth*. The Solicitor General argued additional cases in the Virginia Supreme Court and the Fourth Circuit successfully defended a number of petitions for certiorari in the United States Supreme Court.

Finally, employing both administrative and judicial routes, the Solicitor General enabled the 2011 redistricting of the General Assembly to be pre-cleared under the voting Rights Act of 1965, thereby permitting timely elections to occur in November.

CIVIL LITIGATION DIVISION

The Civil Litigation Division ("Division") defends the interests of the Commonwealth, its agencies, institutions, and officials in civil law suits. Such civil actions include tort, construction, employment, workers' compensation, Birth Injury Fund claims, debt collection matters, and civil rights claims, as well as constitutional challenges to statutes. The Division also handles cases involving the commitment or

conditional release of sexually violent predators. The Division also contains the Division of Debt Collection, which is responsible for providing all legal services and advice related to the collection of funds owed to the Commonwealth. 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. 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 the Civil Litigation Division handles most of the civil litigation filed against the Commonwealth. The cases defended include tort claims, civil rights issues, contract issues, denial of due process claims, defamation claims, employment law matters, election law issues, Birth Injury Fund claims, Freedom of Information Act challenges, contested workers' compensation claims, and constitutional challenges to state statutes. The Section also represents the Commonwealth in matters involving Uninsured Motorists/Under Insured Motorists and the Birth-Related Neurological Injury Compensation Program. The Section also provides support to the Solicitor General's office on major litigation, such as the healthcare suit and any suits that arise out of the decennial redistricting. The Trial Section consists of three Units: General Trial Unit, Employment Law Unit, and Workers' Compensation Unit.

General Trial Unit

In 2011, the General Trial Unit received 242 new suits in addition to the matters continued from prior years. Significant cases that the Unit worked on during 2011 include several defending Virginia Tech. The Unit continued defending the wrongful death suits filed by two families as a result of the April 16, 2007 shootings. The court dismissed all of the Virginia Tech defendants except the Commonwealth. In a related matter, Unit attorneys represented Virginia Tech before the United States Department of Education in a hearing appealing a fine imposed upon Virginia Tech for allegedly failing to timely issue a warning about the first murders on campus. The Unit successfully defended a suit arising from the murder of one Virginia Tech student who was killed by a fellow student and settled a wrongful death action brought by parents who alleged that Virginia Tech failed to prevent the suicide of their son who was living off-campus.

The Unit also handled *Educational Media v. Swecker*, a suit brought by the University of Virginia and Virginia Tech student newspapers challenging the constitutionality of ABC regulations that restrict the advertisement of alcohol in college student publications. The district court found the regulations to be facially unconstitutional and issued a permanent injunction. On appeal, the Fourth Circuit reversed and remanded the matter for further proceedings. The newspapers' petition for rehearing and rehearing en banc was denied, and their petition for certiorari was denied. We continue to defend the issues remaining on remand to the district court.

Additionally, the Unit defended four significant cases involving the State Board of Elections. *Lux v. Palmer* challenged Virginia's requirement that people who witness ballot petitions to add a candidate to a ballot must be from the district where the election in question is held. The district court granted the Unit's motion to dismiss. Plaintiff appealed, and the Fourth Circuit remanded the case. The Fourth Circuit did not find the requirement unconstitutional, but held that the case relied upon by the district court is no longer good law. In *Project Vote v. Palmer*, plaintiff alleged that the State Board of Elections' refusal to permit the inspection of voter registration applications violates the National Voter Registration Act of 1993. The court ruled for the plaintiff, finding that the public disclosure section of the Act compels disclosure of completed voter registration applications. The ruling was only prospective and required only the disclosure of applications completed following the date of the ruling. We appealed the ruling to the Fourth Circuit Court of Appeals in December. *Osborne v. Palmer* concerned whether an independent candidate may question the method used by a party chairman to certify a party candidate and, thus, disqualify the party candidate from appearing on the November 2011 general election ballot. As the November 2011 election results were already certified, the issue was moot. The Unit also was involved in *Perry v. Palmer*, a constitutional challenge brought by Republican candidates for President who failed to gain access to the primary ballot.

In another case, *ASWAN v. Commonwealth*, the Unit successfully defended plaintiff's Americans With Disabilities Act, Fair Housing Act, civil rights, and retaliation claims, in which they alleged that defendants conspired to move a facility serving food to the homeless and others outside of the downtown Richmond area to a location two miles away. VCU owns the land where the new facility sits, and the facility is run by a non-party. The district court dismissed the claims and plaintiff appealed to the Fourth Circuit. The Fourth Circuit affirmed, and a petition for writ of certiorari is pending with the Supreme Court of the United States.

In representing the Birth-Related Neurological Injury Compensation Program, the Unit provides legal advice to the Board and its Executive Director, defends appeals of Board decisions regarding specific claims for benefits to the Workers' Compensation Commission, and represents the Program in eligibility determination cases from the Workers' Compensation Commission through the Virginia Court of Appeals. In 2011, the Unit handled 10 new eligibility petitions in addition to the 24 matters continued from prior years.

The General Trial Unit also provides legal advice to state courts and judges, the Virginia State Bar, the Virginia Board of Bar Examiners, and the Commonwealth Health Research Board, and participates in the annual training of newly appointed district and circuit court judges. In 2011, the Unit represented the Virginia State Bar in 21 matters, including 15 attorney disciplinary appeals before the Supreme Court of Virginia, and prosecuted 3 persons for the unauthorized practice of law.

Employment Law Unit

In 2011, the Unit provided employment law advice to many different state entities, including the Department of Human Resource Management, the Human Rights Council, the Virginia Indigent Defense Commission, the Department of Labor and Industry, the Department of Minority Business Enterprise, the State Board of

Elections, the Department of Corrections, the Department of Transportation, the Department of State Police, the Department of Health, the Department of Behavioral Health and Developmental Services, the Department of Social Services, the State Corporation Commission, the State Council of Higher Education, Virginia Commonwealth University, Virginia State University, Norfolk State University, the Department of Criminal Justice Services, the Virginia State Bar, and the Supreme Court of Virginia.

In addition, attorneys in the Unit trained and advised human resource personnel from state agencies in recent developments in the field of employment law. Other trainees included managers employed by the State Corporation Commission and the Department of Corrections, University Counsel, and new members of the Human Rights Council. The Unit further provided state-wide training to human resource professionals on the Fair Labor Standards Act in Richmond, Chester, Suffolk and Charlottesville. Attorneys in the Unit also participated in training sponsored by the Department of Human Resource Management.

In 2011, the Unit continued to build on its success over the past few years in strengthening the Commonwealth's position that employees who challenge the termination of their employment in a grievance hearing provided by the statutory grievance procedure (*see* Virginia Code § 2.2-3000, *et seq*.) are thereafter precluded from re-litigating claims related to their termination in court. One of the significant cases in this regard was *Johnson v. Commonwealth*. While investigating an earlier civil rights complaint filed by the plaintiff/employee, the Department of Alcoholic Beverage Control discovered that Johnson improperly had used his sick leave in violation of applicable employment policies. Johnson was disciplined for the violation and challenged the discipline, asserting that it was in retaliation for his prior complaint. The grievance hearing officer found no retaliation and upheld the discipline. Johnson appealed the decision by the hearing officer but did not raise the retaliation issue before the Circuit Court in Hampton, which found against Johnson and dismissed his appeal. Johnson then filed suit in federal court, where he claimed, among other things, that Virginia's statutory grievance procedure did not adequately afford him the necessary scope of review as required by the Supreme Court of the United States in *University of Tennessee v. Elliott.* The federal court disagreed with Johnson and dismissed his case with prejudice on *res judicata* grounds. In addition, in *Whitt v. Commonwealth*, the Circuit Court in Wise County dismissed the plaintiff's lawsuit challenging certain aspects of the termination of his employment pursuant to the doctrines of claim preclusion and election of remedies where the plaintiff previously had grieved his termination under Virginia's statutory grievance procedure.

Workers' Compensation Unit

The Workers' Compensation Unit provides advice and training to the Office of Workers' Compensation and its third-party administrator concerning claims, compensability decisions, and other legal matters arising in the routine handling of claims. In addition, the Unit defends workers' compensation cases filed by employees of State agencies. Because cases are heard throughout the Commonwealth, cases are assigned to attorneys in Richmond, as well as to field attorneys in Abingdon. The Unit handles claims brought by injured workers and employer's applications from initial hearing before a Deputy Commissioner, through review by the Full

Commission, and to appeal to the Virginia Court of Appeals and the Virginia Supreme Court. In calendar year 2011, the Unit handled 334 new cases.

The Unit also pursues subrogation claims in order to recover funds for the Department of Human Resource Management's Office of Workers' Compensation in instances where an injured worker injured by a third-party claimant receives monies in litigation involving the accident in which he was injured. In calendar year 2011, the Unit assisted the Office of Workers' Compensation and its third-party administrator with subrogation recoveries exceeding $1,100,000.

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 all claims and lawsuits made or filed against the Commonwealth, her Agencies, Departments and Institutions involving construction disputes. Further, the Section provides ongoing advice to the Department of Transportation and other state agencies, colleges and universities as part of the administration of well over $2 billion in building, road and bridge construction contracts. These efforts support effective partnerships between the Commonwealth, general contractors and the road builders and facilitate timely and efficient completion of construction projects. In 2011, the Section opened 37 new claim and litigation files. In addition, 9 matters seeking nearly $22 million were resolved for a collective total payment of approximately $3.8 million.

Antitrust and Consumer Litigation Section

The Antitrust and Consumer Litigation Section obtained several significant results during 2011. On the consumer protection front, the Section filed two Virginia-specific enforcement actions. In a suit against a Chesapeake-based loan modification company, we alleged that the company violated the Virginia foreclosure rescue law by charging advance fees to consumers for services to avoid or prevent foreclosure and that it violated the Virginia Consumer Protection Act (VCPA) by failing to deliver on promises to help consumers avoid or prevent foreclosure. We resolved the other action, filed against a Concord-based automotive repair facility, through entry of an Assurance of Voluntary Compliance (AVC). In the complaint, we alleged that the company had violated the VCPA by representing that its mechanics had passed their Virginia state inspection exams, when they had not, and by representing that the facility would receive a state inspection license, when it was denied a license under the Virginia Safety Inspection Program. Under the AVC, the company agreed not to engage in further violations of the VCPA and agreed to pay the Commonwealth $400 for a civil penalty and $400 for reimbursement of our attorney's fees and costs.

The Section resolved claims filed in 2011 against three separate loan modification companies for accepting advance fees. Two Virginia Beach-based companies entered into Consent Judgments that enjoin future violations and awarded the Commonwealth judgments totaling $23,260 for consumer restitution, $27,500 for civil penalties, and $10,000 for reimbursement of the Commonwealth's attorneys fees and costs. After filing a Motion to Show Cause for Contempt, we entered into a modified Consent Judgment with a Chesapeake-based loan modification company. The modified Consent Judgment imposed additional injunctive relief against the

company and its Executive Director and awarded judgments against them in the amounts of $19,444.88 for restitution remaining owed under the original Consent Judgment and $7,000 for reimbursement of the Commonwealth's attorney's fees and costs. It also authorized award of civil penalty judgments (potentially totaling $30,000) against the company and Executive Director if they fail to make quarterly installment payments on the judgments.

In addition to these Virginia-specific actions, the Section entered into two multi-state consumer protection settlements that provide benefits to Virginians. Along with the Attorneys General of the 49 other states and the District of Columbia, we entered into an agreement with the bankruptcy Trustee for Movie Gallery and Hollywood Video concerning potential abuses by third-party debt collectors the video rental companies had retained after filing for bankruptcy to collect on outstanding accounts. Among other relief, the agreement provides that the bankruptcy Trustee will (1) rescind previously submitted credit reports; (2) not assess collection fees or interest on principal amounts allegedly owed by former customers; and (3) pursue collection only of the lesser of the late fee or product charge remaining on a customer's account. The settlement benefits over 76,000 Virginians. Additionally, pursuant to an agreement with the Attorneys General of 38 states and the District of Columbia, the companies Circle K Stores, Inc. and Mac's Convenience Stores, Inc. agreed to implement voluntarily new policies to reduce the sale of tobacco to minors.

Finally, we continued to serve as counsel to the Governor's Foreclosure Prevention Task Force. This year, the Task Force focused on reviewing statewide foreclosure trends and the foreclosure-related legislative proposals introduced during the 2011 General Assembly session for possible 2012 policy recommendations. The Section's role here dovetailed with its continuing involvement in an ongoing multi-state investigation relating to robo-signing and other alleged mortgage servicing and foreclosure abuses committed by the major bank mortgage servicers.

Insurance and Utilities Regulatory Section

The Division's Insurance and Utilities Regulatory Section serves as the Division of Consumer Counsel of the Office of the Attorney General in matters involving public utilities and insurance companies before the State Corporation Commission (SCC), and federal agencies such as the Federal Energy Regulatory Commission (FERC) and Federal Communications Commission (FCC). In this capacity, the Section represents the interests of Virginia's citizens as consumers in the regulation of services and products of insurance companies and regulated utilities including electric, natural gas, water, and telecommunications companies. The Section also appears before General Assembly legislative committees to address issues that implicate consumer interests in the regulation of these industries. The first "biennial review" rate proceedings of Virginia's two largest electric utilities, Dominion Virginia Power and Appalachian Power, dominated the Section's activities before the SCC in 2011. These were the first base rate cases governed entirely by the 2007 Electric Utility Regulation Act. At the Attorney General's request, the 2011 General Assembly amended the Act to extend from 6 months to 8 months the statutory deadlines under which the SCC must complete the biennial review cases, thereby providing all parties and the Commission adequate time to investigate the utilities' rate filings.

Dominion's biennial review focused on measuring regulated earnings from 2009 and 2010 to determine if customers would be due refunds and on determining a new authorized return-on-equity (ROE) for measuring future earnings. Dominion argued it did not have excess past earnings, and it sought a new ROE of 11.5%, plus a 1.00% discretionary "performance incentive" related to utility operations. The SCC found that, after adjustments, Dominion's earnings exceeded it authorized return and ordered the company to refund $78.3 million to its customers. Consumer Counsel supported the SCC's broad discretion in making the types of ratemaking adjustments that made these refunds possible. We also advocated for a "plain meaning" of the statute that provides for a ROE peer group floor, which lead the SCC to reject Dominion's arguments on this issue and aware a base ROE of 10.9%, which included an additional 0.50% for meeting statutory Renewable Portfolio Standard (RPS) goals. The Section successfully opposed the requested 1.0% discretionary performance incentive adder.

Although Appalachian Power (APCo) did not experience any electric rate increases in 2011, it filed several cases for new rates to become effective in 2012. The Section was again very active in these proceedings. In its biennial review filing, APCo initially requested a $126 million increase to its annual revenue requirement (later revised to $117 million) based on an ROE of 11.65%, including the mandatory 0.50% for meeting RPS goals. Our accounting and engineering expert witnesses recommended numerous ratemaking adjustments that would have resulted in no increase in base rates. We were successful on a number of issues, and the SCC reduced the rate request by almost 60%, awarding the company a base rate increase of $55 million using the same 10.9% ROE as for Dominion. APCo also had several separate "rate adjustment clause" cases in 2011. A request for $77 million in environmental compliance costs incurred outside of base rates was reduced by the SCC to $30 million on the basis of recommendations and legal argument from Consumer Counsel and SCC Staff. The Section supported a requested rate adjustment clause for $26 million in costs associated with a new 580 megawatt natural gas-fired electric generation plant acquired from an AEP affiliate because obtaining this facility reduces APCo's generation capacity payments in base rates and is a net savings to customers.

The Commonwealth's second largest electric cooperative, Northern Virginia Electric Cooperative (NOVEC) had its base rates reviewed by the SCC for the first time since 1991. In 2008 NOVEC withdrew from the Old Dominion Electric Cooperative, which had been NOVEC's wholesale power supplier. The Section suggested to the SCC at that time a review of NOVEC's rates would soon be in order. Following the NOVEC rate filing in 2010, the cooperative ultimately agreed to a settlement under which it reduced its base rates by $17.5 million annually. Consumer Counsel and the parties litigated an issue regarding $19 million in certain power cost "variances" from 2009 and 2010. We argued this money should be returned to member customers, and the hearing examiner's findings and recommendations consistent with the Section's position led to this result.

In another case involving NOVEC, the Section opposed a new 50 megawatt biomass electric generation facility that would serve the cooperative. We questioned the economics of the project and the planning used to select it as a least cost alternative for NOVEC's ratepayers. A divided Commission approved the application

but noted "compelling criticisms and concerns from Consumer Counsel," and the SCC imposed a number of conditions on its approval in response to issues raised by the Section and Commission Staff.

At the federal level, the Section prevailed in its petition for review against the U.S. Department of Energy (DOE) over DOE's designation of National Interest Electric Transmission Corridors based on a transmission Congestion Study. Virginia's suit in the U.S. Court of Appeals for the Fourth Circuit was consolidated with others and heard in the Ninth Circuit. The Ninth Circuit, in *California Wilderness Coalition v. DOE*, adopted Virginia's argument that DOE failed in its obligation to properly consult with the affected states in undertaking the congestion study.

The Section's activities in natural gas matters included a Virginia Natural Gas base rate case and a Washington Gas Light case for approval of a new rate rider authorized by 2010 legislation for infrastructure replacement programs. In the Virginia Natural Gas rate case, the company sought an increase of $25.1 million in annual revenues and an authorized ROE of 10.95%. The Section helped negotiate a settlement among the parties that reduced the requested annual rate increase to $11.3 million, based on a 10% ROE. In the Washington Gas case, the Section's advocacy helped to establish favorable precedent for customers when the SCC agreed that costs eliminated from plant retirements must be netted against the cost of new plant investment recovered in the rider surcharge to avoid the possibility of double recovery.

In telecommunications matters, the Section intervened in an SCC show cause proceeding instituted to investigate Verizon landline service quality following complaints from customers and government officials regarding the adequacy of service. We identified issues concerning promised response times for the restoration of service. The SCC adopted various measures and reporting requirements to address the issues. In another matter with Verizon, the Section highlighted the statutory requirement for safeguards to protect customers before declaring certain telephone services to be competitive and deregulating the rates for those services. SCC approval of the application was granted subject to the continuing safeguards.

The Section also concluded a *qui tam* case brought in 2005 against Avaya, Lucent, and AT&T where defendants leased, rented, and made post-warranty maintenance charges for telephone communications systems and services since 1994 to governmental customers who no longer had the telephone systems or to whom the defendants no longer provided maintenance services. Under a settlement entered in February 2011 Virginia received a net settlement amount of $169,580 to be distributed to various localities and entities.

The Section also participated in the annual workers' compensation rate proceeding before the SCC to establish the "loss cost" component of rates for the Voluntary Market, and the "assigned risk" rates for the Assigned Risk Market. Our work in this matter also extends to having an actuarial consultant participate in a work group among the industry, Bureau of Insurance actuarial consultants, and other interested stakeholders to identify and address actuarial issues in between the rate cases each year.

Division of Debt Collection

The mission of the Division of Debt Collection is to provide all appropriate and cost effective debt collection services on behalf of every State agency. The Division has six attorneys and fifteen staff members dedicated to protecting the taxpayers of Virginia by ensuring fiscal accountability for the Commonwealth's receivables. Division attorneys also provide advice on collection and bankruptcy issues to client agencies and to other Divisions within the Office of the Attorney General, and one attorney serves as general counsel to the Unclaimed Property Division of the Department of Treasury.

In furtherance of its mission, the Division hosted its Second Biennial Agency Summit in 2011, which was attended by 91 representatives from 37 agencies. The Summit gave attendees an opportunity to interface with OAG attorneys and staff who led plenary sessions on legislative, billing, and financial processes; legislative updates; judgment enforcement; unclaimed property; and bankruptcy. Breakout sessions were tailored to specific agency issues. As luncheon speaker, Attorney General Cuccinelli provided unique insights on the myriad legal and leadership roles carried out by members of his staff on behalf of the Commonwealth.

The Division is self-funded by contingency fees earned from its recoveries on behalf of State agencies. During the 12 months from July 1, 2010 through June 30, 2011, gross recoveries for 42 state agencies totaled $9.3 million. During fiscal year 2011, the Division recognized fees of $2.1 million, which equates to nearly $362,000 in excess of Division expenditures. These excess fees were turned over to the General Fund at the end of the fiscal year.

Sexually Violent Predators Civil Commitment Section

Since the SVP Act became effective in April of 2003, the Commitment Review Committee and the courts have referred 928 cases to the SVP Section. The Section has filed 518 petitions for civil commitment or conditional release and reviewed 380 cases that did not meet the statutory criteria. In 2011, the Section filed 57 petitions, made 398 court appearances, and traveled 65,000 miles. There are approximately 278 persons civilly committed, the majority of whom are at the Virginia Center for Behavioral Rehabilitation, the facility operated by the Department of Behavioral Health and Developmental Services.

HEALTH, EDUCATION, AND SOCIAL SERVICES DIVISION

The Health, Education, and Social Services Division has an immediate and significant effect on the life, liberty, and property of the citizens of Virginia. It provides advice and counsel to colleges educating the next generation of Virginians and to agencies assisting those facing physical or mental health problems. Much of the guidance from this division affects the youngest and most vulnerable among us. Our client agencies daily face the balance between proper and statutory responsibilities and dangerous government overreach. As such, the attorneys in this division zealously adhere to statutory language and to the Constitution in providing advice. Though each section addressed significant issues in 2011, the Division's single most significant achievement of the year was providing the advice, counsel, and guidance that resulted in promulgating regulations regarding abortion facilities in the Commonwealth. The regulations were drafted in accordance with legislation

adopted during the 2011 General Assembly that defined hospitals as including facilities in which five or more abortion per month are performed. The regulations were drafted to promote the health and safety of patients who have an abortion by creating procedure and facility guidelines.

Health Services Section

The attorneys in the Health Services Section represented the Commonwealth and the Department of Behavioral Health and Developmental Services in the federal investigation of Central Virginia Training Center in Lynchburg under the Civil Rights of Institutionalized Persons Act and the expanded investigation of the Commonwealth's developmental disabilities services system under the Americans with Disabilities Act. The Department of Justice issued its findings letter in February 2011, and the attorneys in the Health Services Section represented the Commonwealth in settlement negotiations to avoid costly and lengthy litigation.

The Section's attorneys also defended the Department of Behavioral Health and Developmental Services in four federal district court lawsuits filed by residents of the Virginia Center for Behavioral Rehabilitation claiming violations of their civil rights. Two of the cases were appealed to the United States Court of Appeals for the Fourth Circuit and the Section's attorneys are representing the Department to ensure that the favorable district court decisions are affirmed.

The Section continued its efforts assisting the Department of Health Professions and its fourteen health regulatory boards in numerous disciplinary proceedings under the Administrative Process Act. Many of these cases were appealed by the disciplined professionals to state courts and the Section's attorneys successfully represented the Boards. In addition, the Section successfully represented the Boards in three federal court cases filed by disciplined physicians.

The attorneys in the Health Services Section provided legal advice to the State Board of Health as it adopted regulations governing abortion facilities. In addition, they represented the Department of Health in five cases filed in state courts challenging the Commissioner's decisions regarding issuance of certificates of public need. The attorneys also provided advice to the Department of Health on a variety of issues, including isolation of TB patients, reporting of child abuse and neglect, vital records, exchange of health information, emergency medical services, employee grievances, and emergency preparedness.

Medicaid & Social Services Section

This section provided agency advice and defense on a variety of programs administered by the Department of Social Services (DSS), including the Food Stamp program, TANF, adoption, foster care, child care subsidy programs, and many other programs providing for the health and welfare of the citizens of the Commonwealth. This Office also successfully defended many cases appealed to circuit court regarding DSS's decisions pursuant to these programs.

The Departmental Appeals Board (DAB) for the Department of Health and Human Services agreed with the position taken by this Office with respect to an audit conducted by the Administration for Children and Families (ACF). This case involved the interpretation of federal regulations related to when a court must make a "contrary to the welfare determination" vis-à-vis the child's removal from the home. The child

was placed in juvenile detention on an allegation that he was in violation of his probation. The court directed that the child be held in detention for several days, pending a detention hearing. He was then placed in foster care at the detention hearing. In conducting an annual audit of foster care cases, the ACF denied IV-E funding for this child on the assertion that the necessary findings should have been made when the child was placed in detention. In challenging the ACF determination, this Office argued that the regulatory interpretation was unreasonable because the child's placement in detention would not be eligible for IV-E funding even if the required "contrary to the welfare determination" had been made. In reversing the disallowance, the DAB agreed with the position taken by this Office. Although the amount of money involved in this appeal is not large, the decision is significant. It is not often that a state prevails in challenges of ACF interpretations, so the "win" itself is important. The decision also has a farther reaching practical impact. Had the ACF interpretation prevailed, Virginia would be required to make a fundamental change in the manner in which the juvenile and domestic relations district courts enter orders holding children in detention. Such a change would be time consuming and costly.

This Office successfully defended many findings of child abuse and neglect throughout the Commonwealth, including that in *Nalley v. DSS*, a sex abuse case involving a four-year-old girl repeatedly abused by her father. There was no criminal conviction in this case because the child was unable to face her father in court. This Office, however, was successful in obtaining a civil disposition of Founded--Sexual Abuse--Level Two. In *Gonzalez v. DSS*, this Office successfully defended a finding of child neglect against a family day home provider in case involving a young boy who was found playing in the snow near the roadway by a passing motorist. In *Mills v. DSS*, this Office successfully defended a finding of child abuse of a two-year-old boy by a day care provider who had slapped the young child in the face and grabbed his neck, leaving marks on his face and neck.

The 2010 General Assembly made several appropriations that directed DSS to provide general fund money directly to charitable organizations in violation of Article IV § 16 of the Constitution of Virginia. In response to a Attorney General's Opinion (11-002) on that subject, we provided DSS with advice on which appropriations fell under the constitutional prohibition and which did not. Several of these appropriations were removed from the 2011 Appropriations Act, only to be replaced with different ones. We provided advice on what should be done with those funds. That advice included assisting DSS and the Secretary's Office in responding to a Delegate's inquiry about why one particular appropriation could not be paid to a particular charitable organization.

Additionally, this Office mitigated losses against the Commonwealth in a number of provider reimbursement cases by negotiating and settling such cases with opposing counsel. One example involves two such cases against Avante, an operator of nursing facilities throughout the Commonwealth. Pursuant to two DMAS audits, the agency found that Avante had reported excess costs for respiratory therapy services for FY2002 and 2003 (Avante I) and FY2006 (Avante II). Avante I was decided in favor of Avante by the Court of Appeals and was remanded to DMAS for a cost assessment, which would have involved extensive auditing by an outside auditing firm. Avante II was decided in favor of Avante but the Court denied a remand, which DMAS appealed to the Court of Appeals. If further administrative proceedings had

occurred in Avante I based upon the Court of Appeals remand and if Avante II had been litigated to the Court of Appeals, DMAS at the least would have been responsible for costly auditing fees and likely would have been responsible for significant attorneys' fees. Without auditing and attorneys' fees, the amount at issue was $9,903,926. Avante agreed to settle the matter for $8,913,533 with no attorneys fees and costs paid by DMAS. Had this matter been litigated further, the cost to the Commonwealth would have been significantly more than the settlement amount. This Office also assisted DMAS in resolving investigations by the Office of Civil Rights (OCR) with respect to two Medicaid recipients. Through our work with OCR and the client, the Commonwealth was able to provide these recipients with additional hours of care, enabling them to continue to reside in the community. These resolutions obverted lengthy investigations by OCR and potential federal lawsuits.

While representing the Office of Comprehensive Services (OCS), this Office successfully recouped nearly $8 million in misappropriated taxpayer funds. This was a case of first impression in that no locality had ever been audited formally by the Commonwealth with respect to this program. OCS requested the Auditor of Public Accounts to review expenditures of Comprehensive Service Act funds reimbursed to Pittsylvania County. The Auditor found an overpayment to the county in the amount of $7,699,933. After a lengthy hearing, the State Executive Council (SEC) found that Pittsylvania County-Danville Community Policy and Management Board (CPMB) was liable to the Commonwealth for $7,699,933 in CSA funds that were spent for ineligible students and services. The SEC found that testimony and exhibits demonstrated that the CPMB lacked adequate controls over the CSA program, that there was a lack of communication and cooperation between the Pittsylvania County School Board and the CPMB. The lack of cooperation on the part of the School Board limited the CPMB's ability to appropriately determine eligibility. The SCC also found that the CPMB self-reported non-compliance, sought technical assistance, and began the process of corrective action on its own initiative. The SEC ordered the CPMB to repay the Commonwealth $250,000 per year for ten years while simultaneously implementing a quality improvement program to be monitored by the OCS and supervised by the SEC. If at the end of 10 years the CPMB has implemented and satisfactorily sustained the quality improvement program, the remainder of the debt will be forgiven. If the CPMB fails to comply with the terms of the SEC Order, it will be subject to repayment of the full amount for which it was found liable.

Child Support Enforcement Section

The Child Support Enforcement Section continued its efficient and vigorous prosecution of child support cases, handling 138,469 child support hearings in 2011. The Section established new child support orders totaling more than $1.4 million and enforced existing orders by obtaining lump sum payments in excess of nearly $12 million and sentences totaling 776,153 days in jail. The courts sentenced 6140 contemnors to jail; the majority of these individuals purged their contempt by paying the court ordered amount prior to reporting to jail or shortly after being incarcerated. The Section also handled 41 significant appellate and trial cases and succeeded in obtaining dismissals of 23 claims or appeals, including a United States Supreme Court case, 5 Virginia Supreme Court cases, 11 Virginia Court of Appeals cases, 5

circuit court cases, and a U.S. Court of Appeals case in the Eleventh Circuit. In that case, we obtained a reversal of decisions in the U.S. Bankruptcy Court and the U.S. District Court for the Middle District of Florida finding the Commonwealth liable for damages and sanctions totaling $67,622 for violating a bankruptcy automatic stay and discharge injunction. In addition, we settled an $850,000 claim in state court for $15,000. The total amount in unsuccessful claims against the Commonwealth was nearly $1 million.

The Children and Families (ACF) case involved an interpretation of federal regulation related to when a court must make a "contrary to the welfare determination" vis-à-vis the child's removal from the home. The child was placed in juvenile detention on an allegation that he was in violation of his probation. The court directed that the child be held in detention for several days, pending a detention hearing. He was then placed in foster care at the detention hearing. In conducting an annual audit of foster care cases, the ACF denied IV-E funding for this child on the assertion that the necessary findings should have been made when the child was placed in detention. In challenging the ACF determination, this Office argued that the regulatory interpretation was unreasonable because the child's placement in detention would not be eligible for IV-E funding even if the required "contrary to the welfare determination" had been made. In reversing the disallowance, the DAB agreed with the position taken by this Office. Although the amount of money involved in this appeal is not large, this decision is significant. It is not often that a state prevails in challenges of ACF interpretations, so the "win" itself is important. The decision also has a farther reaching practical impact. Had the ACF interpretation prevailed, Virginia would be required to make a fundamental change.

PUBLIC SAFETY AND ENFORCEMENT DIVISION

The Public Safety and Enforcement Division comprises the following Sections: Computer Crimes, Correctional Litigation, Criminal Litigation, Medicaid Fraud and Elder Abuse, and Special Prosecutions and Organized Crime. This Division handles criminal appeals, prisoner cases, Medicaid fraud cases, health professions hearings, Alcoholic Beverage Control (ABC) enforcement hearings, as well as prosecutions relating to child pornography, 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, with the exception of TRIAD, the Division is responsible for the Attorney General's anti-crime initiatives. These programs include the nationally recognized Gang Reduction and Intervention Program, and the work of the statewide facilitator for victims of domestic violence.

Public Safety Initiatives

In 2011, the Public Safety and Enforcement Division made considerable strides in outreach and education throughout the Commonwealth. Involving gangs, the Division produced and released a youth anti-gang video, "The Big Lie: Unmasking the Truth Behind Gangs." The video, targeted toward 8-12 year olds, features inactive gang members, law enforcement, and peers speaking directly to kids about the dangers of gangs and the positive alternatives at their disposal. Over 2,000 copies of the video have been distributed throughout the nation and it was aired "On

Demand" through Comcast cable. In addition to the video, members of the Division have provided training to over 1,000 people throughout the Commonwealth on the subjects Gangs 101, How to Target Kids, Gangs and Virginia Law, and Gangs and Technology.

Also in 2011, the Division spearheaded an anti-bullying effort that included a website launch and a PSA featuring Miss Virginia. In the area of human trafficking, the office, in partnership with the Virginia Department of Criminal Justice Services, conducted a full-day training of prosecutors, law enforcement officers, and state victim-witness coordinators from jurisdictions across Virginia on how to investigate and prosecute human trafficking under Virginia law. This training was the first of its kind in the Commonwealth.

Another first for the Division were the three community days held in 2011. In the past, Community Days were held every 2 years. However, this past year the office hosted 3, in Petersburg, Danville, and Richmond. Each event saw hundreds of community members, law enforcement, area businesses, and local government officials coming together to beautify an area park.

Computer Crime Section

In 1998, the General Assembly authorized and funded the creation of a Computer Crime Section within the Office of the Attorney General (OAG). The long-term vision for the Section was to spearhead Virginia's computer-related criminal law enforcement in the Twenty-First Century. In accordance with § 2.2-511, the OAG has concurrent and original jurisdiction to investigate and prosecute crimes within Virginia's Computer Crimes Act, crimes that implicate the exploitation of children or involve identity theft. During 2011, the Computer Crime Section continued to travel extensively throughout the Commonwealth to investigate and prosecute such crimes. The Section's attorneys are cross-designated as Special Assistant United States Attorneys and prosecute cases in federal and state courts. Also in 2011, the OAG created a Computer Forensic Unit within the Computer Crime Section to better leverage the office's resources and assist in handling computer forensics for various law enforcement agencies statewide.

The Section successfully prosecuted several notable cases in 2011. In *United States v. Hoover*, undercover FBI agents detected the defendant trading child pornography images on a peer-to-peer network. FBI agents executed a search warrant at his Fredericksburg residence and seized computer equipment and digital media. A subsequent forensic examination revealed thousands of child pornographic images and movies saved on numerous hard drives. The images contained prepubescent children engaged in sadomasochistic conduct and bestiality. The defendant was sentenced in U.S. District Court in Richmond to 10 years active imprisonment with an additional 8 years of supervised release on one count of distribution of child pornography. *Commonwealth v. Ludwig* was tried after an officer with the Richmond Police Department received a cyber tip from the National Center for Missing and Exploited Children that a person had uploaded child pornography onto teenage social networking sites. Contemporaneous to this tip, an agent with Virginia State Police was able to download child pornography videos and images from that same IP address. Additional investigation revealed the IP address belonged to the defendant and agents subsequently executed a search warrant at his residence in Chesterfield. A

subsequent forensic examination revealed hundreds of child pornography images and videos saved on his computers. The defendant was sentenced to 44 years imprisonment, with 22 years suspended following his previous guilty plea to twenty-two counts of possession of child pornography.

In another case, *Commonwealth v. Hoffman*, investigators discovered the defendant after a tip from a prostitute that the defendant had asked her to arrange for him to meet a 12-year-old female. After further investigation, investigators were able to obtain a search warrant for the defendant's Google account, which revealed that he was deeply involved in soliciting prostitutes on Craigslist. The Google account also contained emails from the defendant asking other Craigslist users to arrange for him to meet and have sex with a minor. Based on this information, investigators obtained a search warrant for the defendant's residence. During the search for evidence of prostitution, investigators discovered child pornography on the defendant's computer and obtained a second search warrant to search the computers for child pornography. Investigators subsequently identified four minors in Virginia depicted in images on the defendant's computer. The defendant pled guilty to two counts of production of child pornography and received an active sentence of 13-years imprisonment. Additionally, law enforcement identified the defendant in *Commonwealth v. Doolittle* through an undercover investigation trading child pornography through Gigatribe. The defendant asked to join the undercover officer's network, engaged in a chat with the officer, in which he indicated that he hoped the officer enjoyed his collection, and made more than 200 files containing child pornography available for distribution. The defendant pled guilty to four counts of distribution of child pornography in exchange for a recommended sentence of 7 years imprisonment with 13 years of suspended time and 5 years of supervised probation.

The Section continues to be an active member of the Richmond-based Virginia Cyber Crime Strike Force, dedicating a part-time investigator and providing three prosecutors to pursue the resulting cases in both state and federal courts. This partnership between federal, state and local law enforcement was created to coordinate the prosecution of Internet crime and provide Virginia with a centralized location to report Internet-related crimes. 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 also actively participates in the Peninsula Innocent Images Task Force based at the Newport News U.S. Attorney's Office. The task force consists of federal, state, and local law enforcement from the Richmond and Tidewater areas tasked to investigate and prosecute Internet crimes against children. The Computer Crime Section has provided one part-time investigator and its three prosecutors, on an "as needed" basis, to pursue the Task Force's cases in federal and state courts.

The Section's team of prosecutors and investigators continue to educate and train prosecutors and law enforcement statewide. Throughout 2011, the Section's prosecutors and investigators trained law enforcement and school resource officers at police training academies throughout the Commonwealth. The training focused on obtaining search warrants for digital evidence and the use of procedural tools in the investigation of computer crimes and identity theft, as well as an overview of the pertinent law related to identity theft and related computer crimes. Members of the

Computer Crime Section also traveled frequently throughout Virginia to speak to students and parents and deliver the office's "Safety Net" presentation. "Safety Net" is an interactive presentation that addresses issues of "cyber-bullying" and "sexting," and utilizes a real-life story to demonstrate how easy it is for a predator using very little personal information to track down a child victim over the Internet.

In addition to investigating and prosecuting computer crimes, the Section serves as a clearinghouse for information concerning criminal and civil misuses of computers and the Internet. In 2011, the Section's investigators handled over 1,000 investigatory leads funneled through the Internet Crime Complaint Center, the primary, national clearinghouse for computer crime complaints. The Section also reviewed over 250 notifications from companies experiencing database breaches for compliance with the database breach notification law contained in Virginia Code § 18.2-186.6.

Correctional Litigation Section

The Correctional Litigation Section represents the Departments of Corrections, Juvenile Justice, and Correctional Education, the Parole Board and Correctional Enterprises. Further, the Section represents the Secretary of Public Safety and the Governor on extradition matters and Commonwealth's Attorneys on detainer matters. During 2011, the Section was responsible for handling 105 § 1983 cases, 10 employee grievances, 162 habeas corpus cases, 206 mandamus petitions, 54 inmate tort claims, 7 warrants in debts, and 414 advice matters. In 2011, the Section handled several significant matters in the federal district courts, the Fourth Circuit Court of Appeals and the circuit courts of the Commonwealth, including 10 trials, 27 hearings, 17 videoconferences and 1 oral argument.

The Section was involved in several notable cases in 2011. In *Peyton v. Watson*, which was tried in the United States District Court for the Western District of Virginia, a Department of Corrections offender brought an Eighth Amendment excessive force claim alleging that he was assaulted by correctional officers at Wallens Ridge State Prison. A Motion for Summary Judgment was filed and denied, and after a bench trial, the court awarded judgment in favor of the defendants. In the United States District Court in Roanoke, the plaintiff in *DePaola v. Taylor* brought an Eighth Amendment claim alleging excessive force and failure to protect him. DePaola alleged that he had been assaulted by correctional officers at Red Onion State Prison, and that another correctional officer failed to protect him from the assault. A Motion for Summary Judgment was filed and denied, and the matter was heard by a seven-member jury. The jury returned a verdict in favor of the defendants.

Additionally, in *Burnette v. Virginia Parole Board*, counsel filed in the United States District Court for the Eastern District of Virginia a class action suit in which 11 inmates convicted of violent crimes challenged their ongoing Virginia Parole Board denials of release on discretionary parole. They alleged numerous practices and procedures that they argued constitute a violation of due process and effectively abolished parole in violation of the *ex post facto* clause. Although the judge granted our Motion to Dismiss, the plaintiffs' counsel filed a Motion to Vacate the Dismissal and requested leave to amend their pleadings. The court reaffirmed its decision to dismiss. The matter is pending on appeal. *Lord Versatile v. Johnson*, also filed in the Eastern District, involved members of the Five Percenter security threat group, who

sought the exercise of alleged religious rights under the Religious Land Use and Institutionalized Persons Act. The court granted summary judgment on all issues in this case finding that the Five Percenters did not constitute a religion, but even assuming that they were, a total ban on their membership and activities was justified under federal law. The matter has been appealed to the Fourth Circuit Court of Appeals.

Finally, this year saw the first change to the chemicals used to carry out executions in Virginia and the first execution in Virginia using the chemical pentobarbital was accomplished without incident. Litigation continued over the chemical composition being brought by a third party to intervene in the execution process with cameras, changed procedures, and medical supervision. The office prevailed in that litigation.

Criminal Litigation Section

The Criminal Litigation Section handles an array of post-conviction litigation filed by state prisoners challenging their convictions. These cases include 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 has been 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 2011, the Section defended against 1042 petitions for writs of habeas corpus and represented the Commonwealth in 334 appeals in state and federal courts. The Section received 27 petitions for writs of actual innocence, an ever-increasing area of responsibility.

The Section obtained some significant rulings from the Supreme Court of Virginia in 2011. In *Ellis v. Commonwealth*, the Court held a conviction for unlawfully shooting into an occupied building did not require proof the defendant had the specific intent to shoot at the building, but only that he knew or should have known an occupied building or buildings were in his line of fire. In *Angel v. Commonwealth*, the Court held a juvenile's life sentences for the non-homicide crimes did not violate the Eighth Amendment and that Virginia's "geriatric parole" provided a "meaningful opportunity to obtain release" as required under the United Supreme Court's decision of *Graham v. Florida*. The Court ruled in *Sanders v. Commonwealth* that a laboratory report prepared to assist a physician in determining proper treatment for a victim who had been sexually abused was "nontestimonial" and there was no Confrontation Clause violation when the physician testified at trial, but the scientist who prepared the report did not. In *Commonwealth v. Chan and Commonwealth v. Morris*, the Court reversed the orders of two circuit courts modifying the petitioners' criminal sentences. The circuit courts had granted writs of *coram nobis* and *audita querela*, on the ground that the petitioners had been unaware of the impact on their immigration status of their convictions and sentences when they pled guilty pursuant to plea agreements. The Court held that these writs did not lie to authorize modification of the two sentences.

Also notable were *Startin v. Commonwealth and Courtney v. Commonwealth*, in which the Court affirmed convictions for use of a firearm in the commission of a

robbery, where the defendant used a replica of a .45 caliber handgun that looked real but had no firing pin (*Startin*); and the defendant told the robbery victim he had a gun, even though she did not see a weapon, and the police later found only a toy gun (*Courtney*) in the defendant's car. The Court also affirmed the circuit court's decision in *Reed v. Commonwealth* to dismiss a motion to vacate, holding the absence of the grand jury foreman's signature on the indictments upon which the defendant was tried and convicted was a defect in form only and did not render the indictments unconstitutionally defective. In *Turner v. Commonwealth*, the Court affirmed the ruling of the *en banc* Court of Appeals of Virginia and held a petitioner was not entitled to a writ of actual innocence on his convictions for the first degree murder and abduction with intent to defile because a rational trier of fact could have found the evidence sufficient to convict Turner of abduction with intent to defile by deception as well as the felony murder of the victim during the abduction.

Finally, the Section's Capital Unit defended on appeal and against collateral attack the convictions of persons sentenced to death under Virginia law. One death-row inmate was executed in 2011. In *Jackson v. Kelly*, the United States District Court vacated Jackson's death sentence, imposed for his capital murder and rape of an elderly woman in Williamsburg, after an extensive evidentiary hearing. Subsequently, the United States Supreme Court was persuaded to deny Jackson a stay and certiorari review, and Jackson was executed as scheduled. In *Juniper v. Warden* and *Gray v. Warden*, the Virginia Supreme Court dismissed petitions for writs of habeas corpus challenging Juniper's and Gray's capital murder convictions and death sentences from Norfolk and the City of Richmond.

Health Care Fraud and Elder Abuse Section

The Health Care Fraud and Elder Abuse Section's Medicaid Fraud Control Unit (MFCU) investigates and prosecutes allegations of Medicaid fraud and elder abuse and neglect in health care facilities. MFCU comprises of investigators, auditors, analysts, computer specialists, attorneys, outreach workers and support staff. Over the past 29 years, MFCU successfully prosecuted more than 276 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 MFCU has recovered almost $800 million in court-ordered criminal restitution, asset forfeiture, fines, penalties, civil judgments, and settlements.

MFCU has been seeing an increase in referrals as it continues to work with local jurisdictions and agencies throughout the Commonwealth. Due to the increase in referrals of fraud against the Virginia Medicaid program, the Virginia Attorney General's Office received permission last year from the United States Department of Health and Human Services' Office of Inspector General to increase MFCU's staff by 25 positions. These new positions now bring the total MFCU positions to 83.

MFCU has expanded its outreach efforts to seniors, law enforcement and senior citizen service providers. MFCU is now helping to inform the community on the latest methods to effectively prevent and/or report elder abuse and provide an additional resource for investigative referrals. MFCU's Community Outreach Coordinators in Richmond and Roanoke are establishing and strengthening program partnerships between MFCU and community organizations, government agencies, academic institutions and law enforcement personnel working with Virginia's senior

population. MFCU is developing a working group comprised of MFCU staff, prosecutors, ombudsmen, social services, police, adult protective services, and other organizations that will work together on issues of elder abuse and neglect. The goal is to share information and work cooperatively among different types of agencies. This group will then be used as a best practices model that can be replicated throughout the Commonwealth on how to organize the same type of groups in different jurisdictions. MFCU publishes an Annual Report, quarterly newsletter, and has an active Facebook page.

MFCU had a very successful year. At the end of 2011, MFCU had 43 active criminal investigations. The Civil Investigations Squad opened 107 new civil cases, and 10 criminal cases were awaiting trial or sentencing in federal court. MFCU ended the fiscal year with 9 convictions, and the recoveries from criminal and civil investigations totaled more than $16,317,449.00. MFCU delivered restitution checks in excess of $3,280,418.00 to the Department of Medical Assistance Services (DMAS) to be deposited into the Commonwealth's General Fund Health Care Account.

MFCU handled several significant cases in 2011. For example, in *United States v. Pierre*, MFCU conducted a joint investigation with the Federal Bureau of Investigations and the United States Attorney's Office into the unlawful billing practices at First Call Home Health (First Call), a Medicaid-contracted home health agency in Woodbridge, Virginia. Pierre was employed at First Call as the office manager and office administrator. Beginning in 2008, Pierre began submitting false claims to a DMAS intermediary for home health services to Medicaid recipients when she knew the services had not been provided. To cover up the fraud, Pierre enlisted First Call employees and family members of Medicaid recipients to fabricate nursing time sheets to corroborate the fraudulent billing. In total, the attempted loss attributed to the fraudulent billing by Pierre was approximately $979,000. Of that amount, First Call received $698,434.47. Pierre was convicted for fraudulently billing Medicaid by a federal jury and subsequently was sentenced to 51 months in prison, followed by a three-year term of supervised release,

In *United States v. HealthCare of Virginia (HCVA)*, MFCU, U.S. Department of Health and Human Services - Office of the Inspector General, and United States Attorney's Office investigated HCVA, a Medicaid-contracted home health agency based in Covington, Virginia. HCVA Executive Director Sandra Pope McElwain, Office Manager Agnes Vint, and Staffing Coordinator Melissa Cary were each charged and convicted for their roles in defrauding Medicaid by sending untrained personal care aides into Medicaid recipients' homes to deliver personal care services. DMAS requires that all personal care aides receive a minimum of 40 hours of training prior to employment, which must be taught and supervised by a registered nurse. DMAS also requires that all patients receive periodic nursing visits to verify patient safety and the continuing need for services. Between March 2008 and March 2010, HCVA issued false training certificates in order to cover-up the lack of training received by personal care aides assigned to Medicaid patients. Vint falsified nursing assessments to cover up the fact that the HCVA nurse, co-defendant McElwain, the owner and sole RN employed by HCVA, failed to make the required visits. Under the direction and control of Pope, HCVA did not provide the required training of personal care aides. Instead, Pope and HCVA issued false training certificates and

assigned those personal care aides to care for Medicaid patients in their homes. As a result, from October 2007 through June 2010, HCVA billed and was paid Medicaid funds for non-certified, untrained personal care aides placed with Medicaid patients. HCVA was sentenced to three years probation, a fine of $10,000 and ordered to pay $323,420 in restitution. McElwain was sentenced to sixteen months in prison, followed by a three-year term of supervised release.

In addition to obtaining significant criminal recoveries, MFCU also settled several noteworthy civil matters. One case was a settlement involving Forest Laboratories, Inc. and Forest Pharmaceuticals, Inc., (together, Forest) in which MFCU played a leading role in the investigation and negotiation of the settlement recovery on behalf of the states. The National Association of Medicaid Fraud Control Units (NAMFCU) appointed a global case team led by counsel from Virginia, AAG Lelia Winget-Hernandez, to negotiate a multimillion dollar settlement on behalf of the Medicaid participating states. The underlying investigation was based on several *qui tam* civil actions filed in federal district courts and state courts across the country. The state Medicaid settlement resolved civil liability against Forest for its efforts to illegally market the prescription drugs Celexa and Lexapro for off-label uses (both drugs are approved by the Food and Drug Administration as antidepressants), and illegal distribution of Levothroid based on the company's increased distribution of the drug after it was no longer classified as a covered outpatient drug within the meaning of 42 U.S.C. § 1396r-8(k)(2). The civil settlement released Forest from civil liability based on the company’s illegal marketing and kickback schemes to promote Celexa and Lexapro and the illegal distribution of Levathroid. The total civil settlement was $149.1 million, of which $131,140,212 was designated as the recovery to the Medicaid program, including federal and state shares. The total recovery to the state share of the Medicaid program was $60,324,497.48. The final settlement to the Commonwealth of Virginia was $1,003,703.90, including interest. In addition to a civil recovery, Forest pleaded guilty to violation of 18 U.S.C. § 1505 in that the company corruptly endeavored to influence, obstruct, and impede an agency proceeding; violations of 21 U.S.C. §§ 331(a), 333(a)(1), 352(f)(1) for introducing an unapproved drug, Levothroid, into interstate commerce; and violations of 21 U.S.C. §§ 331(a), 333(a)(1), 352(f)(1) for introducing a misbranded drug, Celexa, into interstate commerce.

MFCU also expects to participate in a settlement involving a $950 million recovery for the United States and the participating states based on an investigation involving Merck Sharp & Dohme Corp. (Merck). The NAMFCU-appointed global case team worked with the Department of Justice and the states to negotiate a settlement with Merck on behalf of the state Medicaid programs. Once the agreement is finalized, the state Medicaid settlement will resolve civil liability against Merck for its practices to market Vioxx for unapproved uses resulting in payment of Medicaid reimbursements for the drug. Specifically, the civil Medicaid settlement will resolve civil liability against the company for improperly engaging in practices designed to market, advertise and promote Vioxx for treatment of rheumatoid arthritis, a condition that Vioxx is not approved by the Food & Drug Administration to treat. Moreover, the settlement will resolve civil liability against the company for improperly promoting the cardiovascular safety of Vioxx based on improper statements and misleading promotional materials. Based on the state Medicaid

programs' reliance on Merck's representations, the company caused false claims for Vioxx to be submitted to government healthcare programs, including Medicaid. The total Medicaid recovery for the states and federal government was $429,734,000, of which the total share of the recovery designated for the state programs was $201,975,000. Virginia's federal and state share of the settlement was $8,650,306.20, of which the state share of the settlement was $4,583,738.57. In addition to the civil settlement, as part of the global resolution of this case, the company will plead guilty to misbranding in violation of 21 U.S.C. §§ 331(a), 333(a)(1), 352(f)(1). Finally, the company will abide by the terms of a Corporate Integrity Agreement with the United States Department of Health and Human Services' Office of the Inspector General.

Special Prosecutions / Organized Crime Section

The Special Prosecutions/Organized Crime Section (SPOCS) is the primary prosecutorial section of the Office of the Attorney General. The Section prosecutes various crimes, either pursuant to the Office's jurisdiction under the Virginia Code or by request of local Commonwealth's Attorneys, throughout the Commonwealth; represents criminal justice and public safety agencies; and implements public safety initiatives set forth by the Attorney General. In 2011, the Section set out to continue its' agenda of helping to keep the citizens of the Commonwealth safe. The Section accomplished this through multiple initiatives including: engaging in prevention, intervention, and suppression of criminal street gang activity; the prosecution and prevention of identity theft offenses; administrative prosecutions against medical professionals who have violated Virginia's Health Professions regulations; enforcement of Virginia's fair housing laws through mediation and civil actions; and targeting and bringing down violators of the Virginia RICO and tobacco statutes.

Criminal Prosecutions and Enforcement Unit

The Criminal Prosecutions and Enforcement Unit (CPEU or "Unit') is headed by a Director who reports directly to the Chief of the Special Prosecutions and Organized Crime Section. CPEU consists of eight Assistant Attorneys General, four who have also been appointed Special Assistant United States Attorneys (SAUSA). Three Assistant Attorneys General who serve as SAUSAs are federally funded grant positions, and are exclusively assigned to prosecute federal Project Safe Neighborhood cases. They work out of various regional United States Attorney's Offices in the Eastern District of Virginia –Alexandria, Richmond, and Norfolk. An Assistant Attorney General serves as special counsel to the Shenandoah Valley Multijurisdictional Grand Jury investigating gang-related activity in that region. He has also been appointed to serve as the special counsel to a newly formed Multijurisdictional grand jury in the Tidewater area.

CPEU serves as agency counsel to the Department of State Police (State Police), the Department of Criminal Justice Services (DCJS), and the Department of Forensic Science (DFS). This legal representation includes, but is not limited to, review of proposed legislation and regulations, representation before federal and state courts, contractual advice, personnel issues, and legal advice on a broad range of issues. These attorneys also have been asked to represent other state agencies such as the

Board of Accountancy and the Department of Charitable Gaming in what can be referred to as "administrative prosecutions."

The Unit representings DCJS in administrative hearings involving individuals licensed or certified by the agency such as law enforcement officers, bail bondsmen, bail enforcement agents, and private security guards. The Unit also provides legal advice to DCJS involving a number of issues, including FOIA requests, updating and implementation of regulations, and interpretation of state code. Attorneys have represented the State Police in various courts around the Commonwealth throughout 2011. The scope of representation varied from motions to vacate improperly granted expungements to motions to quash subpoenas *duces tecum*. Also in 2011, attorneys from CPEU represented State Police in several cases filed by registered sex offenders petitioning the court to be relieved of their registration requirements.

In addition to serving as counsel to the above-noted agencies, members of CPEU also represent the Department of Alcoholic Beverage Control's (ABC) Bureau of Law Enforcement Operations at administrative hearings involving the revocation or suspension of ABC licenses, and routinely consult with Enforcement agents about their investigations. The bulk of the administrative hearings handled by CPEU involved licensees with establishments that constituted public safety concerns. In 2011, ABC did not refer many cases to the Unit, which is a significant decline from past years.

Assisting Virginia's Commonwealth's Attorneys is a staple of the Unit's agenda. In 2011, the Unit assisted Commonwealth's Attorneys in numerous prosecutions from all over Virginia, resulting in significant periods of incarceration. Attorneys from CPEU prosecuted cases in Newport News, Norfolk, Richmond, and all throughout the Shenandoah Valley. Prosecutions ranged from theft and embezzlement of state property to gang participation to trafficking in untaxed cigarettes. The Office's commitment to the Richmond Community Violence Reduction Partnership (CVRP) afforded the opportunity to prosecute several robberies assigned to a multi-agency task force. All of the attorneys assigned to CPEU have open investigations and prosecutions in various jurisdictions throughout the Commonwealth.

A number of these open investigations involve the theft of hundreds of thousands of dollars of state funds. For example, in 2011 a member of CPEU prosecuted three defendants identified from a 2010 case involving Iris Allen, a former employee of the Virginia Birth-Related Neurological Injury Compensation Fund (BIF). In 2010, Allen pled guilty to embezzling more than $800,000 from BIF. The total amount of fraudulent claims alleged in the indictment is $819,111.48. She was sentenced to ten years imprisonment and ordered to pay full restitution. As a result of the Unit's involvement with this case, three additional people were identified as participating in similar schemes to defraud BIF, including a doctor and a nurse. Two of those people were charged and eventually pled guilty to misdemeanor theft from a health care program. The doctor pled guilty to felony theft from a health care program in 2012 and is awaiting sentencing. Restitution to BIF from these three defendants is over $83,000, and almost $400,000 will be forfeited.

The three SAUSA in the Unit handled several cases last year involving violent criminals. For example, one SAUSA prosecuted a defendant for a rash of armed robberies in Virginia and North Carolina netting a 97 year sentence. In what the Unit calls the "Pants on Fire" case, another SAUSA prosecuted a Northern Virginia bank

robber who unwisely placed stolen money containing a dye pack in his pants. As he fled the bank, the pack detonated, leaving a trail of smoke in his wake. After a short pursuit, he was captured and is now serving a 92 year sentence.

Another member of CPEU prosecuted two significant gang cases last year. In one case, four defendants were convicted of gang participation and raping two teenage victims who were drugged and sodomized as part of a gang rite. The other case netted what is believed to be the largest gang related sentence in Virginia history. A member of the Bloods recruited and organized a new sect in Newport News using violence and intimidation. He was sentenced to life plus 237 years for a number of crimes, including conspiracy to commit murder and gang participation.

Virginia law prohibits State Police from initiating, undertaking, or continuing an investigation of a state or local elected official for a criminal violation except upon the request of the Governor, Attorney General, or a grand jury. Because sheriffs and chiefs of police are invariably conflicted out of investigating criminal activity of local elected officials within their jurisdictions, the vast majority of elected official investigations are conducted by the State Police. When the State Police requests permission to conduct an investigation of an elected official, it is the CPEU's responsibility to review the allegations to determine what, if any, criminal violations may have occurred if the allegations are proven. Attorneys from CPEU work closely with State Police to judiciously give these very important cases the attention they merit. In 2011, attorneys from CPEU processed over fourteen of these requests for investigation, and authorized ten investigations.

Once an elected official investigation is authorized, CPEU provides any necessary supervision and legal advice to the State Police. Because local Commonwealth's Attorneys often recues themselves from any resulting prosecution of an elected official from within their jurisdiction, CPEU stands ready to handle any requests for criminal prosecutions. Attorneys from the section have been appointed as special prosecutors in two different jurisdictions in these types of cases. 2011 saw one significant elected official case involving the former sheriff of Middlesex County. After a lengthy investigation by the State Police that covered ten years of the sheriff's misconduct, Guy Abbott was indicted by a special grand jury for 25 felonies, including misuse of public assets, embezzlement, and bribery. Two members of the Unit are leading the prosecution efforts, which is scheduled for trial in August 2012.

Health Professions Unit

The Health Professions Unit (HPU) performs two primary functions for the Special Prosecutions & Organized Crime Section (SPOCS). First, HPU provides a focused and effective administrative prosecution of cases against health care professionals involving violations of health care-related laws and regulations before the various health care regulatory boards under the Virginia Department of Health Professions (DHP). Second, HPU 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.

The Unit's staff primarily focuses on providing legal advice and representation of a prosecutorial nature to the Boards within DHP, including, Medicine, Nursing,

Pharmacy, Veterinary Medicine, Dentistry, Funeral Directors and Embalmers, Counseling, Long-Term Care Administrators, Social Work, Psychology, Physical Therapy, Optometry, and Audiology & Speech-Language Pathology. In addition to prosecuting administrative actions against the licensees, HPU provides training to investigators, Board staff, and Board members. Many of the cases that HPU prosecutes involve standard of care violations, substance abuse, mental illness/incompetence, sexual touching, and patient abuse. Following formal hearings before the Boards, disciplinary sanctions, including suspension and revocation of licenses, are often imposed.

HPU handled several significant cases before the health regulatory boards in 2011. In May, following a formal hearing in *Board of Psychology v. Rodriguez*, the Board ordered Mr. Rodriguez's license to practice as a psychologist in the Commonwealth be indefinitely suspended for not less than eighteen months. The Commonwealth's evidence showed that Mr. Rodriguez had committed a boundary violation by sexually touching a nineteen-year old client who had been referred by her insurance company for neuro-psychological testing. In addition, the Commonwealth's evidence showed that Mr. Rodriguez had entered an Alford guilty plea to misdemeanor sexual battery in March 2011.

The Fair Housing staff prosecutes alleged violations of the Virginia Fair Housing Law. The prosecutions are based on "reasonable cause" findings and the resulting "Charges of Discrimination" issued by the Virginia Real Estate Board and the Fair Housing Board. In addition, the Unit serves as counsel to the Real Estate Board for fair housing allegations brought against real estate licensees and/or their employees or agents and to the Fair Housing Board for allegations against non-licensees. One of the more significant fair housing cases was *Fair Housing Board v. Briarwood Hearth Owners' Association, Inc.* This civil action was filed in Chesterfield County Circuit Court after the Board determined there was reasonable cause to believe that the Association refused to make a reasonable accommodation regarding its parking policy for resident Patricia Walsh. Ms. Walsh suffers from a mobility impairment and requested reserved parking close to her residence. Despite receiving a copy of Ms. Walsh's disabled parking placard as support, the Association refused Ms. Walsh's request. The case settled after the parties engaged in discovery, with Ms. Walsh receiving $10,000 in compensatory damages. Additional relief included the Association reserving a disabled parking space for Ms. Walsh, the Association's board members obtaining three hours of fair housing training annually for a period of three years, and the Association adopting a policy that ensures disabled residents will have an equal opportunity to use and enjoy their dwellings and the common areas at Briarwood Hearth.

The Financial Crime Intelligence Center

The Mission of the Financial Crime Intelligence Center (FCIC) is to identify, target, and disrupt the financial aspects of crime in the Commonwealth. The FCIC accomplishes this by identifying, targeting, and disrupting the flow of criminal proceeds. The FCIC enables Commonwealth's Attorneys and other law-enforcement officials to better address and attack the financial aspects of crime in their area 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 the Commonwealth's Attorney in their locality; and assisting in asset identification and forfeiture actions.

Of particular note is "Operation Tobacco Road," which targets individuals, corporations and businesses engaged in organized contraband cigarette trafficking, using criminal proceeds to exert unfair advantage over local area business competition. During 2011, the FCIC targeted a Fredericksburg based criminal group responsible for selling over 200,000 cartons of taxed and untaxed cigarettes to five out-of-state cigarette smuggling organizations. In a one year period, these illegal sales generated gross proceeds for the business in the amount of $14 million, which then was laundered through the investment and purchase of hotels, gas stations and quick marts in Virginia and Georgia. The operation resulted in 28 felony arrests, which resulted in four felony convictions in federal court on charges of conspiracy to violate the Contraband Cigarette Trafficking Act.

Gang Reduction and Intervention Program

The Gang Reduction and Intervention Program (GRIP) began with a federal grant from the Office of Juvenile Justice and Delinquency Prevention (OJJDP) in 2003. The Office of the Attorney General (OAG), the Richmond Police Department (RPD), the Richmond Commonwealth's Attorney's Office, and other federal, state, and local entities partnered with local service 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. The goal of GRIP is to reduce the number of gang-involved youth by providing services and healthy alternatives to gang life. The model includes a broad spectrum of programs designed to deal with the full range of personal, family, and community factors that contribute to juvenile delinquency and gang activity. The program includes a five-pronged approach: primary prevention, secondary prevention, gang intervention, gang suppression, and reentry services/programs for those being released from jail or prison. These programs are provided in a range of settings: hospitals, the community, schools, in-home, and at GRIP-sponsored "One Stops."

In January 2011, GRIP in partnership with the Richmond Redevelopment and Housing Authority (RRHA), opened a Northside One Stop Resource Center at the Calhoun Family Investment Center, near Gilpin Court. Among the programs and services available through the Northside One Stop are community-based and residential mental health counseling services, visits from Books on Wheels' "Bookmobile," parenting classes, a tutoring program for young children, a summer enrichment program focusing on job skills targeted to older youth, a teen dating workshop for young women, life skills classes, sports programs, and a Job Center. In June, GRIP celebrated the Grand Opening of its Southside One Stop Resource Center. The Attorney General and Paula Brooks, the Manager of the Town and Country Apartments, were in attendance. Since the Grand Opening, the One Stop has brought the Southside community, among other things, a free monthly health clinic, parenting classes, ESL classes, a teen group, a computer lab.

Community Defined Solutions

Funded by the Community Defined Solutions to Violence Against Women Grant, a coordinator is responsible for developing, implementing, and facilitating training for prosecutors and law enforcement officers on domestic and sexual violence issues. The coordinator participates in a partnership with six government and non-profit agencies to improve practice and policy related to criminal justice and advocacy response to domestic violence. In December 2011, the partnership conducted an Advanced Coordinated Community Response and Leadership Institute to provide leadership-focused training and support to ten coordinated community response teams across Virginia. Each team included a representative from the following disciplines: prosecutors, courts, law enforcement and advocacy, to promote a multi-disciplinary response to domestic and sexual violence cases and their victims.

In addition to training, the Office brings awareness to the issues of domestic and sexual violence and their impact on victims. In April 2011, the OAG hosted a public awareness event for Sexual Violence Awareness Month to honor child victims of sexual abuse. The event included a collection drive from the OAG staff for Operation Fuzzy to complete 80 comfort kits for children who undergo forensic or sexual assault examinations in hospitals across Virginia. In October, as part of Domestic Violence Awareness Month, the OAG hosted an event, featuring a domestic violence survivor speaker, to honor survivors of domestic violence

Tobacco Enforcement Unit

The Tobacco Enforcement Unit administers and enforces the Tobacco Master Settlement Agreement (MSA), a 1998 agreement between the states and leading cigarette manufacturers. In that effort, the Unit works with the Tobacco Project of the National Association of Attorneys General as well as other MSA states. During 2011, the Commonwealth received more than $115 million in payments from the participating manufacturers. These funds are used to support medical treatment for low-income Virginians, to stimulate economic development in former tobacco growing areas, and to establish programs to deter youth smoking and prevent childhood obesity.

The Unit also maintains the Virginia Tobacco Directory, which lists tobacco product manufacturers that have been certified as compliant with Virginia law, and collects information on cigarette stamping activity throughout the Commonwealth. The Unit enforces the MSA's implementing legislation through review, analysis and 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, audits of Tax Stamping Agents, retail inspections, seizures of contraband products, and participation on law enforcement task forces with other federal, state, and local agencies. Specifically in 2011, the Unit investigated 109 persons or entities, certified 31 cigarette manufacturers as compliant with Virginia law, allowed 4 manufacturers to be voluntarily removed from the tobacco directory, and removed 2 companies from the tobacco directory. Representatives from the Unit also worked closely with the Financial Crimes Intelligence Center as they sought to identify, investigate, and prosecute individuals engaged in trafficking of contraband cigarettes. The Unit's efforts at diligently enforcing Virginia's statutes related to contraband and counterfeit cigarettes was bolstered by the addition of three new full-time employees - a second

investigator and two new auditors. In addition, the Unit continued to represent the Commonwealth in a multi-million dollar MSA payment dispute.

TECHNOLOGY, REAL ESTATE, ENVIRONMENT, FINANCIAL LAW AND TRANSPORTATION DIVISION

The Technology, Real Estate, Environment, Financial Law and Transportation Division provides comprehensive legal services to executive agencies, state boards and commissions for much of the Commonwealth's government. Composed of five Sections, the Division provides legal advice across a wide range of substantive subject areas as well as guidance on matters of employment, contracts, purchasing, and the regulatory process. The Division's attorneys regularly assist state agencies with complex and sophisticated transactions and also represent those agencies in court, often in close association with other attorneys in the Office.

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, as well as dozens of other agencies and institutions in areas involving contracts, technology issues, intellectual property, and procurement. In 2011, this Section provided legal assistance for Commonwealth initiatives such as the Medicaid Information Technology Architecture (MITA) project, the Alternative Fuels PPEA, the Unemployment Insurance Modernization Project, the non-tax debt collection services project, and the alternative procurement process for legislatively mandated purchases from charitable institutions, among others. This Section also continued to provide necessary legal support to the Virginia Information Technologies Agency (VITA) in its management of the Commonwealth's Comprehensive Infrastructure Agreement with Northrop Grumman Systems Corporation. This included assistance to help VITA address performance problems and negotiate contract amendments desired by the parties, as well as legal support to help the Commonwealth review and act on an outside auditor's report regarding the major information technology outage that had affected numerous state agencies in August 2010.

This Section provided legal support to the Secretary of Administration that addressed supplier diversity challenges and the development of an appropriate policy regarding the protection and release of patents and copyrights owned by the Commonwealth. The Section also provided assistance to various Commonwealth agencies, institutions and boards in regard to various contract performance problems, technology acquisitions, trademark applications, licensing of Commonwealth data and software to other parties, data security issues, intellectual property claims and agreements, Internet issues, electronic contracting, structuring of procurements, and resolution of procurement protests. Additionally, the Section provided workshop training for state contract negotiators at the annual Public Procurement Forum sponsored by the Department of General Services, and a presentation on legal risks and issues relating to governmental use of social media, at the 2011 COVITS conference.

Real Estate and Land Use Section

The Real Estate and Land Use Section (RELU) handles several specialized areas of legal practice. Real estate questions and transactions affect every state agency to some degree. RELU handles the majority of these transactions directly, or provides support and assistance to agency counsel who wish to retain their role as primary agency contact for the transaction. The Section does not handle Virginia Department of Transportation (VDOT) right-of-way acquisitions. RELU opened 232 new matters and closed 338 matters during 2011. At the end of 2011, the Section was handling 267 active cases with a declared value in excess of $1.3 billion.

Significant transactional real estate matters handled for the Commonwealth include sales, purchases, leases and easements on state lands. RELU provides daily advice on real estate issues to the Department of General Services (DGS) and handles the sale and exchange of state surplus property. The Section also handles all leasing and other real property matters for the Department of Military Affairs, the Department of Veterans Services and the Department of Alcoholic Beverage Control. In addition, the Section provides significant real estate support to the various institutions of higher education, as well as 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 and federal condemnation actions, as well as miscellaneous real estate related matters. During 2011, several issues arose involving the rights of the Commonwealth in and to subaqueous lands. RELU has worked closely with the Environmental Section to advise state agencies on these issues. RELU is also involved in a title dispute regarding property in Virginia Beach at the State Military Reservation.

RELU represents the Department of Conservation and Recreation (DCR) on its real estate matters, including conservation easements. The Section also advises the Virginia Outdoors Foundation on its open space easements, as well as general legal matters, and 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.

The Section provides advice to agencies and the Construction Litigation Section on construction procurement, contract management and dispute resolution issues on all construction matters other than VDOT projects. This representation encompasses providing advice on a wide range of issues, including construction bid documents, appropriate public procurement measures, bid protests, contract interpretation during construction and negotiation to resolve disputes during performance, and tendering of a formal complaint and transfer of the case to the Construction Litigation Section. One RELU attorney has assisted VDOT with the administration and claims resolution in the I-495 High Occupancy Toll lanes project, the widening of Interstates 66 and 95, and other high profile VDOT projects in Northern Virginia.

RELU also advises DGS' Division of Engineering and Buildings (DEB) regarding policies, procedures and other issues that arise in that Division's role as statewide construction manager and building official. Following the dissolution of the Design Build/Construction Management Review Board, RELU has worked closely with DEB to revise its policies and procedures to reflect accurately the changes to the law in these areas and to draft new policies for adoption by the Secretary of Administration.

RELU continues to serve as the General Counsel to the Fort Monroe Authority (FMA) and counsel to the Governor on all matters related to Fort Monroe. Fort Monroe was listed on the 2005 BRAC closure list, and the U.S. Army ceased all active military operations there on September 15, 2011. Approximately two-thirds of the land area at Fort Monroe will revert to the Commonwealth, perhaps one-sixth of the area is disputed regarding whether it reverts or is federal surplus, and the other one-sixth is federal surplus. All of the undisputed federal surplus property will be transferred to the National Park Service (NPS) to create the Fort Monroe National Monument. The Governor has agreed that certain portions of reversionary land also will be transferred to the NPS for the Monument. Coordinating all of the activities and actions necessary to have a functioning and useful national park will be a significant focus during the 2012 calendar year. Negotiations with the Army continue regarding remaining conveyance issues. The Section also is assisting the FMA with a myriad of other issues of varying complexity.

During 2011, the Section continued its support and assistance to Norfolk State University (NSU) with respect to issues involving the Light Rail Transit Project in Norfolk. The Section provided significant support to NSU in determining the properties affected, strategizing regarding the University's needs and negotiating with the City of Norfolk (City) and Hampton Roads Transit (HRT). NSU, the City, HRT, and the Norfolk Redevelopment and Housing Authority executed a comprehensive agreement to resolve these issues, and the light rail system began operations in August 2011. In addition, the Section is assisting Virginia State University in the acquisition of approximately 189 parcels of land targeted for its proposed convocation center.

The Section also assisted DGS and the City of Hampton in finding a potential solution to the problem of unclear title to former state-owned property after closure of the Virginia School for the Deaf, Blind and Multi-Disabled in Hampton. Approximately 25 acres in the heart of the campus were donated to the Commonwealth in 1908 by a deed that retained a reverter interest in what was, at the time of closure, a long defunct corporation. The Section researched the title issues, then drafted proposed legislation that would allow DGS to dispose of any interest it might still retain in the property in order to clear title to the property. Additionally, the Section assisted the Frontier Culture Museum of Virginia, an educational institution, in completing a complicated transaction in which it transferred multiple parcels of land containing approximately 132 acres to the American Frontier Culture Foundation.

Environmental Section

The Environmental Section primarily represents agencies under the Secretary of Natural Resources, as well as the Department of Mines, Minerals and Energy, the Department of Forestry, and the Environmental Health Division of the Virginia Department of Health. Section attorneys provide a range of legal services, including litigation, regulation and legislation review, transactional work, representation in personnel issues, and related matters.

In 2011, the Section represented the State Water Control Board (SWCB) in an action brought by the Blue Ridge Environmental Defense League (the League) and others to seek judicial review of the Virginia Pollutant Discharge Elimination System

permit issued by the SWCB to Dominion Power. The permit authorized Dominion to discharge from its North Anna Nuclear Power Station into Lake Anna. The League argued, in part, that the permit failed to regulate properly the discharge of thermal pollution into the facility's waste heat treatment facility and thus failed to protect water quality standards in the waste heat treatment facility and in Lake Anna itself. Although the circuit court set aside the permit, the Court of Appeals of Virginia reversed the lower court's ruling. In a published opinion, the Court of Appeals held that "the SWCB's decision not to regulate the waste heat treatment facility based on its determination that it fell under the 'waste heat treatment system' exemption was not arbitrary or capricious constituting an abuse of its delegated discretion, and, thus, the circuit court erred in not according deference to the SWCB in its construction of its own regulations and erred further in not permitting the SWCB to defer to the EPA's construction of federal regulations." The Supreme Court of Virginia affirmed the Court of Appeals' decision.

The Section also represented the SWCB in an action brought by the Chesapeake Bay Foundation and the Citizens of Stumpy Lake seeking judicial review of a permit issued in 2003 pursuant to Virginia Code § 62.1-44.15:5 (2003) and the applicable SWCB regulation. The permit would allow the construction of a mixed-use development in the City of Chesapeake adjacent to Stumpy Lake. Appellants argued that the permittee failed to avoid, mitigate and compensate properly for affected wetlands and failed to delineate properly the affected wetlands at the site, especially in light of the U.S. Army Corps of Engineers' conflicting delineation issued several years after the SWCB issued the challenged permit. The Circuit Court held that Chesapeake Bay Foundation and the Citizens of Stumpy Lake failed to meet their burden of proof in establishing (i) that the SWCB had insufficient evidential support for its findings of fact or (ii) that the SWCB had violated § 62.1-44.15:5(D) or any other laws or regulations.

In addition, the Section represented the Virginia Marine Resources Commission in an appeal of a permit it issued to the City of Virginia Beach to place a concrete pipe and outfall structure on state-owned bottomland channelward of the mean low water mark. Twenty-nine residents of Virginia Beach challenged the permit. These residents live in the vicinity of a proposed upland pump house that will be part of a stormwater removal system that will connect to the pipe and outfall structure. The Circuit Court dismissed the case for failure to allege facts sufficient to establish standing, but the Court of Appeals reversed and remanded for an evidentiary hearing to determine if the residents had been aggrieved. The Court of Appeals further held that, because the Rules of the Supreme Court do not expressly require an appellant in an APA appeal to plead facts sufficient to establish standing, no such requirement exists. On appeal to the Supreme Court of Virginia, the Commission and the City argued that despite the Rules' silence, there are fundamental pleading requirements in all contested matters. The Supreme Court agreed, reversed the Court of Appeals' opinion, and entered final judgment in favor of the Commission and the City of Virginia Beach.

On behalf of the Commonwealth, the Section participated in an EPA/DOJ stormwater management enforcement case against national homebuilder, The Ryland Group, Inc. The case, which was filed in the U.S. District Court for the Western District of North Carolina in October 2011, alleges Clean Water Act violations in

multiple states, including Virginia. A proposed consent decree was filed with the complaint and EPA and DOJ are in the process of finalizing it.

Financial Law and Government Support Section

The Financial Law and Government Support Section provides legal counsel to the agencies and boards reporting to the Secretaries of Administration, Commerce and Trade, Agriculture and Forestry and Finance, as well as to the Secretariats. These agencies and boards include the Department of Agriculture and Consumer Services and all the boards serviced by that agency, the Virginia Economic Development Partnership, the Virginia Tourism Authority and Virginia Film Office, the Department of Professional and Occupational Regulation and the boards serviced by that agency, the Department of Taxation, the Department of the Treasury, the Virginia Employment Commission, the Department of Labor and Industry, the Department of Housing and Community Development and the boards serviced by that agency, the Virginia Resources Authority, the Virginia Board of Accountancy, the Department of Business Assistance, and the State Board of Elections. This Section also provides advice to certain independent agencies including the Virginia Retirement System and the Virginia Workers Compensation Commission. In addition, this Section works with constitutional officers and local government attorneys to assist in the resolution of issues of local concern as they arise.

In 2011, the Virginia Employment Commission was served with a record 174 petitions for judicial review of unemployment benefit cases, a significant increase from the 68 petitions received in 2007. The Court of Appeals of Virginia issued one published opinion in 2011 for unemployment benefit appeals. Additionally in 2011, the Section, which further provides counsel to all agencies under the Secretary of Veterans Affairs and Homeland Security, including the Department of Veterans Services, the Virginia War Memorial, the Veterans Services Foundation and the Joint Leadership Council of Veterans Services Organizations, helped train Department of Veterans Services claims agents and trained over 3,000 supervisors and employees on the Uniformed Services Employment and Reemployment Rights Act.

This Section handles a significant volume of litigation for the Department of Taxation regarding state tax assessments with respect to individual and corporate income taxes and retail sales and use taxes. This caseload includes complex litigation regarding land preservation tax credits. The Section also provides advice to the Department of Alcoholic Beverage Control and, on its behalf, litigated eight appeals of administrative actions at the circuit court level, all of which resulted in favorable outcomes for the agency. The Section responded to 50 requests for assistance from animal control, law enforcement and Commonwealth's attorneys regarding animal neglect/cruelty, dangerous dog and animal fighting cases throughout the Commonwealth. The Section successfully prosecuted two individuals for animal cruelty and animal fighting in June 2011, under a special prosecution arrangement with the Commonwealth's Attorney for King William County.

Transportation Section

The Transportation Section represents and advises the state agencies, offices, authorities, and boards that report or are assigned to the Secretary of Transportation. These include the Virginia Department of Transportation (VDOT), the

Commonwealth Transportation Board (CTB), the Department of Motor Vehicles, the Commission on the Virginia Alcohol Safety Action Program (VASAP), the Department of Rail and Public Transportation (DRPT), the Virginia Port Authority, the Virginia Port Authority Board of Commissioners, the Virginia Department of Aviation, the Virginia Aviation Board, the Motor Vehicle Dealer Board, the Board of Towing and Recovery Operators, the Virginia Commercial Space Flight Authority and the Office of Transportation Public-Private Partnerships for the Commonwealth of Virginia. The Section also advises and acts as counsel to the Secretary of Transportation.

The Section attorneys serve the transportation client agencies and entities in numerous administrative, regulatory, transactional/contractual and litigation matters. Those matters include: land use issues; outdoor advertising and highway sign issues relating to right of way; personnel issues; environmental issues; procurement disputes; titling and registration of automobiles; licensure and regulation of drivers; motor fuels tax collection and enforcement; licensure and regulation and discipline of motor vehicle dealers; administration of motor vehicle dealer franchise laws and regulation of disputes between franchise dealers and manufacturers; licensure and regulation of towing and recovery operators; administration of the VASAP program; transportation legislative reviews; freedom of information requests; conflict of interest questions; and administrative hearings involving a wide array of issues and several different transportation agencies and entities.

In 2011, attorneys in the Section appeared in state and federal courts throughout Virginia, including the Supreme Court of Virginia, to represent and protect the Commonwealth's transportation interests in litigation. For example, the Section defended the Commonwealth in a number of National Environmental Policy Act (NEPA) cases brought by individuals and nonprofit interest groups challenging transportation projects such as the I-81 widening and the I-95/I-395 High Occupancy Toll Lanes project. The Section also defended the arrest and seizure of a Chinese container crane manufacturer's vessel after the Chinese vessel owner refused to post a letter of undertaking when the vessel struck and damaged both the wharf and new cranes being delivered to the APM Terminal in Hampton Roads (currently leased by the Virginia Port Authority). Another significant case involved an inverse condemnation claim asserted by over 100 landowners in Fairfax County seeking $9 million in damages sustained after a severe rain event in 2006 caused flooding throughout Northern Virginia and in the District of Columbia. Eminent domain proceedings included issues related to landowners' claims for damages from road projects that had resulted in (i) changes in access to a shopping center and an apartment complex and (ii) a restaurant chain's claim for compensation for personal property in a restaurant when the real property was taken for a road widening project.

In 2011, the Public-Private Transportation Act (PPTA) provided significant, complex work for the Section. The Secretary of Transportation established a separate independent Office of Transportation Public-Private Partnerships (OTP3) for the Commonwealth of Virginia. The Section advised and assisted with the implementation of OTP3 and also advised this new office with respect to three significant PPTA projects for which PPTA agreements were negotiated and signed in 2011: (i) to advance the Coalfields Expressway and the Route 58 Corridor Improvement projects ($124 Million); (ii) to begin a new Portsmouth - Norfolk

Midtown Tunnel project building a second tunnel, rehabilitating the existing Midtown Tunnel as well as the Downtown Tunnels while also extending the Martin Luther King Freeway ($2.1 Billion); and (iii) to initiate the Northern Virginia I-95 High Occupancy Vehicle/High Occupancy Toll (HOV/HOT) Lanes Project ($940 Million). As a result of a favorable bond and market financing rates in 2011, this Section also assisted in extensive legal preparations for the issuance of several refunding and refinancing bond issues as well as new bond issues for the Commonwealth's transportation infrastructure.

The Section was heavily involved in rail transportation issues. The Section participated in negotiations with the Federal Railroad Administration and with North Carolina concerning the funding and the development of High Speed Rail in Virginia, and it advised Virginia's DRPT concerning the Virginia-North Carolina High Speed Rail Compact in working towards cooperative development of the High Speed Rail corridor. Our attorneys negotiated and drafted agreements for the development of Passenger Rail Service between Norfolk and Richmond (which will also be a part of the High Speed Rail system corridor) and worked towards resolving legal issues concerning state-supported passenger rail operations from Lynchburg to Washington and from Richmond to Washington, D.C. Other work focused on Phase 2 of the Dulles Metrorail Project, particularly negotiations and advice concerning Project Labor Agreements and the applicability of the Virginia Right to Work Law and the drafting of a Memorandum of Agreement for Phase 2 with the U.S. Secretary of Transportation and officials from the Metropolitan Washington Airports Authority, Fairfax County, Loudoun County and Washington Metropolitan Area Transit Authority (WMATA). Finally, the Section provided legal support concerning the resolution of safety issues on WMATA's Metro system.

LEGISLATIVE ACCOMPLISHMENTS

During the 2011 Session of the General Assembly, the Office of the Attorney General worked to implement legislation to advance protections of property rights, improve the benefits of veterans living in Virginia, and enhance public safety for all citizens.

Through the hard work of many and with broad bipartisan support, 2011 marked the successful completion of the first step in enhancing the protection of property rights provided by the Constitution of Virginia. Legislation proposing an amendment to the Constitution passed both Houses of the General Assembly. The purpose of the amendment is to ensure private property can be taken or damaged only for a public use, only with just compensation to the owner and only to the extent that is necessary for the public use. The measure includes language that would require just compensation to be equal or exceed the value of the property taken, lost profits, lost access and damages to the residue caused by the taking. Furthermore, the amendment would require the General Assembly to define "lost profits" and "lost access." The office further worked with various stakeholders to allow public service companies, Public Service Corporation or railroad the power of eminent domain for public use when such exercise is for the authorized provision of utility, common carrier, or railroad services. In all other cases, a taking or damaging of private property is not for public use if the primary use is for private gain, private benefit, private enterprise, increasing jobs, increasing tax revenue or economic development, except for the

elimination of public nuisances exist on the property. Lastly, this amendment shifts the burden to the condemnor to prove that the use is public.

Additionally, the Office of the Attorney General led the efforts to improve current eminent domain statutes. This measure requires condemnors of property to provide all appraisals obtained prior to making an offer to owners of condemned property. This measure additionally strengthened the opportunity of landowners to buy back property that was taken for a public use but was subsequently not needed for a public use project.

This Office also worked closely with legislators and others to address various measures to protect seniors and the disabled from abuse and neglect. The Office of the Attorney General led the efforts to permit this Office to investigate complaints of abuse of person in the care of others who receive payments for medical assistance under the state plan for medical assistance, regardless if the patient is the actual recipient of those funds. Another successful legislative effort was aimed at protecting tax dollars used by Medicaid. This measure requires the court to order restitution to be made to the Department of Medical Assistance Services for any loss caused by a felony conviction of making a false statement or representation in application for payment under Medicaid.

The Office of the Attorney General was also proud to be part of the bipartisan effort to improve veteran services in Virginia. This office assisted in various new benefit programs for Virginia veterans, including in-state tuition for spouses of service members and veterans, a special hunting permit for partially disabled veterans, consideration of military experiences for licensure or certification with the Board of Medicine and Board of Nursing, and improvements to the staff-to-veteran ratio at the Virginia Department of Veteran Services. Additionally, we proudly supported the creation of the cabinet level Secretary of Veterans Affairs and Homeland Security. It is important to the Office of the Attorney General that Virginia is the veteran friendly.

Finally, this Office was proud to work with the General Assembly on numerous initiatives to improve the safety of Virginians. One such law continued and expanded the Address Confidentiality Program to all jurisdictions in the Commonwealth. This program allows victims of domestic violence added protection to themselves and children. Another law improves the protective order statutes by expanding the criteria by which non-family or non-household members can petition for a protective order and allows that any person who has been subjected to an act of violence, force, or threat can petition a district or circuit court for a protective order. Further, this office worked with bipartisan support on a bill that would provide minimum standards for facilities in which five or more first trimester abortions are performed per month. This bill further required the Board of Health to promulgate regulations containing these standards.

OPINIONS SECTION

The Opinions Section processes and manages requests made pursuant to § 2.2-505 for official opinions of the Attorney General as well as conflict of interests opinions for state government officers and employees and members of the General Assembly. The Section also handles confidential informal opinions that are issued by

Senior Counsel. Opinions are assigned to attorneys within all Divisions of the Office based on the request's subject matter. In 2011, the Opinions Section received over 150 opinion requests, including requests not statutorily entitled to a response, that were withdrawn or were answered by previously issued opinions. The Office issued 103 official, informal and conflict of interest opinions in 2011, including the 60 official opinions published in this report and on the OAG website. The Section is responsible for publishing the Annual Report of the Office of the Attorney General mandated by § 2.2-516 and presenting it to the Governor of Virginia on May 1st.

CONCLUSION

It is an honor and pleasure to serve the citizens of the Commonwealth as Attorney General. The achievements of the attorneys and staff of this Office are many, and while it is impossible to include all of their accomplishments in this report, the names of the dedicated professionals who served the Office last year are listed on the following pages. The citizens of the Commonwealth are well served by the efforts of these individuals.

With kindest regards, I am

Very truly yours,

Kenneth T. Cuccinelli II
Attorney General

PERSONNEL OF THE OFFICE[1]

Kenneth T. Cuccinelli II ..... Attorney General
Charles E. James Jr. ..... Chief Deputy Attorney General
G. Michael Favale ..... Deputy Attorney General
David E. Johnson ..... Deputy Attorney General
Richard F. Neel Jr. ..... Deputy Attorney General
Wesley G. Russell Jr ..... Deputy Attorney General
E. Duncan Getchell Jr. ..... Solicitor General of Virginia
Stephen R. McCullough ..... Opinions Counsel/Senior Appellate Counsel
Jeffrey R. Allen ..... Sr. Assistant Attorney General/Chief
Elizabeth A. Andrews ..... Sr. Assistant Attorney General/Chief
C. Meade Browder Jr. ..... Sr. Assistant Attorney General/Chief
Craig M. Burshem ..... Sr. Assistant Attorney General/Chief
Patrick W. Dorgan ..... 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
David B. Irvin ..... Sr. Assistant Attorney General/Chief
Alan Katz ..... Sr. Assistant Attorney General/Chief
Joshua N. Lief ..... 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
Jill M. Ryan ..... Sr. Assistant Attorney General/Chief
Pamela A. Sargent ..... Sr. Assistant Attorney General/Chief
Jerry P. Slonaker ..... Sr. Assistant Attorney General/Chief
Allyson K. Tysinger ..... Sr. Assistant Attorney General/Chief
John S. Westrick ..... Sr. Assistant Attorney General/Chief
Steven T. Buck ..... Chief Section Counsel
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
Gary L. Conover ..... 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

[1] This list includes all persons employed and compensated by the Office of the Attorney General during calendar year 2011, as provided by the Office's Division of Administration. The most recent title is used for any employee whose position changed during the year.

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
John P. Griffin..... Senior Assistant Attorney General
Wayne T. Halbleib..... Senior Assistant Attorney General
Catherina F. Hutchins..... Senior Assistant Attorney General
Donald E. Jeffrey III..... 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
Cynthia H. Norwood..... 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
Sydney E. Rab..... Senior Assistant Attorney General
Jill M. Ryan..... Senior Assistant Attorney General
Richard S. Schweiker Jr..... Senior Assistant Attorney General
Deanis L. Simmons..... Senior Assistant Attorney General
Jeffrey A. Spencer..... Senior Assistant Attorney General
Virginia B. Theisen..... 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
Catherine Crooks Hill..... Senior Assistant Attorney General/Unit Manager
Ronald N. Regnery..... Senior Assistant Attorney General/Unit Manager
Katherine Quinlan Adelfio..... Assistant Attorney General
Sarah O. Allen..... Assistant Attorney General
Alice T. Armstrong..... Assistant Attorney General
Karri B. Atwood..... Assistant Attorney General
Angela B. Axselle..... Assistant Attorney General

Rachel J. Baer.....Assistant Attorney General
Susan F. Barr.....Assistant Attorney General
Jacob L. Belue.....Assistant Attorney General
Angela Benjamin-Daniels.....Assistant Attorney General
Anthony R. Bessette.....Assistant Attorney General
John W. Blanton.....Assistant Attorney General
Kimberly M. Bolton.....Assistant Attorney General
Michael H. Brady.....Assistant Attorney General
Ryan J. Brown.....Assistant Attorney General
Aaron J. Campbell.....Assistant Attorney General
Carla R. Collins.....Assistant Attorney General
Braden J. Curtis.....Assistant Attorney General
Joshua M. Didlake.....Assistant Attorney General
Amy K. Dilworth.....Assistant Attorney General
Elizabeth G. Dwyer.....Assistant Attorney General
Kate E. Dwyre.....Assistant Attorney General
Farnaz Farkish.....Assistant Attorney General
James A. Fiorelli.....Assistant Attorney General
Elizabeth L. Fitzgerald.....Assistant Attorney General
Gregory W. Franklin.....Assistant Attorney General
Megan Revis Frederick.....Assistant Attorney General
Ryan F. Furguson.....Assistant Attorney General
John D. Gilbody.....Assistant Attorney General
C. Nicole Gilliam.....Assistant Attorney General
Brett C. Glymph.....Assistant Attorney General
David C. Grandis.....Assistant Attorney General
Ann R. Gregory.....Assistant Attorney General
Stephen M. Hall.....Assistant Attorney General
Susan M. Harris.....Assistant Attorney General
Mary Hendricks Hawkins.....Assistant Attorney General
Joshua D. Heslinga.....Assistant Attorney General
Megan L. Holt.....Assistant Attorney General
Candice D. Hooper.....Assistant Attorney General
Laurel S. Huerkamp.....Assistant Attorney General
Matthew R. Hull.....Assistant Attorney General
Steven P. Jack.....Assistant Attorney General
Michael A. Jagels.....Assistant Attorney General
Adam L. Katz.....Assistant Attorney General
Benjamin H. Katz.....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
Ashley B. Macko.....Assistant Attorney General

Mikie F. Melis ..... Assistant Attorney General
Karen G. Misbach ..... Assistant Attorney General
Christy W. Monolo ..... Assistant Attorney General
Ishneila G. Moore ..... Assistant Attorney General
Lawrence L. Muir Jr ..... Assistant Attorney General
Andrew J. Mulcunry ..... Assistant Attorney General
Sean J. Murphy ..... Assistant Attorney General
Elizabeth B. Myers ..... Assistant Attorney General
Valerie L. Myers ..... Assistant Attorney General
Carrie S. Nee ..... Assistant Attorney General
Adele M. Neiburg ..... Assistant Attorney General
Thomas W. Nesbitt ..... Assistant Attorney General
Kerri L. Nicholas ..... Assistant Attorney General
James W. Noel III ..... Assistant Attorney General
Kevin C. Nunnally ..... Assistant Attorney General
Patrick O. O'Leary ..... Assistant Attorney General
Joseph C. Obenshain ..... 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
Alisson O. Pouille ..... Assistant Attorney General
Lori L. Pound ..... Assistant Attorney General
Charles A. Quagliato ..... Assistant Attorney General
Rodolfo R. Remingo ..... Assistant Attorney General
William T. Reisinger ..... Assistant Attorney General
Sarah F. Robb ..... Assistant Attorney General
Tracey D.S. Sanders ..... Assistant Attorney General
Greer D. Saunders ..... Assistant Attorney General
James E. Schliessmann ..... Assistant Attorney General
Noëlle L. Shaw-Bell ..... Assistant Attorney General
Susan H. Siegfried ..... Assistant Attorney General
Nicholas F. Simopoulos ..... Assistant Attorney General
Craig W. Stallard ..... Assistant Attorney General
Christopher D. Supino ..... Assistant Attorney General
C. Nicole Sydnor ..... Assistant Attorney General
J. David Taranto ..... Assistant Attorney General
Lara K. Todd ..... Assistant Attorney General
Crystal Y. Twitty ..... Assistant Attorney General
Samantha D. Vanterpool ..... Assistant Attorney General
K. Michelle Welch ..... Assistant Attorney General
Janet L. Westbrook ..... Assistant Attorney General
Steven M. Westermann ..... Assistant Attorney General
Josephine F. Whalen ..... Assistant Attorney General

Erin Dugan Whealton.....Assistant Attorney General
Julie M. Whitlock.....Assistant Attorney General
Collette M. Wilcox.....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
Susan B. Curwood..... Asst. Att'y Gen./Dir., Tobacco Enforcement Unit
Eric A. Gregory ..... Asst. Att'y Gen./Dir., Compliance & Special Counsel
Shannon Dion Taylor ..... Assistant Attorney General/CPEU Director
Phillip O. Figura..... Assistant Attorney General/Gang Prosecutor
Vaso Tahim Doubles..... Assistant Attorney General/Prosecutor
Steven W. Grist ..... Assistant Attorney General/Prosecutor
Janine M. Myatt..... Assistant Attorney General/Prosecutor
Marc J. Birnbaum..... Assistant Attorney General/SAUSA
Cameron M. Rountree ..... Assistant Attorney General/SAUSA
David W. Tooker..... Chief Prosecutor
Erica J. Bailey..... Chief of Civil Investigations
Joseph E.H. Atkinson ..... Lead Attorney/Assistant Attorney General
Rosemary V. Bourne ..... Lead Attorney/Assistant Attorney General
W. Clay Garrett ..... Lead Attorney/Assistant Attorney General
Lelia P. Winget-Hernandez ..... Lead Attorney/Assistant Attorney General
John R. Butcher ..... Special Assistant Attorney General
Henry L. Chambers Jr ..... Special Assistant Attorney General
Frederick S. Fisher ..... Special Assistant Attorney General
Guy W. Horsley Jr..... Special Assistant Attorney General
Megan Boyle Larkin..... Special Assistant Attorney General
Richard B. Smith ..... Special Assistant Attorney General
Crystal V. Adams ..... Legal Secretary Senior
Matthew B. Addison..... Claims Representative
J. Hunter Allen Jr.....Analyst
S. Elizabeth Allen.....Legal Secretary Senior Expert
Esther Welch Anderson.....MFCU Administrative Manager
Paul N. Anderson ..... Deputy Director, Investigations & Audits
Susan M. Antonelli..... Claims Representative
Kristine E. Asgian .....Chief Auditor, Financial Investigations
Juanita Balenger ..... Community Outreach and TRIAD Director
Andrew P. Barone .....Senior Investigator
Delilah Beaner.....Administrative Legal Secretary Senior
Kiana M. Beekman.....Investigator
Elizabeth K. Beverly .....Investigator
Mary H. Blackburn.....Senior Financial Investigator
Heather K. Blanchard.....Paralegal Senior
Carolyn R. Blaylock..... Legal Secretary Senior

Daniel M. Booth ..... Financial Investigator
Charles D. Branson..... Senior Criminal Investigator
Linda F. Browning .....Employee Relations Manager
Heather K. Brunner ..... Legal Secretary Senior
John B. Buckovich .....MFCU Investigative Supervisor
Charles R. Calton .....Claims Representative
Philip J. Caudery .....Investigator
Lera L. Champagne-Andriani..... Nurse Investigator
Addison L. Cheeseman.....MFCU Computer Forensic-IT Supervisor
Gloria A. Clark ..... Legal Secretary Senior
Harrison L. Clark..... Director of Administration
David E. Clementson..... Director of Communications
Heather A. Clouse .....Legal Secretary
Randall L. Clouse ..... Dir. & Chief, 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
Juliana L. Comer ..... Exec. Asst. to the Chief Dep. Att'y Gen.
Joseph J. Conahan .....Investigator
Deborah P. Cook .....Claims Specialist Senior
John K. Cook Jr ..... Office Technician
Jill S. Costen..... Investigative Supervisor
Donna D. Creekmore..... Legal Secretary Senior
Horace T. Croxton..... Senior Criminal Investigator
Charles E. Crute Jr..... Senior Criminal Investigator
Kaci M. Cummings ..... Paralegal
Shannon M. Curtin ..... Financial Investigator
Beverly B. Darby.....Investigator
Jennifer S. Dauzier .....Criminal Analyst Senior
Diane W. Davis .....Legal Secretary
J. Randall Davis..... Community Outreach Coordinator
Robert A. DeGroot ..... Investigative Supervisor
Angela M. Desrochers..... Receptionist
Linda A. Dickerson .....Consumer Specialist Senior
Polly B. Dowdy ..... Paralegal Senior Expert
Edward J. Doyle .....Director, FCIC
Sara L. Duvall..... Paralegal
Stephanie A. Edwards .....Criminal Investigator
Sonya L. Edwards.....Paralegal Senior
Kelly Ford Ecimovic ..... Senior Expert Claims Representative
Patrice S. Elliott.....Director of Finance
Devin A. England ..... Financial Investigator
Harrell E. Erwin ..... Senior Criminal Investigator
Tosha A. Feild .....Investigator

Mark S. Fero.....Financial Manager
Vivian B. Ferry.....Legal Secretary Senior Expert
Hunter W. Fisher.....Program Coordinator
Cheryl D. Fleming.....Legal Secretary
Gordon C. Frank.....Computer Programmer
Judith B. Frazier.....Legal Secretary Senior
William W. Gentry.....Criminal Investigator
Caroline P.R. Gibson.....Deputy Director of Communication
Montrue H. Goldfarb.....Paralegal Senior
Mary P. Goodman.....Legal Secretary Senior
Brian J. Gottstein.....Director of Communication
David C. Graham.....Crime Analyst
LaToya S. Gray.....Executive Assistant to the Attorney General
Karl E. Grotos.....Financial Specialist
Steven F. Hadra.....Senior Investigator
Lynda S. Hamm.....Nurse Investigator
Lyn J. Hammack.....Administrative Legal Secretary Senior
Mary Anne Harper.....Claims Representative
Rebecca L. Hensby.....Legal Secretary Senior Expert
Margaret C. Horn.....Investigative Supervisor
Sandra W. Hott.....Legal Secretary Senior
Elizabeth E. Hudnall.....Nurse Investigator
Audrey D. Jackson.....Director of Legislative and Government Affairs
Jerome A. Jackson.....Computer Programmer
Jewel J. Jefferson.....Human Resources Assistant
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
Sara K. Kennedy.....Scheduler
Anne D. Kellum.....Investigator
Debra M. Kilpatrick.....Procurement Manager
Chrystal L. Knighton.....Programmer Supervisor
Mary Anne Lange.....Paralegal
Laureen S. Lester.....Chief of Elder Abuse
Patricia M. Lewis.....Unit Program Coordinator
Robert T. Lewis.....Deputy Director of Finance

Deborah L. Madison ..... Director of Information Systems
Deborrah W. Mahone ..... Paralegal Sr. Expert/Legislative Specialist
Sharon Y. Mangrum ..... Executive Assistant to State Solicitor General
Christopher M. Mann ..... Deputy Director of Communication
Jason A. Martin ..... Computer Forensic Analyst
Sara I. Martin ..... Human Resources Analyst
Tomisha R. Martin ..... Claims Specialist
Joshua A. Marwitz ..... Investigator
Benjamin L. Mason ..... Deputy Scheduler and Press Assistant
Stephanie B. Maye ..... Legal Secretary Senior
Amanda McGuire ..... Publications Coordinator
Judy O. McGuire ..... Claims Representative
George T. McLaughlin ..... Investigator/Forensic Examiner
Natalie A. Mihalek ..... Paralegal Senior
David J. Miller ..... Investigator
Lynice D. Mitchell ..... Office Services Specialist Senior
James B. Mixon Jr. ..... Analyst/Community Outreach Coordinator
Eda M. Montgomery ..... Senior Financial Investigator
Jonah F. Morrison ..... IT Support Specialist I
Howard M. Mulholland ..... FCIC Financial Investigator
Janice M. Myer ..... Paralegal
Elizabeth M. Myers ..... Paralegal
Mary C. Nevetral ..... Receptionist
Connie J. Newcomb ..... Director of Office Operations
Timothy E. Northcutt ..... Investigator
Trudy A. Oliver-Cuoghi ..... Paralegal
Jennifer L. Onusconich ..... Paralegal
Sheila B. Overton ..... Internet Services Administrator
Janice R. Pace ..... Financial Manager
Sharon P. Pannell ..... Legal Secretary Senior
John W. Peirce ..... Senior Criminal Investigator
Coty D. Pelletier ..... Investigator
Jane A. Perkins ..... Paralegal Senior Expert
Bruce W. Popp ..... Deputy Director, Information Systems
Jacquelin T. Powell ..... Legal Secretary Senior Expert
Jennifer L. Powell ..... Administrative Legal Secretary Senior
Sandra L. Powell ..... Legal Secretary Senior
Meredith K. Quillen ..... Director of Administration
N. Jean Redford ..... Legal Secretary Senior Expert
Luvenia C. Richards ..... Legal Secretary
Ryan C. Rios ..... Financial Advisor
David A. Risden ..... Investigator
Melissa A. Roberson ..... Program Coordinator/Domestic Violence
Noah B. Rogers ..... Scheduler

April D. Rogers-Crawford.....Gang Prevention & Va. Rules Prog. Coordinator
Hamilton J. Roye.....Administrative Coordinator
Joseph M. Rusek.....MFCU Investigative Supervisor
Constance S. Saupe .....Legal Secretary
Pamela A. Sekulich .....Financial Services Specialist II
Elizabeth G. Sherron .....Senior Financial 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 Legal Secy. Sr./PS Init. Coordinator
Ryan J. Sneddon.....Deputy Scheduler and Press Assistant
Cheryl L. Snyder .....Legal Secretary
Michele A. Stanley.....Investigator
Eva A. Stuart .....Constituent Services Administrator
Rhonda H. Suggs.....Paralegal Senior
Gregory G. Taylor ..... Claims Representative
Kimberly Edward Taylor..... Executive Assistant to Solicitor General
David A. Terry ..... Computer Programmer
Susan W. Terry.....Paralegal Senior
Patricia S. Thomas..... Nurse Investigator
Erin K. Thompson .....Investigator
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 Program
Kathleen B. Walker .....Program Assistant, Victim Notification Program
Patricia J. Wash .....Legal Secretary
Christine A. Wells .....Financial Manager
Nanora W. Westbrook…….....Program Asst. Sr., Victim Notification Program
Amy R. Wight .....Special Projects Manager/GRIP Director
Kimberly Wilborn ..... Paralegal
M. Donette Williams .....Administrative Coordinator
Brenda K. Wright .....Legal Secretary Senior Expert
Michael J. Wyatt.....Investigator
Abigail T. Yawn ..... Legal Secretary Senior
James A. Zamparello.....Investigator

ATTORNEYS GENERAL OF VIRGINIA
1776 – 2011

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
A.S. Harrison Jr.	1958–1961
Frederick T. Gray[6]	1961–1962

[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.

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

CASES DECIDED IN THE SUPREME COURT OF VIRGINIA[1]

Bazan-Alfaro v. Commonwealth-Dep't of Med. Assistance Servs. Dismissing after oral argument plaintiff''s appeal pursuant to Rule 5:25, finding that the Commonwealth was entitled to payment of the full lien plus accrued interest.

Commonwealth v. Amerson. Reversing the trial court's decision to conditionally release Amerson out-of-state, finding that the SVP Act does not authorize out-of-state conditional release.

Commonwealth v. Bell. Reversing the trial court's decision to conditionally release Bell at his first annual review hearing, establishing that it is the respondent's burden to prove that he meets all four of the mandatory statutory criteria for conditional release found in Virginia Code § 37.2-912.

Duncan v. Virginia State Bar. Affirming a two-year suspension of license to practice law.

Doud v. Commonwealth. Affirming the circuit court's finding that the Commonwealth is not liable in tort for the acts of a sheriff or his deputies.

In re Counts. Dismissing a petition for writ of mandamus seeking to have a judge unseal records pertaining to a tax abatement proceeding that he had sealed at the request of the parties.

In re Province. Dismissing a petition for writ of mandamus to require a circuit court judge to reverse a discretionary ruling on whether petitioner is entitled to a jury trial on a specific issue in a domestic relations case.

Kantro v. Virginia State Bar. Dismissing an appeal of revocation of a license to practice law for, among other things, transferring $161,000 in legal fees to the attorney's mother, and failing to report that to the opposing side and the court during subsequent divorce proceedings.

Montgomery County v. Va. Dep't of Rail and Public Transp. Affirming trial court's ruling upholding the constitutionality of the Rail Enhancement Fund Statute, § 33.1-221.1:1.1, clearing the way for the construction of the intermodal facility in Elliston which is a part of the Heartland Corridor Rail Project, linking the Port of Virginia with the Midwest.

Taco Bell v. Commonwealth Transp. Comm'r. Reversing the trial court's rulings on whether certain property constituted personal property or fixtures for the purposes of awarding compensation in an eminent domain case.

Va. Marine Res. Comm'n v. Clark. Reversing Court of Appeals decision and entering final judgment in case dismissed by trial court for plaintiffs' failure to allege facts sufficient to establish standing.

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[1] A complete listing of all the cases handled by the Office of the Attorney General is not reprinted in this Report. Only 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*. Further, several noteworthy Supreme Court cases are highlighted in the Letter to the Governor describing the accomplishments of each Division of the Office of the Attorney General.

CASES PENDING IN THE SUPREME COURT OF VIRGINIA[2]

Blue Ridge Environmental Defense League v. Commonwealth. Appealing Court of Appeals reversal of trial court ruling setting aside permit issued by State Water Control Board to Dominion Power for discharges from North Anna Nuclear Power Plant.

Campbell County v. Royal. At the request of the Supreme Court, the Civil Litigation Division filed an *amicus curiae* brief on the application and effect of 42 U.S.C. § 9658, as limited by 42 U.S.C. § 9601(14) and (33), on the commencement date of the Commonwealth's statute of limitations and application and interaction of the Waste Management Act, Code § 10.1-1400 et seq.; former Solid Waste Management Regulations, 9 VAC 20-82-10 et seq.; and State Water Control Law, Code § 62.1-44.2 et seq.

Commonwealth v. Blaxton. Appealing trial court's decision to conditionally release Blaxton out- of-state, ruling that Interstate Compact could facilitate such a transfer since he had a remaining criminal supervision obligation.

Demille v. Commonwealth. Appealing trial court's decision that Demille is a sexually violent predator, despite no expert testimony on the ultimate issue.

FR Pike 7 Limited Partnership v. Commonwealth Transp. Comm'r. Appealing a jury award which allowed no compensation for alleged damages for changes to access to a shopping center pursuant to a road project.

Livingston v. Va. Dep't of Transp. Appealing the trial court's grant of defendants' demurrer and the court's ruling that a one-time instance of flooding caused by an extraordinary storm in July 2006 did not give rise to a cause of action for inverse condemnation. Landowners alleged that the flooding was caused by, among other things, relocation of Cameron Run during construction of the Capital Beltway in the 1960's.

CASES REFUSED BY THE SUPREME COURT OF VIRGINIA

Anderson v. Dep't of Professional and Occupational Regulation. Refusing to hear appeal from Anderson of Prince William Circuit Court decision dismissing appeal from general district court order transferring venue to Fairfax County.

Clayton v. State Building Code Technical Review Bd. Refusing to hear appeal from ruling of the Court of Appeals affirming trial court's upholding of board's decision that the Virginia Maintenance Code does not require retrofitting of petitioner's condominium building.

Monticello Apartments Ltd. Partnership v. Commonwealth Transp. Comm'r. Refusing an appeal of jury award that allowed no compensation for damages for changes to access to an apartment complex pursuant to a road project.

Ricks v. Commonwealth Transp. Comm'r. Denying Petitions for Appeal and Rehearing to reverse an adverse trial court decision determining plaintiff was not entitled to compensation under Article I, § 11 of the Virginia Constitution for damages sustained from a flood in October 2006 that occurred during an extraordinary storm.

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[2] Although these cases were pending in the Supreme Court in 2011, some have reached decision in early 2012, prior to publication of this Report. Those case decisions will be included in the 2012 Annual Report's Cases Decided.

Starr v. Commonwealth Transp. Comm'r. Denying pro se Petitions for Appeal and Rehearing to reverse trial court's dismissal on statute of limitations grounds of an eminent domain action claiming compensation under Article I, § 11 of the Virginia Constitution for damages sustained from VDOT's development of an I-81 cloverleaf, which affected access to her hotel business property.

Williams v. Real Estate Bd. Refusing petition for appeal filed by Williams from Court of Appeals ruling that affirmed in part the decision of the Henrico County Circuit Court upholding the Real Estate Board's revocation of petitioner's real estate license, but reversed the circuit court's decision to uphold the Board's conclusion that Williams violated Code § 54.1-2138.

CASES IN THE SUPREME COURT OF THE UNITED STATES

Amr v. Moore. Denying petition for writ of *certiorari* of former Virginia State University professor who claimed race and national origin discrimination and defamation.

ASWAN v. Commonwealth. Pending petition for writ of *certiorari* in action of relocation of facility which serves food to the homeless and others in the downtown Richmond area, claiming violations of their civil rights under the American with Disabilities Act and the Fair Housing Act.

Parks v. Lowe. Denying petition for writ of *certiorari* of former inmate's § 1983 action to recover against eight defendants for conspiring to violate certain Constitutional rights for various acts spanning the length of his latest incarceration, including his conviction.

Official Opinions

of

Attorney General

Kenneth T. Cuccinelli II

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

Each opinion in this report is preceded by an opinion number and 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: 2011 Op. Va. Att'y Gen. __.

Opinions of the Attorney General beginning with opinions issued in January 1996, and Annual Reports of the Attorney General may be accessed on the Internet at www.vaag.com. Opinions of the Attorney General are also available on LEXISNEXIS, beginning with opinions issued in July 1958; on WESTLAW, beginning with opinions issued in 1976; and on CaseFinder, beginning with opinions from July 1976.

OP. NO. 11-039

ADMINISTRATION OF GOVERNMENT: STATE AND LOCAL CONFLICT OF INTERESTS ACT

EDUCATION: TEACHERS, OFFICERS AND EMPLOYEES

The exception found in § 2.2-3119(E) applies to Franklin County, because it is a member of Planning District 12.

Section 2.2-3119(E) does not require the school board to forfeit hiring authority; rather, it requires the superintendent independently to reach a determination about the qualifications of an applicant who is married to or related to a school board member and to do so without any involvement of the school board in that hiring decision. Upon receiving the superintendent's recommendation, the non-conflicted school board members then can vote on the applicant.

The requirements of § 2.2-3119(E) are satisfied when a school board member recuses himself and certifies on the record that he had no involvement in the decision to hire his spouse or relative.

B. JAMES JEFFERSON, ESQUIRE
COUNTY ATTORNEY, FRANKLIN COUNTY
MAY 27, 2011

ISSUES PRESENTED

You ask a number of questions in connection with § 2.2-3119(E), which provides an exception to the general rule that prohibits certain family members or spouses from working in a particular school division if their spouse or relative serves on the school board of that school division. You first ask whether the exception, which applies to certain specifically named planning districts, applies to Franklin County. You then ask whether it is possible for the superintendent to certify that "no member of the Board had any involvement with the hiring decision" when the school board, by statute, retains the ultimate responsibility for hiring school personnel. You further inquire whether the school board member avoids any impermissible conflict if he recuses himself, avoids being physically present during the closed session during which his spouse or relative employee is discussed, avoids voting on the issue, and certifies by affidavit that he had no involvement in the hiring decision. You also ask whether any citizen of the County could bring a civil suit for malfeasance in office and/or seek criminal prosecution against the school board or the superintendent for participating in the hiring of such an individual. Finally, you ask whether it is unconstitutional for the General Assembly to provide the exception for individuals in certain specified areas of the Commonwealth without extending that exception to all.

RESPONSE

It is my opinion that the exception found in § 2.2-3119(E) applies to Franklin County, because it is a member of Planning District 12. It is further my opinion that § 2.2-3119(E) can be harmonized with other statutes that require the school board to retain ultimate authority for hiring decisions. Section 2.2-3119(E) does not require the

school board to forfeit that authority; rather, it requires the superintendent independently to reach a determination about the qualifications of an applicant who is married to or related to a school board member and to do so without any involvement of the school board in that hiring decision. Upon receiving the superintendent's recommendation, the non-conflicted school board members then can vote on the applicant. I also conclude that the requirements of § 2.2-3119(E) are satisfied when a school board member recuses himself and certifies on the record that he had no involvement in the decision to hire his spouse or relative. Although it is my view that the Code authorizes a Commonwealth's Attorney or citizens to file suits for violations of the Conflicts Act, such a suit would be unsuccessful when the strictures of § 2.2-3119(E) are followed because no violation of the Act would have occurred. Finally, I am unable to conclude that § 2.2-3119(E) is unconstitutional, given the presumption of constitutionality of statutes and the highly deferential standard of review that would be applied to judicial scrutiny of this statute.

APPLICABLE LAW AND DISCUSSION

The General Assembly of Virginia has vested hiring authority for schools in local school boards. Section 22.1-313(A) provides that "[t]he school board shall retain its exclusive final authority over matters concerning employment and supervision of its personnel, including dismissals, suspensions and placing on probation." In addition, § 22.1-293(A) provides that "[a] school board, upon recommendation of the division superintendent, may employ principals and assistant principals." Section 22.1-295(A) states that "[t]he teachers in the public schools of a school division shall be employed and placed in appropriate schools by the school board upon recommendation of the division superintendent."

Section 2.2-3119 of the State and Local Government Conflicts of Interest Act ("the Conflicts Act") provides in relevant part that

> Notwithstanding any other provision of this chapter, it shall be unlawful for the school board of any county or city or of any town constituting a separate school division to employ or pay any teacher or other school board employee from the public funds, federal state or local, or for a division superintendent to recommend to the school board the employment of any teacher or other employee, if the teacher or other employee is the father, mother, brother, sister, spouse, son daughter, son-in-law, daughter-in-law, sister-in-law or brother-in-law of the superintendent, or any member of the school board.

Subsection (E) of § 2.2-3119 carves out an exception to this general rule, by specifying that

> The provisions of this section shall not apply to employment by a school district located in Planning Districts 11, 12, and 13 of the father, mother, brother, sister, spouse, son, daughter, son-in-law, daughter-in-law, sister-in-law, or brother-in-law of any member of the school board provided (i) the member certifies that he had no involvement with the hiring decision and (ii) the superintendent certifies to the remaining members of the governing

> body in writing that the employment is based upon merit and fitness and the competitive rating of the qualifications of the individual and that no member of the board had any involvement with the hiring decision.[1]

A Planning District Commission is a political subdivision of the Commonwealth, chartered under the Regional Cooperation Act by the local governments of each planning district.[2]

Like other government entities, school boards may delegate responsibilities to subordinate officers. For example, the school board can delegate to the superintendent "such other duties as may be prescribed . . . by the school board."[3]

With respect to your first question, the fact that Franklin County is a member of two planning districts, Planning District 12 and Planning District 5,[4] does not alter the fact that it is in Planning District 12. Because it is located in Planning District 12, it falls under the plain language of § 22.1-293(E).

One could read § 2.2-3119(E) to require the school board to have no involvement with the decision to hire an employee who is married to or related to a school board member. Such a reading would conflict with several statutes: § 22.1-313(A) (providing that the ultimate responsibility for hiring in a school division rests with the school board) and §§ 22.1-293 (providing for the school board to make hiring decisions with respect to principals and assistant principals) and 22.1-295 (providing for the school board to make hiring decisions with respect to teachers). "When two statutes seemingly conflict, they should be harmonized, if at all possible, to give effect to both. However, when two statutes do conflict, and one statute speaks to a subject generally and another deals with an element of that subject specifically, the more specific statute is controlling."[5] Section 2.2-3119(E) can be harmonized with §§ 22.1-293, 22.1-295(A) and 22.1-313(A). The plain language of § 2.2-3119(E) does not require the school board to have no involvement in the hiring decision. It simply requires that *at the time the superintendent presents the hiring recommendation* to the school board, he must certify that "no member of the school board had any involvement in the [superintendent's] hiring decision."[6] In other words, the superintendent is making a certification that he reached an independent determination of the merit of the candidate without any involvement by school board members. When presented with the superintendent's recommendation, school board members – save the school board member married to or related to the applicant – can then vote on hiring the candidate.

In response to your third question, § 2.2-3119(E) is satisfied if the school board member who is married to or related to the person seeking employment recuses himself from participating in the decision and certifies on the record that he had no involvement in the hiring decision. If, in addition to these requirements, the school board member in this situation also avoids being physically present at the closed session during which the employee is discussed, and certifies by affidavit that he had no involvement in the hiring decision, the school board member certainly would satisfy § 2.2-3119(E).

You next ask whether a citizen or a commonwealth's attorney could file suit for a violation of the Conflicts Act if one of the specified relatives of a school board members is hired to work in the school division covered by § 2.2-3119(E). Section 2.2-3126(B) authorizes the attorney for the Commonwealth to enforce the provisions of this chapter with respect to officers of local government. The Code further provides that "[i]rrespective of whether an opinion of the attorney for the Commonwealth or the Attorney General has been requested and rendered, any person has the right to seek a declaratory judgment or other judicial relief as may be provided by law."[7] I can find no precedent for the precise scope of the relief a citizen can seek under this provision. Nevertheless, if the school board and the superintendent have followed the strictures of § 2.2-3119(E), such a suit would not be successful because no *knowing* violation of the Conflicts Act could be established. Even if the court were to conclude that the school board could not delegate its hiring authority to the superintendent in any circumstance, and therefore § 2.2-3119(E) is a nullity, or, alternatively, that § 2.2-3119(E) is found to be unconstitutional, a superintendent or school board member who relies on an express and presumptively valid provision of the Code could not have committed a *knowing* violation of the law.

I further note that a commonwealth's attorney can provide advisory opinions to local government officials with respect "to whether the facts in a particular case would constitute a violation of" the Conflicts Act.[8] A good-faith reliance on a written advisory opinion, made after full disclosure of the facts, would shield the requester from a prosecution for violations of the Conflicts Act.[9]

Finally, you ask whether the limited conflicts exception in § 2.2-3119(E) for Planning Districts 11, 12, and 13 violates any provision of the Virginia or United States Constitutions. Article IV, § 14 of the Virginia Constitution imposes certain restrictions on the power of the General Assembly to impose a "local, special or private law."

> The essence of prohibited special legislation is the existence of an arbitrary separation of persons, places, or things of the same class, with the result that some of them will, and some will not, be affected by the law. Nonetheless, constitutional prohibitions against special laws do not proscribe classification. All classifications import some degree of discrimination, but the legislature is not required to achieve mathematical nicety. The classification, however, must be natural and reasonable, and appropriate to the occasion. Routinely, legislation pertains to specific classifications of persons, places or property. Such an enactment is nonetheless "general," provided the classification is reasonable, not arbitrary, and applies to all persons who are similarly situated as well as to all parts of the State where like conditions exist."[10]

"Importantly, the necessity for and the reasonableness of the classification are primarily questions for the legislature. If any state of facts can be reasonably conceived that would sustain it, that state of facts at the time the law was enacted must be assumed. And the burden is upon the assailant of the legislation to establish that it does not rest upon a reasonable basis, and is essentially arbitrary."[11] Finally,

and importantly, "[a]ny reasonable doubt regarding the constitutionality of an enactment must be resolved in favor of the law's validity."[12]

Other potentially applicable vehicles for challenge are the Equal Protection Clause and the substantive due process aspect of the Fourteenth Amendment to the United States Constitution.[13] Government employment free of any conflict of interest does not implicate any suspect classes or fundamental rights, so the distinction would be reviewed under the highly deferential rational basis scrutiny.[14]

> [E]qual protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against [an] equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification . . . . [A] legislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data.[15]

Given the "strong presumption in favor of the constitutionality of statutes,"[16] the highly deferential standard of review that would be applied to the classification at issue here, and the great reluctance of the Attorney General to declare any statute unconstitutional,[17] I am unable to conclusively determine that § 2.2-3119(E) is unconstitutional.[18]

CONCLUSION

Accordingly, it is my opinion that the exception found in § 2.2-3119(E) applies to Franklin County, because it is a member of Planning District 12. It is further my opinion that § 2.2-3119(E) can be harmonized with other statutes that require the school board to retain ultimate authority for hiring decisions. Section 2.2-3119(E) does not require the school board to forfeit that authority; rather, it requires the superintendent independently to reach a determination about the qualifications of an applicant who is married to or related to a school board member and to do so without any involvement of the school board in that hiring decision. Upon receiving the superintendent's recommendation, the non-conflicted school board members then can vote on the applicant. I also conclude that the requirements of § 2.2-3119(E) are satisfied when a school board member recuses himself and certifies on the record that he had no involvement in the decision to hire his spouse or relative. Although it is my view that the Code authorizes a Commonwealth's Attorney or citizens to file suits for violations of the Conflicts Act, such a suit would be unsuccessful when the strictures of § 2.2-3119(E) are followed because no violation of the Act would have occurred. Finally, I am unable to conclude that § 2.2-3119(E) is unconstitutional, given the presumption of constitutionality of statutes and the highly deferential standard of review that would be applied to judicial scrutiny of this statute.

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[1] During the 2011 Session, the General Assembly added planning district 3 to this list. 2011 Va. Acts ch. 517. Planning District 3 covers the Counties of Bland, Carroll, Grayson, Smyth, Washington and Wythe; the cities of Bristol and Galax, and the towns of Abingdon, Chilhowie, Damascus, Fries, Glade Spring, Hillsville, Independence, Marion, Rural Retreat, Saltville, Troutdale and Wytheville. The Districts

currently covered by the statute include Planning District 11, which covers counties of Amherst, Appomattox, Bedford and Campbell; the cities of Bedford and Lynchburg; the towns of Altavista, Amherst, Appomattox and Brookneal. Planning District 12 is comprised of Franklin, Henry, Patrick and Pittsylvania; the cities of Danville and Martinsville and the town of Rocky Mount. Finally, Planning District 13 includes the counties of Brunswick, Halifax and Mecklenburg and the towns of South Hill and South Boston. *See* http://www.dhcd.virginia.gov/CommissiononLocalGovernment/pages/PDC.htm (listing the different planning commissions and their members).

[2] *See* VA. CODE ANN. §§ 15.2-4200 through 15.2-4222 (2008 & Supp. 2010).

[3] VA. CODE ANN. § 22.1-70 (2006).

[4] The General Assembly expressly has authorized a locality to belong to more than one planning district. Section 15.2-4220 (2008).

[5] Viking Enter. v. County of Chesterfield, 277 Va. 104, 110, 670 S.E.2d 741, 744 (2009) (internal citations, quotation marks, and alternations omitted).

[6] VA. CODE ANN. § 2.2-3121 (2008).

[7] Section 2.2-3126(B).

[8] *Id.* If the local government official disagrees with the conclusion of the Commonwealth's Attorney, he can seek a potentially overriding opinion from the Office of the Attorney General. *Id.*

[9] Section 2.2-3121(B).

[10] Holly Hill Farm Corp. v. Rowe, 241 Va. 425, 430-31, 404 S.E.2d 48, 50 (1991) (citations and internal quotation marks omitted).

[11] *Id.* at 431, 404 S.E.2d at 50 (citations and internal quotations omitted).

[12] *Id.* at 430, 404 S.E.2d at 50 (citations and internal quotations omitted).

[13] The Fourteenth Amendment of the United States Constitution provides that "no State shall … deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. This provision includes both a procedural and a substantive component. Etheridge v. Medical Ctr. Hosp., 237 Va. 87, 97, 376 S.E.2d 525, 530 (1989). The Fourteenth Amendment of the United States Constitution also provides that "[n]o State … shall deny to any person within its jurisdiction of the equal protection of the laws." U.S. Const. amend. XIV, § 1.

[14] Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 457-58 (1988); *see also* Hess v. Snyder Hunt Corp., 240 Va. 49, 55, 392 S.E.2d 817, 821 (1990).

[15] Advanced Towing Co. v. Fairfax Cnty. Bd. of Sprvrs., 280 Va. 187, 191, 694 S.E.2d 621, 623-24 (2010) (quoting FCC v. Beach Comm'ncs, Inc., 508 U.S. 307, 313-15 (1993)).

[16] FFW Enters. v. Fairfax County, 280 Va. 583, 590, 701 S.E.2d 795, 799 (2010).

[17] *See, e.g.*, 2007 Op. Va. Att'y Gen. 30, 34-35.

[18] *But see* Thompson v. Gallagher, 489 F.2d 443 (5th Cir. 1973) (finding Equal Protection violation in city employee classification); Dean v. Paolicelli, 194 Va. 219, 237-38, 72 S.E.2d 506, 517-18 (1952) (finding a violation of the prohibition on special laws).

OP. NO. 11-045

ADMINISTRATION OF GOVERNMENT: STATE AND LOCAL CONFLICT OF INTERESTS ACT

Persons appointed by local governing bodies or by school boards to a position of trust, as well as members of local boards and councils, need not file a disclosure statement unless the local governing body or school board specifically requires them to do so.

THE HONORABLE TAMARA C. NEO
COMMONWEALTH'S ATTORNEY FOR BUCHANAN COUNTY
APRIL 21, 2011

ISSUE PRESENTED

You inquire whether persons appointed to local boards and councils, or persons who occupy positions of trust for a locality, automatically must file disclosure statements under § 2.2-3115, or whether such persons must file a disclosure only when the local governing body has enacted an ordinance specifically requiring such persons to file a disclosure statement.

RESPONSE

It is my opinion that persons who are appointed by local governing bodies or by a school board to a position of trust, as well as members of local boards and councils, need not file the disclosure statement unless the local governing body specifically requires them to do so by enacting an ordinance or, for school boards, by adopting a policy to that effect.

APPLICABLE LAW AND DISCUSSION

The State and Local Government Conflict of Interests Act ("the Act") imposes a variety of restrictions and requirements on local government officers. Among those requirements is a disclosure statement listing various economic interests:

> [t]he members of every governing body and school board of each county and city and of towns with populations in excess of 3,500 shall file, as a condition to assuming office or employment, a disclosure statement of their personal interests and other information as is specified on the form set forth in § 2.2-3117 and thereafter shall file such a statement annually on or before January 15.
>
> The members of the governing body of any authority established in any county or city, or part or combination thereof, and having the power to issue bonds or expend funds in excess of $10,000 in any fiscal year, shall file, as a condition to assuming office, a disclosure statement of their personal interests and other information as is specified on the form set forth in § 2.2-3118 and thereafter shall file such a statement annually on or before January 15, unless the governing body of the jurisdiction that appoints the members requires that the members file the form set forth in § 2.2-3117.
>
> Persons occupying such positions of trust appointed by governing bodies and persons occupying such positions of employment with governing *bodies as may be designated to file by ordinance of the governing body shall file*, as a condition to assuming office or employment, a disclosure statement of their personal interests and other information as is specified on the form set forth in § 2.2-3117 and thereafter shall file such a statement annually on or before January 15.

> Persons occupying such positions of trust appointed by school boards and persons occupying such positions of employment with school boards *as may be designated to file by an adopted policy of the school board* shall file, as a condition to assuming office or employment, a disclosure statement of their personal interests and other information as is specified on the form set forth in § 2.2-3117 and thereafter shall file such a statement annually on or before January 15.
>
> B. Nonsalaried citizen members of local boards, commissions and councils *as may be designated by the governing body shall file*, as a condition to assuming office, a disclosure form of their personal interests and such other information as is specified on the form set forth in § 2.2-3118 and thereafter shall file such form annually on or before January 15.[1]

As you note, the Act plainly requires members of the board of supervisors and of the school board to file a disclosure statement listing various economic interests. Under the plain language of the statute, persons who are appointed by the local governing body to a "position of trust" or to a local board or council are not required to file a disclosure unless "designated to file by ordinance of the governing body."[2] When the General Assembly wishes to require automatic disclosures, it knows how to do so, as it has with members of the school board and members of the governing body. With respect to persons who occupy a position of trust, or who sit on local boards or councils, the General Assembly has added the phrase "as may be designated by the governing body" or "as may be designated to file by an adopted policy of the school board." Therefore, unless the governing body has enacted an ordinance or the school board has adopted a policy that requires the disclosure statement to be completed and filed, there is no need for persons who occupy positions of trust or members of local boards or councils to file the disclosure statement.[3] This interpretation is consistent with past opinions of this Office.[4]

CONCLUSION

Accordingly, it is my opinion that persons who are appointed by local governing bodies or by a school board to a position of trust, as well as members of local boards and councils, need not file the disclosure statement unless the local governing body specifically requires them to do so by enacting an ordinance or, for school boards, by adopting a policy to that effect.

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[1] VA. CODE ANN. §§ 2.2-3115(A) and (B) (2008) (emphasis added).

[2] Section 2.2-3115(A).

[3] Section 2.2-3115(B).

[4] Two previous opinions construed § 2.1-639.14, the predecessor statute to § 2.2-3115. Although the statute was recodified, its language did not change. *See* 1996 Op. Va. Att'y Gen. 4, 4 (noting that "persons appointed by the governing body or school board to 'positions of trust' must file if 'designated to file by ordinance of the governing body'" and, further, that the governing body can "designate which, if any, '[n]onsalaried citizen members of local boards, commissions and councils' must file a financial disclosure form."); 1996 Op. Va. Att'y Gen. 8, 8-9 (noting that a locality is not required to adopt an ordinance mandating the filing of a disclosure form).

OP. NO. 11-096

ADMINISTRATION OF GOVERNMENT: VIRGINIA FREEDOM OF INFORMATION ACT

ELECTIONS: LOCAL ELECTORAL BOARDS

Discussion of electoral board business by two members of the Board constitutes a meeting of the Board under FOIA that must be conducted in public and properly noticed as required by the Act.

Transaction of public business includes conversations over the telephone involving rescheduling board meetings, submitting agenda items, commenting on unapproved draft minutes of prior meetings and other similar matters.

MR. ROBIN R. LIND
SECRETARY, GOOCHLAND COUNTY ELECTORAL BOARD
AUGUST 5, 2011

ISSUE PRESENTED

You inquire whether under the open meeting provisions of the Freedom of Information Act ("the Act") you may conduct a telephone conversation with another member of the Goochland County Board of Elections "for the purpose of ascertaining a member's position with respect to the transaction of public business," which would include "rescheduling board meetings, submitting agenda items, commenting on the unapproved draft minutes of prior meetings, and other items to be considered in forthcoming open public meetings."

RESPONSE

It is my opinion that the discussion of the business of the electoral board by two members of the Board constitutes a meeting of the Board under the Act that must be conducted in public and properly noticed as required by the Act. It is further my opinion that the transaction of public business includes conversations over the telephone involving "rescheduling board meetings, submitting agenda items, commenting on unapproved draft minutes of prior meetings" and other similar matters. Such matters, however, may be discussed via electronic mail. Electronic mail lacks the simultaneous feature of telephone meetings and, therefore, does not constitute a "meeting" under the Act.

APPLICABLE LAW AND DISCUSSION

The General Assembly enacted the Virginia Freedom of Information Act to

> [e]nsure[] the people of the Commonwealth . . . free entry to meetings of public bodies wherein the business of the people is being conducted. The affairs of government are not intended to be conducted in an atmosphere of secrecy since at all times the public is to be the beneficiary of any action taken at any level of government. Unless a public body or its officers or employees specifically elect to exercise an exemption provided by this

> chapter or any other statute, every meeting shall be open to the public and all public records shall be available for inspection and copying upon request. All public records and meetings shall be presumed open, unless an exemption is properly invoked.[1]

In addition, the "provisions of this chapter shall be liberally construed to promote an increased awareness by all persons of governmental activities and afford every opportunity to citizens to witness the operations of government."[2]

The Act mandates that "[a]ll meetings of public bodies shall be open," with limited exceptions.[3] Furthermore, subject to limited exceptions, "[n]o meeting shall be conducted through telephonic, video, electronic or other means where the members [of the public body] are not physically assembled to discuss or transact public business."[4] Boards of local government are forbidden from "conduct[ing] a meeting wherein the public business is discussed or transacted through telephonic, video, electronic or other communication means where the members are not physically assembled."[5] In addition, before a meeting, a public body must "give notice of the date, time, and location of its meetings" in the manner specified by the statute.[6]

"Meeting" or "meetings" is defined in § 2.2-3701 as

> the meetings including work sessions, when sitting physically, or through telephonic or video equipment . . . as a body or entity, or as an informal assemblage of (i) as many as three members or (ii) a quorum, if less than three, of the constituent membership, wherever held, with or without minutes being taken, whether or not votes are cast, of any public body.

The Goochland County Board of Elections is composed of three individuals. A quorum is therefore present when one member of the Board telephones another member to discuss the business of the electoral board.[7] Consequently, under the Act, the discussion of the affairs of the Board between two members over the telephone constitutes a meeting. It would constitute an "informal assemblage" of the members of the Board.

The statute excludes certain assemblages among board members from the requirements of the Act. Section 2.2-3707(G) provides that

> Nothing in this chapter shall be construed to prohibit the gathering or attendance of two or more members of a public body (i) at any place or function where *no part* of the purpose of such gathering or attendance is the discussion or transaction of any public business, and such gathering or attendance was not called or prearranged with any purpose of discussing or transacting any business of the public body . . . . [Emphasis added.]

In addition, § 2.2-3710(B) provides that

> nothing contained herein shall be construed to prohibit . . . separately contacting the membership, or any part thereof, of any public body for the purpose of ascertaining a member's position with respect to the transaction of public business, whether such contact is done in person, by telephone or

> by electronic communication, *provided the contact is done on a basis that does not constitute a meeting as defined in this chapter*[.] [Emphasis added.]

You ask whether these provisions would permit the communication over the telephone of certain matters concerning the Board. While the determination of whether any particular conduct would violate the Act must be made on a case-by-case basis, I can offer the following guidelines.[8] Under the Act, exemptions from public access to meetings must be narrowly construed so that no meeting is closed "unless specifically made exempt pursuant to this chapter of other specific provision of law."[9]

Although the Code does not define the term "public business," no distinction can be found between procedural and substantive business affairs. This office previously has concluded that meeting "for the purpose of deliberating policy or preparing to take action" constitutes public business.[10] Further, the Roanoke Circuit Court concluded that "'officially transacting public business' . . . contemplates a broad view extended not only to the taking of an official vote but also to the peripheral discussions surrounding the vote."[11] Under the plain language of the statute, a telephone conversation about scheduling, draft minutes, or items to place or remove from the agenda would constitute a "discussion . . . of . . . public business."

Finding no applicable exception, I conclude that the discussion of the affairs of the Board, including rescheduling board meetings, submitting agenda items, and commenting on the draft minutes of prior meetings all constitute a part of the "public business" of the Board. By its plain terms, § 2.2-3710(B) offers no relief, because it applies only when no "meeting" is taking place. As noted above, when two or more members of the electoral board transact or discuss public business over the telephone, that constitutes a meeting of an electoral board.

You relate that it would impose a substantial hardship if telephone calls between two members of the Board were deemed to be a meeting under the Act. That may well be the case. No matter how impractical the requirements of the Act might be, however, where the Act applies, it must be followed. Exceptions to the Act must be enacted into law by the General Assembly.[12]

I further note, however, that under the jurisprudence of the Supreme Court of Virginia, interaction from one board member to another via electronic mail does not offend the Act.[13] In contrast to telephonic interaction, which is simultaneous, electronic mail is "more like traditional letters sent by ordinary mail, courier, or facsimile."[14] Such interaction is not an "assemblage" under the Act because it lacks the "quality of simultaneity."[15] Therefore, two members of the Board may exchange emails about rescheduling board meetings, submitting agenda items, and commenting on draft minutes of prior meetings without triggering the provisions of the Act.

CONCLUSION

Accordingly, it is my opinion that the discussion of the business of the electoral board by two members of the Board constitutes a meeting of the Board under the Act. It is

further my opinion that the transaction of public business includes conversations over the telephone involving "rescheduling board meetings, submitting agenda items, commenting on unapproved draft minutes of prior meetings" and other similar matters. Such matters, however, may be discussed via electronic mail, which lacks the simultaneous feature of telephone meetings. Electronic mail, therefore, does not constitute a "meeting" under the Act.

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[1] VA. CODE ANN. § 2.2-3700 (2008).

[2] *Id.*

[3] Section 2.2-3707(A) (Supp. 2010).

[4] Section 2.2-3707(B).

[5] Section 2.2-3708(A) (2008).

[6] Section 2.2-3707(C).

[7] VA. CODE ANN. § 24.2-107 (Supp. 2010) (quorum for electoral board consists of two members).

[8] This Office historically has declined to issue opinions requiring a factual determination.

[9] Section 2.2-3700(B).

[10] 1984-85 Op. Va. Att'y Gen. 426, 427 (preparing city officials for individual court testimony was "public business," but the Act did not apply because there was no "informal assemblage" under the facts presented).

[11] WDBJ Telev. v. Roanoke Cnty., 4 Va. Cir. 349, 351 (Roanoke Cnty. Cir. Ct. 1985). The court concluded that the meetings at issue, which involved members of the board of supervisors and a professional who was there to teach the members of the board to better communicate with each other, how to handle stress and techniques of decision-making did not involve the transaction of public business. Rather, "it was a professional's critique of their methods of dealing with the public and with each other but not upon the merits of how they should or should not vote or stand on an issue of public business." *Id*. at 352.

[12] I note that the General Assembly is aware of the exigent peculiarities associated with the duties of electoral boards. The legislature has provided several exemptions from the FOIA meeting requirements to deal with these particular circumstances. *See* § 24.2-107.

[13] Beck v. Shelton, 267 Va. 482, 489-92, 593 S.E.2d 195, 198-200 (2004). The Court cautioned that a meeting under the Act "may be present when e-mail technology is used in a 'chat room' or as 'instant messaging.'" *Id.* at 490, 593 S.E.2d at 198.

[14] *Id.* at 491, 593 S.E.2d at 198.

[15] *Id.* at 491, 593 S.E.2d at 199.

OP. NO. 11-059

ADMINISTRATION OF GOVERNMENT: VIRGINIA PUBLIC PROCUREMENT ACT

E-verify requirement does not apply to state contracts that are primarily for the acquisition of goods but it can apply if the contract is primarily to acquire services.

E-verify requirement does not apply to subcontractors under a State contract.

Seasonal workers, who return to a contractor's work site after having left the country and lawfully re-entered, are "newly hired" for purposes of E-Verify if they did not have at all times a reasonable expectation of resuming employment.

THE HONORABLE ALBERT C. POLLARD, JR.
MEMBER, HOUSE OF DELEGATES
JULY 1, 2011

ISSUES PRESENTED

You inquire about the scope of the duty imposed under a recently enacted law[1] upon certain employers who transact business with the Commonwealth. This law will go into effect on December 1, 2013.[2] Using the hypothetical of a purchase of tomatoes by an agency of the Commonwealth, you ask whether § 2.2-4308.2 will require the contractor to use E-Verify to confirm the employment eligibility of employees who pick the tomatoes as well as employees who drive the delivery truck. In addition, you ask whether § 2.2-4308.2 applies to subcontractors under a State contract. Finally, you ask whether a contractor must treat seasonal workers as "newly hired" for purposes of E-Verify when they return to the contractor's work site after leaving and lawfully re-entering the country.

RESPONSE

It is my opinion that § 2.2-4308.2 does not apply to state contracts that are primarily for the acquisition of goods but that it can apply if the contract is primarily to acquire services. It is further my opinion that § 2.2-4308.2 does not apply to subcontractors. Finally, it is my opinion that seasonal workers, who return to a contractor's work site after having left the country and lawfully re-entered, are "newly hired" for purposes of E-Verify if they did not have at all times a reasonable expectation of resuming employment.

APPLICABLE LAW AND DISCUSSION

Federal law generally prohibits the employment of unauthorized aliens within the United States.[3] As an enforcement measure, federal law requires employers to verify the eligibility status of individuals they hire.[4] To facilitate the verification process, Congress directed the Secretary of Homeland Security to implement an E-Verify program to enable employers to confirm employment eligibility of new hires.[5] The Secretary, in turn, has issued regulations governing the program.[6]

While participation in E-Verify is voluntary for most businesses, companies may be required by state law or federal regulation to use E-Verify.[7] In its 2011 Session, the General Assembly of Virginia enacted a law requiring certain employers to register and participate in the E-Verify program.[8]

Section 2.2-4308.2 amends the Virginia Public Procurement Act[9] to require the use of E-Verify by certain employers who enter into certain contracts with agencies of the Commonwealth. Specifically, it provides that

> Any employer with more than an average of 50 employees for the previous 12 months entering into a contract in excess of $50,000 with any agency of the Commonwealth to *perform work or provide services* pursuant to such contract shall register and participate in the E-Verify program to verify

> information and work authorization of its newly hired employees performing work pursuant to such public contract.[10]

"E-Verify program" refers to "the electronic verification … program of the Illegal Immigration Reform and Immigration Responsibility Act [], as amended, operated by the U.S. Department of Homeland Security … to verify the work authorization status of newly hired employees[.]"[11]

While the scope of the new provision is broader than its placement among sections of the Virginia Public Procurement Act pertaining to construction[12] might suggest, the plain language of the enactment limits its application to contracts "to perform work or provide services." The Virginia Public Procurement Act defines "services" as "any work performed by an independent contractor wherein the service rendered does not consist primarily of acquisition of equipment or materials…."[13] It is my opinion that, given the plain language of the statute, the requirement found in § 2.2-4308.2 to register and participate in E-Verify is triggered only when the performance required by the contract emphasizes services rather than goods. A contract that is primarily for the acquisition of goods will not trigger the new requirement.

Your hypothetical scenario concerning a contract to purchase tomatoes involves primarily an acquisition of goods, even if it involves some incidental service elements, such as a requirement to deliver the goods purchased. In response to your first question concerning a hypothetical purchase of tomatoes by the Commonwealth, I therefore conclude that a contract to purchase tomatoes does not trigger the requirements of § 2.2-4308.2 and, therefore, in that situation the contractor is not required to use E-Verify to confirm the employment eligibility of employees who pick the tomatoes or who drive the delivery truck.

In your second question, you raise the possibility that a prime contractor covered by § 2.2-4308.2 might subcontract the work to another company, and in such circumstances, you ask whether the employment eligibility of the employees who perform the subcontracted work must be confirmed through E-Verify. By its terms, § 2.2-4308.2 applies only to companies that enter into a contract with an agency of the Commonwealth. In other provisions of the Virginia Public Procurement Act, the General Assembly has made requirements applicable not only to the prime contractor but also to its subcontractors.[14] Section 2.2-4308.2 does not include any such provision. Moreover, by its terms, § 2.2-4308.2 requires the contractor to use E-Verify to confirm the employment eligibility of "its" employees. It does not require the Contractor to use E-Verify to confirm eligibility of workers employed by subcontractors. It is therefore my opinion that § 2.2-4308.2 does not apply to subcontractors. Although § 2.2-4308.2 does not require a contractor to check E-Verify for subcontractors, I would further note, however, that agencies of the Commonwealth are free to refuse to do business with businesses that are engaged in unethical or illegal business practices.

Finally, you ask whether seasonal workers, who return to a contractor's work site after having left the country and lawfully re-entered, are considered "newly hired" under the E-Verify program. Because statutes relating to the same subject matter are

to be read *in pari materia*,[15] I find that the federal regulations governing the implementation of the federal law cited in the Virginia statute provide guidance in interpreting the phrase.[16] The regulations issued by the Department of Homeland Security specifically address the application of the federal statute to seasonal employees.[17] Those regulations provide that:

> An employer will not be deemed to have hired an individual for employment if the individual is continuing in his or her employment and has a reasonable expectation of employment at all times.[18]

The regulation further provides that "[a]n individual is continuing in his or her employment" when "an individual is engaged in seasonal employment."[19] Nonetheless, "[t]he employer who is claiming that an individual is continuing in his or her employment must also establish that the individual expected to resume employment at all times and that the individual's expectation is reasonable."[20]

In light of this authority, I conclude that a seasonal worker, who returns to a contractor's work site after having left the country and lawfully re-entered, is "newly hired" for purposes of E-Verify if he did not have at all times a reasonable expectation of resuming employment. Conversely, a seasonal worker would not be "newly hired" if he in fact did at all times have a reasonable expectation of resuming employment. The determination of whether there was a reasonable expectation of resuming employment must be made on a case-by-case basis, considering all relevant factors.[21]

CONCLUSION

Accordingly, it is my opinion that § 2.2-4308.2 does not apply to contracts that are primarily for the acquisition of goods, including tomatoes, but that it can apply if the contract is primarily to acquire services. It is further my opinion that § 2.2-4308.2 does not apply to subcontractors. Finally, it is my opinion that seasonal workers, who return to a contractor's work site after having left the country and lawfully re-entered, are "newly hired" for purposes of E-Verify if they did not have at all times a reasonable expectation of resuming employment.

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[1] 2011 Va. Acts ch. 573; 2011 Va. Acts ch. 583. *Id*. cl. 2.

[2] *Id*. cl. 2.

[3] 8 U.S.C. § 1324a(a) (2006).

[4] 8 U.S.C. §§ 1324a(a)(1)(B); 1324a(b) (2006).

[5] *See* Illegal Immigration Reform and Immigration Responsibility Act of 1996 §§ 401 through 404, 8 U.S.C.S. § 1324a note (LexisNexis 2011).

[6] 8 C.F.R. §§ 274a.1 through 274a.11.

[7] *See* Chamber of Commerce v. Whiting, No. 09-115, 2011 U.S. LEXIS 4018, at *45 (U.S., May 26, 2011).

[8] *See* 2011 Va. Acts ch. 573, cl. 1; 2011 Va. Acts ch. 583, cl. 1. The law has a delayed effective date of December 1, 2013. *Id*. cl. 2.

[9] VA. CODE ANN. §§ 2.2-4300 through 2.2-4377 (2008 & Supp. 2010).

[10] 2011 Va. Acts ch. 573, cl. 1; 2011 Va. Acts ch. 583, cl. 1 (emphasis added).

[11] *Id*.

[12] *See* §§ 2.2-4305 through 2.2-4308.1 (2008 & Supp. 2010). Chapters 573 and 583 add a new provision, § 2.2-4308.2, and amend § 2.2-4317.

[13] Section 2.2-4301 (Supp. 2010).

[14] *See, e.g.,* §§ 2.2-4311, 2.2-4312 & 2.2-4354 (2008).

[15] *See* 2008 Op. Va. Att'y Gen. 52, 53-54 ("'where legislation dealing with a particular subject consists of a system of related general provisions indicative of settled policy, new enactments . . . are to be taken as intended to fit into the existing system . . . and they should be so construed as to harmonize the general tenor or purport of the system and make the scheme consistent in all its parts and uniform in its operation'") (citations omitted).

[16] *See* 1982-83 Op. Va. Att'y Gen. 484, 485 (interpreting Virginia statute's use of "work experience program component" in harmony with the nearly identical language contained in a related federal statute). The federal law requires the use of the confirmation system "to seek confirmation of the identity and employment eligibility of an individual, by not later than the end of 3 working days (as specified by the Secretary of Homeland Security) after the date of the hiring…." *See* note 5, *supra*, at § 403(a)(3)(A).

[17] *See* 8 C.F.R. § 274a.2(b)(viii)(A)(*8*).

[18] 8 C.F.R. § 274a.2(b)(viii).

[19] 8 C.F.R. § 274a.2(b)(viii)(A).

[20] 8 C.F.R. § 274a.2(b)(viii)(B).

[21] *See id*. (providing a non-exclusive list of seven factors that would indicate that an individual has a reasonable expectation of resuming employment).

OP. NO. 11-095

AGRICULTURE: IMPLEMENTATION OF TOBACCO MASTER SETTLEMENT AGREEMENT (VIRGINIA ESCROW STATUTE)

A retailer who allows customers to use an on-premises machine to make RYO cigarettes for that customer's personal use is not a "tobacco product manufacturer" under the Virginia Escrow Statute.

THE HONORABLE TERRY G. KILGORE
MEMBER, HOUSE OF DELEGATES
SEPTEMBER 2, 2011

ISSUE PRESENTED

You inquire whether a retail tobacco shop is a "tobacco product manufacturer" within the meaning of the Virginia Tobacco Escrow Statute[1] when the retail tobacco shop allows customers to use an on-premises machine to make roll-your-own ("RYO") cigarettes for personal use but does not use that machine to produce any cigarettes for sale.

RESPONSE

It is my opinion that a retailer who allows customers to use an on-premises machine to make RYO cigarettes for that customer's personal use is not a "tobacco product manufacturer" under the Virginia Escrow Statute.[2]

BACKGROUND

You relate a scenario in which customers can purchase loose tobacco and cigarette paper from a retailer and then uses a roll-your-own cigarette machine ("RYO machine") at that retail establishment to roll their own cigarettes for personal use. The retailer leases or purchases the RYO machine, which allows customers to roll approximately 200 cigarettes every 10 minutes. You note that these RYO machines are used only by consumers in rolling cigarettes for personal use and not for commercial resale. You further note that retailers do not use the RYO machines to produce cigarettes for consumers and that the retailer's involvement in the operation of the RYO machines is limited to repairs and maintenance.

APPLICABLE LAW AND DISCUSSION

The Virginia Tobacco Escrow Statute imposes certain requirements on tobacco product manufacturers, including the payment of funds into an escrow account.[3] Section 3.2-4200 defines a "tobacco product manufacturer" as "an entity that . . . directly . . . [m]anufactures cigarettes anywhere that such manufacturer intends to be sold in the United States."[4] You ask whether the shop in the scenario you present constitutes such a manufacturer.

"In deciding the meaning of the statute, we must consider the plain language that the General Assembly employed in enacting this statute."[5] Specifically, because the legislation does not go on to define "manufacture," its ordinary meaning must be applied.[6] To "manufacture" is "to make into a product suitable for use" or "to make from raw materials by hand or by machinery[.]"[7] Accordingly, a retailer who makes a RYO machine available to consumers is not a "tobacco manufacturer" under the definition set forth in § 3.2-4200. The retailer does not "manufacture" cigarettes for sale. Rather, in the situation you describe, consumers purchase their own tobacco and tubes and then rent the use of the RYO machine to make cigarettes for their own personal use. After that, the consumer – not the retailer – operates the RYO machine by putting tobacco in the top of the machine, putting tubes in the side, and collecting the cigarettes. The retailer does not "directly"[8] manufacture the cigarettes and cannot become a manufacturer indirectly based upon a consumer's use of the RYO machines.

Further, by limiting its definition to cigarettes "intend[ed] to be sold,"[9] the General Assembly exempts cigarettes produced for personal use. You note that consumers are permitted to produce cigarettes by use of the RYO machine only for their personal use; thus, cigarettes produced by RYO machines fall outside the scope of the statute's definition of "tobacco product manufacturers."

CONCLUSION

Accordingly, it is my opinion that a retailer who allows customers to use an on-premises machine to make RYO cigarettes for that customer's personal use is not a "tobacco product manufacturer" under the Virginia Escrow Statute.[10]

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[1] VA. CODE ANN. §§ 3.2-4200 through 3.2-4219 (2008 & Supp. 2011). The provisions compose Chapter 42 of Title 3.2; the chapter is entitled "'Implementation of Tobacco Master Settlement Agreement."

[2] I note that this opinion addresses the scope of the term only as it is defined by Virginia law. Other jurisdictions may use a broader definition.

[3] Section 3.2-4201 (2008).

[4] Section 3.2-4200 (2008).

[5] Haislip v. So. Heritage Ins. Co., 254 Va. 265, 268, 492 S.E.2d 135, 137 (1997).

[6] *See, e.g.,* Protestant Episcopal Church v. Truro Church, 280 Va. 6, 21, 694 S.E.2d 555,563 (2010) ("the use of 'plain and ordinary meaning' is, of course, a fundamental rule of statutory construction to be applied where a word or phrase is not otherwise defined by the Code").

[7] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 707 (10th ed. 1998).

[8] Section 3.2-4200. *Black's Law Dictionary* (6th ed.) defines "directly" as "[i]n a direct way without anything intervening; not by secondary, but by direct means." *Cf.* Commonwealth v. Cmty. Motor Bus Co., 214 Va. 155, 157, 198 S.E.2d 619, 620 (1973) ("'Directly' is usually defined as 'without intervention.'") (citation omitted). *See also* Carolina Tobacco Co. v. Baker, 670 S.E.2d 811, 814-15 (Ga. Ct. App. 2008) (interpreting identical language in Georgia statute and concluding: "'Directly' means 'without any intervening agency or instrumentality.' Thus. by using the adverb 'directly' to modify 'manufactures,' the legislature clearly intended to define as tobacco product manufactures only those entities that physically fabricate cigarettes themselves. Otherwise, the words 'directly (and not exclusively through any affiliate)' would be mere surplusage.") (footnotes omitted). *But see* New Hampshire v. North of the Border Tobaco, LLC, 2011 N.H. LEXIS 87 (N.H. June 30, 2011). In the scenario you present, the customer who actually uses the machine "intervenes" between the sale of the tobacco and the "manufacture" of the cigarette. Accordingly, the retailer is not "directly" engaged in the manufacturing of cigarettes as required by § 3.2-4200.

[9] *Id*.

[10] While, based on the facts you provide, I conclude that the retailer is not a "tobacco product manufacturer" for purposes of § 3.2-4200, I note that even a small change in the facts could change the analysis. For instance, if the retailer were to operate the machine for the customer or sell sticks made on the machine, it may become a "tobacco product manufacturer." Nonetheless, because your request is limited to the facts as you present them, no such scenario is not before me, and therefore, I offer no definitive opinion on it.

OP. NO. 11-083

AGRICULTURE: RIGHT TO FARM

COUNTIES, CITIES AND TOWNS: PLANNING, SUBDIVISION OF LAND AND ZONING/AGRICULTURAL AND FORESTAL DISTRICTS ACT

Proposed amendments to the Right to Farm Act would apply to areas currently zoned as agricultural districts or classifications, as well any other areas in which the zoning provisions allow for agricultural activity.

THE HONORABLE THOMAS K. NORMENT, JR.
MEMBER, SENATE OF VIRGINIA

AUGUST 19, 2011

ISSUE PRESENTED

You inquire whether proposed amendments to the Right to Farm Act[1] that were put forward during the 2011 General Assembly session by committee substitute Senate Bill 1190[2] would apply only to areas currently zoned as agricultural districts or also to other land not currently zoned as an agricultural district.

RESPONSE

It is my opinion that the proposed amendments would apply to areas currently zoned as agricultural districts or classifications, as well any other areas in which the zoning provisions allow for agricultural activity.

APPLICABLE LAW AND DISCUSSION

To promote the "health, safety or general welfare of the public[,]"[3] localities are authorized to enact zoning ordinances that, first, "classify the territory under its jurisdiction . . . into districts of such number, shape and size as it may deem best . . ." and then, within each district, "regulate, restrict, permit, prohibit, and determine[,]" among other things,

> 1. The use of land, buildings, structures and other premises for agricultural, business, industrial, residential, flood plain and other specific uses;
>
> 2. The size, height, area, bulk, location, erection, construction, reconstruction, alteration, repair, maintenance, razing, or removal of structures;
>
> 3. The areas and dimensions of land, water, and air space to be occupied by buildings, structures and uses, and of courts, yards, and other open spaces to be left unoccupied by uses and structures . . . [4]

In addition, "to provide a means for a mutual undertaking by landowners and localities to protect and enhance agricultural and forestal land as a viable segment of the Commonwealth's economy and as an economic and environmental resource of major importance[,]"[5] the General Assembly has established a statutory scheme[6] by which landowners may submit to the locality an application for the creation of specially designated "agricultural districts."[7] These districts are distinct from zoning districts that have been classified as agricultural.[8]

I further note, however, that while land may be classified as agricultural for zoning purposes or encompassed within specially created agricultural districts, nothing in the Code provides that agricultural activities must be exclusive to those specified areas. Rather, localities are free to permit agricultural uses in areas otherwise zoned or designated.

Notwithstanding the broad control local governing bodies have over land use, the Right to Farm Act restricts the ability of localities to regulate certain activities within

particular areas.[9] Senate Bill 1190 proposes to amend these statutes to add aquaculture[10] as a protected agricultural activity.

Specifically, key definitions would be expanded to include aquaculture references. Section 3.2-300 would be amended as follows:

> As used in this chapter, unless the context requires a different meaning:
>
> "Agricultural operation" means any operation devoted to the bona fide production of crops, or animals, or fowl including the production of fruits and vegetables of all kinds; meat, dairy, and poultry products; nuts, tobacco, nursery, and floral products; *the production and harvest of products from the practice of aquaculture, as defined in § 3.2-2600;* and the production and harvest of products from silviculture activity.
>
> "Production agriculture and silviculture" means the bona fide production or harvesting of agricultural*, aquacultural,* or silvicultural products but shall not include the processing of agricultural*, aquacultural,* or silvicultural products or the aboveground application or storage of sewage sludge.[11]

In addition, § 3.2-301, would provide, as amended, in relevant part, that

> In order to limit the circumstances under which agricultural operations may be deemed to be a nuisance, especially when nonagricultural land uses are initiated near existing agricultural operations, no county shall adopt any ordinance that requires that a special exception or special use permit be obtained for any production agriculture or silviculture activity in an area that is zoned as an agricultural district or classification. Counties may adopt setback requirements, minimum area requirements, and other requirements that apply to land on which agriculture and silviculture activity is occurring within the locality that is zoned as an agricultural district or classification. No locality shall enact zoning ordinances that would unreasonably restrict or regulate farm structures*, piers or docks attached to upland property zoned to allow agricultural activity,* or farming and forestry practices in an agricultural district or classification unless such restrictions bear a relationship to the health, safety, and general welfare of its citizens.[12]

When statutory language is clear and unambiguous, the plain meaning of the language used should determine the legislative intent, unless such a literal construction would lead to a manifest absurdity.[13] Moreover, "'[a] statute is not to be construed by singling out a particular phrase; every part is presumed to have some effect and is not to be disregarded unless absolutely necessary.'"[14]

The proposed amendment to § 3.2-301 would have added aquaculture to the definition of "agricultural operation." Concretely, this means that a locality could not require a special exception or a special use permit for aquaculture that occurs "in an area that is zoned as an agricultural district or classification." The plain language of the statute is not limited to an "agricultural district." It also includes an "agricultural . . . classification."

Furthermore, under this proposal, localities could not unreasonably restrict or regulate "piers or docks attached to upland property zoned to allow agricultural activity." Because property "zoned to allow agricultural activity" may include areas zoned under an agricultural classification, areas designated as agricultural districts, and areas zoned as other classifications that may allow agriculture, each of these areas would be included in the areas afforded protection under the proposed amendment.

CONCLUSION

Accordingly, it is my opinion that the proposed amendments would apply to areas currently zoned as agricultural districts or classifications, as well any other areas in which the zoning provisions allow for agricultural activity.

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[1] VA. CODE ANN. §§ 3.2-300 through 3.2-302 (2008).

[2] On February 8, 2011, the Senate of Virginia passed on a vote of 23 to 17 the committee substitute for SB 1190 reported from the Senate Committee on Agriculture, Conservation and Natural Resources. The Virginia House of Delegates Committee on Agriculture, Chesapeake and Natural Resources, however, tabled SB 1190 on February 16, 2011. *See* http://leg1.state.va.us/cgi-bin/legp504.exe?ses=111&typ=bil&val=sb1190.

[3] VA. CODE ANN. § 15.2-2283 (2008).

[4] Section 15.2-2280 (2008).

[5] Section 15.2-4301 (2008).

[6] Agricultural and Forestal Districts Act, VA. CODE ANN. §§ 15.2-4300 through 15.2-4314 (2008 & Supp. 2011).

[7] Section 15.2-4305 (Supp. 2011).

[8] The Agricultural and Forestal Districts Act makes separate reference to zoning provisions and establishes its own criteria and conditions for the creation of agricultural districts under its provisions. *See* §§ 15.2-4305 (Supp. 2011); 15.2-4306 (2008); 15.2-4312(B) (2008); 15.2-4314 (Supp. 2011).

[9] *See* §§ 3.2-300 through 3.2-302.

[10] "'Aquaculture'" means the propagation, rearing, enhancement, and harvest of aquatic organisms in controlled or selected environments, conducted in marine, estuarine, brackish, or fresh water." Section 3.2-2600 (2008).

[11] S.B. 1190, 2011 Reg. Sess. (Va. 2011), *available at* http://leg1.state.va.us/cgi-bin/legp504.exe?111+ful+SB1190S1+pdf.

[12] *Id*.

[13] *See* Wright v. Commonwealth, 278 Va. 754, 759, 685 S.E.2d 655, 657 (2009).

[14] Jeneary v. Commonwealth, 262 Va. 418, 430, 551 S.E.2d 321, 327 (2001) (quoting Commonwealth v. Zamani, 256 Va. 391, 395, 507 S.E.2d 608, 609 (1998)).

OP. NO. 11-069

ALCOHOL BEVERAGE CONTROL ACT: DEFINITIONS AND GENERAL PROVISIONS

Neither a member of the Board of Supervisors nor the Board in its entirety is authorized to petition the circuit court for a referendum on mixed beverage sales.

J. VADEN HUNT ESQUIRE
PITTSYLVANIA COUNTY ATTORNEY
JULY 1, 2011

ISSUE PRESENTED

You inquire whether a member of a Board of Supervisors ("Board"), individually, or the Board, as a unit, may petition the circuit court pursuant to § 4.1-124(A) in order to place on the ballot a referendum asking whether the jurisdiction should permit, within its boundaries, the sale of mixed beverages by restaurants licensed by the Virginia Alcoholic Beverage Control Board.

RESPONSE

It is my opinion that, based on the plain language of § 4.1-124(A), neither a member of the Board nor the Board in its entirety is authorized to petition the circuit court for a referendum on mixed beverage sales.

APPLICABLE LAW AND DISCUSSION

Section 4.1-124 of the Alcoholic Beverage Control (ABC) Act[1] provides that a locality may permit the sale of mixed beverages when a majority of the voters in that jurisdiction approves such sales by referendum. Section 4.1-124(A) further provides that:

> The qualified voters of a town, county, or supervisor's election district of a county may file a petition with the circuit court of the county asking that a referendum be held on the question of whether the sale of mixed beverages by restaurants licensed by the [ABC] Board should be permitted within that jurisdiction… Upon the filing of a petition, and under no other circumstances, the court shall order the election officials of the county to conduct a referendum on the question.[2]

When a statute is clear and unambiguous, the rules of statutory construction dictate that the statute be interpreted according to its plain language.[3] Here, the Code expressly requires such a petition to be signed by ten percent of the qualified voters of a jurisdiction or by one hundred qualified voters, whichever is greater.[4] Because "qualified voters" does not refer to or include the Board of Supervisors,[5] and the mention of one thing in a statute generally implies the exclusion of another,[6] I conclude that a Board of Supervisors and its members are not authorized under § 4.1-124 to petition a court to call for a referendum regarding the sale of mixed beverages by restaurants. This conclusion is supported by the comparable language of § 4.1-123(A), which provides that "[e]ither the qualified voters *or the governing body*" may file a petition to limit the sale of alcohol on Sundays (emphasis added). If the General Assembly had intended to permit a Board of Supervisors or its members to file a petition in the situation you present, it clearly knew how to do so.[7]

In addition, the ABC Act constitutes a comprehensive legislative scheme, by which the Commonwealth has preempted control of alcoholic beverages, so that political subdivisions retain only the limited and specific authority set out in the statute.[8] Moreover, Virginia adheres to the Dillon Rule of strict construction, which provides

that local governing bodies have "only those powers which are expressly granted by the state legislature, those powers fairly or necessarily implied from expressly granted powers, and those powers which are essential and indispensable."[9] Any doubt as to the existence of the power must be resolved against the locality.[10] I can find no other Code section that would provide a Board of Supervisors the authority to file such a petition. As such, only qualified voters may file a petition to seek a referendum on the sale of mixed beverages.

CONCLUSION

Accordingly, it is my opinion that neither a member of the Board nor the Board in its entirety is authorized to petition the circuit court for a referendum on mixed beverage sales.

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[1] VA. CODE ANN. §§ 4.1-100 through 133 (2010).

[2] The General Assembly has taken action to amend this provision of the statute to simplify the language, but the relevant portions will remain unchanged. *See* 2011 Va. Acts ch. 560.

[3] *See, e.g.,* HCA Health Servs. of Va., Inc. v. Levin, 260 Va. 215, 220, 530 S.E.2d 417, 419-20 (2000).

[4] Section 4.1-124, *but see* note 2, *supra*.

[5] *See* VA. CODE ANN. § 24.2-101 (Supp. 2010) (defining "qualified voter"). Clearly, the individual members of the Board are qualified voters, but their status as Board members does not afford them any greater authority than other citizens in this instance.

[6] *See* Smith Mountain Lake Yacht Club v. Ramaker, 261 Va. 240, 246, 542 S.E.2d 392, 395 (2001). *See also* NORMAN J. SINGER & J.D. SHAMBLE SINGER, 2A SUTHERLAND STATUTORY CONSTRUCTION § 47.23 (7th ed. 2007).

[7] The General Assembly is presumed to have chosen with care the words it used when it enacted the statute, Barr v. Town & Country Props., Inc., 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990); and the legislature knows how to express its intention, *see, e.g.* 2006 Op. Va. Att'y Gen. 29, 31 n.5 and opinion cited therein.

[8] *See* 1976-77 Op. Va. Att'y Gen. 4, 5; 1968-69 Op. Va. Att'y Gen. 234A, 235.

[9] Arlington Cnty. v. White, 259 Va. 708, 712, 528 S.E.2d 706, 708 (2000) (alteration in original) (quoting City of Va. Beach v. Hay, 258 Va. 217, 221 (1999)).

[10] 2004 Op. Va. Att'y Gen. 117, 118 (citing 2A EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 10.19 (3d ed. 1996)).

OP. NO. 11-057

CIVIL REMEDIES AND PROCEDURES: DOCKETS

Whether a particular filing qualifies as a "proceeding" requires a review of its specific contents. When an attorney files a copy of a letter to opposing counsel with the Clerk of Court, such a filing does not constitute a "proceeding," but the filed letter may indicate there are other ongoing proceedings, thereby foreclosing discontinuance of the action.

THE HONORABLE JACK KENNEDY
CLERK, CIRCUIT COURT OF WISE COUNTY
JULY 22, 2011

ISSUE PRESENTED

You inquire what constitutes a "proceeding" as the term is used in § 8.01-335(A) of the *Code of Virginia*. Specifically, you ask whether the filing with the Clerk of the Court of a letter to opposing counsel constitutes a "proceeding."

RESPONSE

It is my opinion that the determination of whether a particular filing qualifies as a "proceeding" under § 8.01-335(A) requires a review of its specific contents. It further is my opinion that when an attorney files a copy of a letter to opposing counsel with the Clerk of Court, such a filing does not constitute a "proceeding" under § 8.01-335, but that the filed letter may indicate that there are other ongoing proceedings pending in the action, thereby foreclosing the discontinuance of the action.

APPLICABLE LAW AND DISCUSSION

Section 8.01-335(A) provides: "[e]xcept as provided in subsection C, any court in which is pending an action, wherein for more than two years there has been no order or proceeding, except to continue it, may, in its discretion, order it to be struck from its docket, and the action shall thereby be discontinued." The statute further provides that the "clerk of court shall notify the parties in interest if known, or their counsel of record . . . at least fifteen days before the entry of such order of discontinuance, so that all parties may have an opportunity to be heard on it."[1]

The Supreme Court of Virginia has noted that the purpose underlying § 8.01-335(A) is "to enable trial courts to identify cases which litigants or their counsel are not interested in pursuing to a conclusion."[2] The statute "gives trial courts the discretionary authority to order law actions, dormant for more than two years, struck from their dockets[,]" and further "provides a device designed to benefit the trial courts in setting cases for trial and expediting litigation[.]"[3]

"Proceeding" is not defined in § 8.01-335. Nor is the term generally defined elsewhere in the *Code of Virginia*. In the absence of a statutory definition, words are to be interpreted according to their plain meaning.[4] *Black's Law Dictionary* offers several definitions:

1. The regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgment.
2. Any procedural means for seeking redress from a tribunal or agency.
3. An act or step that is part of a larger action.
4. The business conducted by a court or other official body; a hearing.[5]

In a different context, the Supreme Court of Virginia found that the term "proceeding" includes "anything done in the cause, except an order of continuance; meaning any step or means taken in the prosecution of or defense of an action."[6] The Court concluded that the term was "broad enough to cover any act, measure, step or all steps in a course taken in conducting litigation, civil or criminal."[7] Accordingly,

the term "proceeding" does not simply refer to a formal action that provides a complete remedy, but also to procedural steps that are part of that larger action.

Black's Law Dictionary provides numerous examples of actions constituting a proceeding. These include:

> (1) the institution of the action; (2) the appearance of the defendant; (3) all ancillary or provisional steps, such as arrest, attachment of property, garnishment, injunction . . . (4) the pleadings; (5) the taking of testimony before trial; (6) all motions . . . (7) the trial; (8) the judgment; (9) the execution; . . . (11) the taking of the appeal . . . (12) the *remittitur*, or sending back of the record to the lower court . . . (13) the enforcement of the judgment or, or a new trial . . . .[8]

Although "proceeding" is clearly broad in its scope, it is not all-inclusive. For example, it does not extend to mere requests for information.[9]

Applying these definitions and the purpose of the statute to your inquiry, a letter between counsel does not become a "proceeding" simply because one of the attorneys filed it with the Clerk. Letters between counsel are often exchanged with little or no effect. Nonetheless, the contents of the letter may indicate that proceedings are ongoing in the case. For example, a copy of letter constituting a notice of depositions pursuant to Supreme Court Rule 4:5(b)(1) or an attorney-issued *subpoena duces tecum* under Rule 4:9(A)(2) could be filed in the Clerk's office. Clearly, because such procedural devices progress an action towards final judicial resolution, they constitute "proceedings."

In these, or similar potential instances, the letter demonstrates that the matter remains active. Therefore, irrespective of any requirement of the court or Clerk to act, if the Clerk has been made aware of such proceedings via the filing of the letter, then the Clerk may not employ § 8.01-335(A) to discontinue the action, provided those proceedings have occurred within the previous two years.

CONCLUSION

Accordingly, it is my opinion that the determination of whether a particular filing qualifies as a "proceeding" under § 8.01-335(A) requires a review of its specific contents. It further is my opinion that when an attorney files a copy of a letter to opposing counsel with the Clerk of Court, such a filing does not constitute a "proceeding" under § 8.01-335, but that the filed letter may indicate that there are other ongoing proceedings pending in the action, thereby foreclosing the discontinuance of the action.

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[1] I note that § 8.01-335(B), which permits the court to strike and dismiss from its docket an action in which there has been no order or proceeding for more than three years, also uses the term "proceeding." In that instance, however, "the court may dismiss cases under this subsection without any notice to the parties." VA. CODE ANN. § 8.01-335(B) (2007).

[2] Nash v. Jewell, 227 Va. 230, 234, 315 S.E.2d 825, 827 (1984).

[3] *Id*.

[4] Murphy v. Norfolk Cmty. Servs. Bd., 260 Va. 334, 339, 533 S.E.2d 922, 925 (2000) (citing cases).

[5] BLACK'S LAW DICTIONARY 1221 (7th ed. 1999).

[6] Sigmon v. Commonwealth, 200 Va. 258, 266-67, 105 S.E.2d 171, 178 (1958) (construing "proceeding" for purposes of criminal prosecutions) (citing Miller v. Whittington, 105 S.E. 907 (W. Va. 1921)).

[7] *Id*. at 267, 105 S.E.2d at 178-79.

[8] BLACK'S LAW DICTIONARY 1221 (quoting EDWIN E. BRYANT, THE LAW OF PLEADING UNDER THE CODES OF CIVIL PROCEDURE 3-4 (2d ed. 1899)).

[9] Zaleski v Judicial Inquiry & Revier Comm'n, 64 Va. Cir. 495 (Richmond 2004) (applying *Sigmon* to construe "proceeding" under VA. CODE ANN. § 17.1-913).

OP. NO. 10-075

CIVIL REMEDIES AND PROCEDURE: EXECUTIONS AND OTHER MEANS OF RECOVERY

Writs of fieri facias, debtor interrogatories and garnishments are distinct proceedings. Although the sheriff or other executing officer may be required to levy on the tangible personal property of a judgment debtor when executing a writ of fieri facias, no such requirement is imposed when serving a Summons for Interrogatories or Garnishment Summons.

The fees sheriffs may charge for services are governed by the express terms of § 17.1-272.

THE HONORABLE L. J. AYERS, III
SHERIFF, AMHERST COUNTY
FEBRUARY 4, 2011

ISSUES PRESENTED

You seek clarification regarding the executions of a Summons to Answer Interrogatories and Summons in Garnishment. You specifically ask whether the execution of the Writ of Fieri Facias requires the Sheriff to levy at the same time either summons is served. You further inquire regarding the appropriate fees to which the sheriff is entitled for his service in executing these collection methods.

RESPONSE

It is my opinion that writs of fieri facias, debtor interrogatories and garnishments are distinct, though related, proceedings, so that, although the sheriff or other executing officer may be required to levy on the tangible personal property of a judgment debtor when executing a writ of fieri facias, no such requirement is imposed when serving a Summons for Interrogatories or Garnishment Summons. It further is my opinion that the fees sheriffs may charge for these services are governed by the express terms of § 17.1-272.

APPLICABLE LAW AND DISCUSSION[1]

Under Virginia law, after obtaining a judgment for the payment of money, a judgment creditor may institute collection proceedings upon the issuance of a writ of fieri facias.[2] Twenty-one days after judgment is entered, the creditor may request the clerk of the court in which judgment was rendered to issue the writ.[3] Upon receiving the request, the clerk is required to issue the writ and deliver it to the sheriff or other proper person for execution.[4] Upon receipt of the writ, the sheriff or other executing officer is "commanded to make the money therein mentioned out of the goods and chattels of the person against whom the judgment is."[5]

Section 8.01-483 prescribes the protocol for the execution of a writ of fieri facias:

> Upon a writ of fieri facias, the officer shall return *whether the money therein mentioned has been or cannot be made*. If there is only part thereof which is or cannot be made, he shall return the amount of such part. With every execution under which money is recovered, he shall return a statement of the amount received, including his fees and other charges, and shall pay such amount, except such fees and charges, to the person entitled. In his return upon every execution, the officer shall also state in what manner a copy of the writ was served in accordance with § 8.01-487.1, *whether or not he made a levy of the same*, the date and time of such levy, the date when he received such payment or obtained such satisfaction upon such execution and, if there is more than one defendant, from which defendant he received the same. [6]

Other provisions govern levying,[7] which is the process "by which [specific] property is set apart from the general property of the defendant and placed into the custody of the law until it can be sold and applied to the payment of the execution."[8] Virginia law clearly contemplates that levying is a distinct act[9] and that a levy may not always occur.[10]

Issuance of the writ of fieri facias authorizes a lien against the personal property of the debtor. A lien attaches to the debtor's *tangible* personal property "from the time it is actually levied by the officer to whom it has been delivered to be executed"[11] and the levy must occur prior to the return date of the writ.[12] Because intangible personal property, such as bonds and notes, is incapable of levy and sale, it is subject to the judgment lien once the writ of fieri facias is *delivered* to an authorized officer.[13]

Garnishment proceedings are available to judgment creditors to collect against third parties who are believed to hold money to which the judgment debtor is or may be entitled.[14] Although creditors may take advantage of this collection method "by reason of the lien of his writ of fieri facias,"[15] garnishment proceedings are separate actions,[16] governed by their own statutory requirements, including specified rules regarding service of process, the form of the summons and the inclusion of the debtor's social security number.[17] A garnishment proceeding "must be regarded as a civil suit, and not as a process of execution to enforce a judgment already rendered. . . . the parties have a day in court; an issue of fact may be tried by a jury; evidence adduced, judgment rendered, costs adjudged, and execution issued on the judgment."[18] Therefore, no levy is necessary when pursuing garnishment proceedings. I further conclude not only that execution of the writ of fieri facias and service of the

summons in garnishment need not occur simultaneously,[19] but also that where the sheriff does provide both services concurrently, no levy is required with respect to the garnishment.

"Debtor interrogatories" are a means for the creditor "to ascertain the personal estate of a judgment debtor . . . to which the debtor *named in a judgment and fieri facias* is entitled[.]"[20] "[U]pon the application of the execution creditor, the clerk of court *from which such fieri facias issued*, shall issue a summons against [] the execution debtor," requiring him to "appear before the court *from which the fieri facias issued* . . . to answer such interrogatories as may be propounded to him[.]"[21] Clearly, issuance of a summons to answer interrogatories requires as a prerequisite the *issuance* of the writ of fieri facias, but the Code does not require that a levy occur. Rather, a judgment creditor may want to discover what property is available before determining whether to proceed via levy or garnishment, or another collection means.[22]

The fee schedule provided in § 17.1-272 supports the above conclusions. It explicitly provides that the fee for "[m]aking a return of a writ of fieri facias where no levy is made" is $12,[23] whereas the fee for "[l]evying an execution" or [l]evying upon current money, bank notes, goods or chattels of a judgment debtor pursuant to § 8.01-478" is $25.[24] Thus, a judgment creditor who asks the sheriff to levy upon the property of the judgment debtor upon service of debtor interrogatories or garnishment summons should be charged $25 for the levy rather than the $12 fee required for serving "any person, firm or corporation, an order notice summons or any other civil process[.]"[25] Moreover, "a judgment creditor who seeks a levy pursuant to a writ of fieri facias must pay separate fees for the levy and the service of the writ."[26]

"A return on a writ or process is the short official statement of the officer endorsed thereon on what he has done in obedience of the writ or, or why he has done nothing"[27] and "it is the duty of a sheriff or other ministerial officer to return all writs on the return day with a short account in writing endorsed by him thereon of the manner in which he has executed the same, or why he has done nothing."[28] The return forms currently authorized by the Supreme Court of Virginia for the institution of debtor interrogatories and garnishment both provide for the executing officer to document the levy.[29] In the situations where the judgment creditor requests a levy, if the officer locates property while executing the writ, the forms instruct the officer to utilize the back of Form DC-467[30] to inventory the property. If no effects can be located by the officer, he can simply note that fact on the back of the summons form. In instances where no levy is required, the officer simply may insert his own notation stating that fact.

CONCLUSION

Accordingly, it is my opinion that writs of fieri facias, debtor interrogatories and garnishments are distinct, though related, proceedings, so that, although the sheriff or other executing officer may be required to levy on the tangible personal property of a judgment debtor when executing a writ of fieri facias, no such requirement is imposed when serving a Summons for Interrogatories or Garnishment Summons. It further is my opinion that the fees sheriffs may charge for their services is governed by the express terms of § 17.1-272.

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[1] Because you have requested a clarification of the law regarding the writ of fieri facias as it pertains only to garnishment and interrogatory proceedings, this opinion is not intended to constitute a comprehensive analysis of all aspects of the law governing post-judgment execution proceedings.

[2] VA. CODE ANN. 8.01-466 (2007). *See also* DOUG RENDLEMAN, ENFORCEMENT OF JUDGMENTS AND LIENS IN VIRGINIA (2d ed. 1996).

[3] *Id*.

[4] *Id.* Although the twenty-one day period generally applies to collection proceedings, the court may enter an order permitting an earlier execution on the judgment if the judgment creditor demonstrates good cause. *Id*.

[5] Section 8.01-474 (2007).

[6] Section 8.01-483 (2007) (emphasis added).

[7] *See, e.g.*, § 8.01-487.1 (2007) (copy of writ and any attachments to be served on debtor or other responsible person or posted at premises where levy made); § 8.01-491 (2007) (officer may break outer doors of dwelling house during daytime to execute a levy after first demanding admittance and may levy on visible property in the debtor's personal possession); § 8.01-490 (2007) (officer may not make unreasonable levy and may not remove property from his jurisdiction unless specifically authorized).

[8] Walker v. Commonwealth, 59 Va. (18 Gratt.) 13, 43 (1867).

[9] "Several successive steps are to be taken between the issuing of the execution and the satisfaction of the judgment. The first step is, to place the execution into the hands of the sheriff. . . . The second step is, to levy the execution on specific property, . . . [t]he third step and last step is, the sale of the property." *Id. See also* Humphrey v. Hitt, 47 Va. (6 Gratt.) 509, 526-28 (1850).

[10] *See, e.g.*, *Humphrey*, 47 Va. (6 Gratt.) at 526-28; Rowe v. Hardy, 97 Va. 674, 676-77, 34 S.E. 625, 625-26 (1899) ("In executing the writ, the sheriff was the agent of the plaintiff, who was entitled to its proceeds, and he and his attorneys had the right to control the execution and to say whether the officer should levy it or return it without doing so."). *See also* RENDLEMAN, *supra* note 2, at 56-58 (noting that the creditor must decide whether or not to levy) and VA. CODE ANN. § 17.1-272 (2010) (establishing different fees for service by sheriff depending on whether levy occurs).

[11] Section 8.01-478 (2007).

[12] Section 8.01-479 (2007).

[13] Section 8.01-501 (Supp. 2010). The statute provides that:

Every writ of fieri facias shall, in addition to the lien it has under §§ 8.01-478 and 8.01-479 on what is capable of being levied on under those sections, be a lien from the time it is delivered to a sheriff or other officer, or any person authorized to serve process pursuant to § 8.01-293, to be executed, on all the personal estate of or to which the judgment debtor is, or may afterwards and on or before the return day of such writ or before the return day of any wage garnishment to enforce the same, become, possessed or entitled, in which, from its nature is not capable of being levied on under such sections, except such as is exempt under the provisions of Title 34, and except that, as against an assignee of any such estate for valuable consideration, the lien by virtue of this section shall not affect him unless he had notice thereof at the time of the assignment.

See also Knight v. Peoples Nat'l Bank of Lynchburg, 182 Va. 380, 391, 29 S.E.2d 364, 370 (1944) ("A summons in garnishment creates no lien. It is a means of enforcing the lien of an execution placed in the hands of an officer to be levied.").

[14] Section 8.01-511 (2007).

[15] *Id. See also* In re Lamm, 47 B.R. 364, 368 (Bankr. E.D. Va. 1984) ("The garnishment summons itself does not create a lien, but the lien is created by the fieri facias, and dates from the date of *delivery* of the fieri facias to the officer. The garnishment is notice of the lien." (emphasis added)).

[16] A "'proceeding in garnishment is substantially an action at law by the judgment debtor in the name of the judgment creditor against the garnishee.'" Network Solutions, Inc. v. Umbro Int'l, Inc., 259 Va. 759, 768, 529 S.E.2d 80, 85 (2000) (quoting Lynch v. Johnson, 196 Va. 516, 521, 84 S.E.2d 419, 422 (1954)).

[17] Section 8.01-513 (2007).

[18] Levine's Loan Office, Inc. v. Starke, 140 Va. 712, 714 125 S.E. 683, 684 (1924) (citations and internal quotation marks omitted).

[19] *Cf.* § 8.01-512.3 ("Date of delivery of writ of fieri facias to sheriff if different from the date of this [garnishment] summons.").

[20] Section 8.01-506 (Supp. 2010) (emphasis added).

[21] *Id.* (emphasis added).

[22] "The law authorizes the plaintiff, though execution has come to the hands of the sheriff, to sue out other and different process of execution." *Humphrey*, 47 Va. (6 Gratt.) at 528.

[23] VA. CODE ANN. § 17.1-272(A)(5) (2010).

[24] Sections 17.1-272(B)(6); 17.1-272(B)(3) (2010).

[25] Section 17.1-272(A)(1) (2010).

[26] 1987-88 Op. Va. Att'y Gen. 72, 73.

[27] *Rowe*, 97 Va. at 676, 34 S.E. at 625.

[28] *Id*. at 679, 34 S.E. at 626.

[29] SUMMONS TO ANSWER INTERROGATORIES, Form DC-440 (07/09) & GARNISHMENT SUMMONS, Form DC-451 (1/07), respectively. S*ee also* § 8.01-512.3 (2007).

[30] WRIT OF FIERI FACIAS, FORM DC-467 (10/07).

OP. NO. 10-128

CIVIL REMEDIES AND PROCEDURE: LIMITATION OF ACTIONS – PERSONAL ACTIONS GENERALLY

The statute of limitations for written contracts applies to credit card agreements when the agreement consists of a series of documents, provided that at least one of the documents referencing and incorporating the others is signed by the cardholder and the written documents contain all essential terms of the agreement.

THE HONORABLE BILL JANIS
MEMBER, HOUSE OF DELEGATES
FEBRUARY 7, 2011

ISSUE PRESENTED

You ask whether credit card agreements governed by the laws of Virginia are written contracts for statute of limitations purposes under § 8.01-246, even though the terms of the contract are found in a series of documents, at least one of which is signed by the cardholder.

RESPONSE

It is my opinion that the statute of limitations for written contracts applies to credit card agreements in the situation where the agreement consists of a series of documents, provided that at least one of the documents referencing and incorporating the others is signed by the cardholder, and also provided that the written documents evidencing the agreement contain all essential terms of the agreement.

BACKGROUND

You relate that lower courts of at least one jurisdiction have held, during the course of credit card debt collections, that credit card agreements are unwritten contracts for purposes of Virginia's statutes of limitations.[1] You state that such rulings were made in spite of the following unrebutted evidence:[2]

> (1) The cardholder applies for, receives, and uses a credit card, and in so doing, signs (either physically or electronically[3]) an application requesting the credit card, the back of the card, and/or charge slips documenting transactions made with the card;
>
> (2) After a card issuer receives, reviews, and approves an application, it opens an account and sends the customer an unactivated credit card, and a written customer agreement;
>
> (3) The customer agreement, along with other account documents or writings incorporated by reference into it (*e.g.*, the credit card, the cardholder's signed application, and periodic billing statements reflecting transactions made on the credit card account),[4] contain all of the essential terms of a credit card agreement;
>
> (4) The back of the credit card contains language near the required signature line stating that use of the card constitutes agreement to be bound by the written customer agreement; and
>
> (5) The cardholder does, in fact, use the credit card and thereafter receives periodic billing statements showing the cardholder's transaction activity and payments and the terms governing repayment of any outstanding debt.

APPLICABLE LAW AND DISCUSSION

Section 8.01-246 provides, in relevant part:

> [A]ctions founded upon a contract, other than actions on a judgment or decree, shall be brought within the following number of years next after the cause of action shall have accrued:
>
> * * *
>
> 2. In actions on any contract which is not otherwise specified and which is in writing and signed by the party to be charged thereby, or by his agent, within five years whether such writing be under seal or not;
>
> * * *

> 4. In actions upon any unwritten contract, express or implied, within three years.

The rationale for a longer statute of limitations for written contracts than for unwritten contracts has been explained as follows:

> When a contract is written, it is the language of the contract itself which governs, and the effect of lost evidence, faded memories, and missing witnesses is less prejudicial to the adjudication of the claim than where parol evidence, memories, and witness will be relied upon to determine the actual terms of an oral contract.[5]

The Supreme Court of Virginia has held that for an agreement to be deemed a written contract for statute of limitation purposes, it must "show on its face a complete and concluded agreement between the parties. Nothing must be left open for future negotiation and agreement . . . ."[6] Consequently, if a written agreement is missing one or more essential terms, it is an unwritten contract for statute of limitations purposes, and is subject to a three-year limitations period.[7]

Virginia law does not require that a written contract be contained within a single writing to satisfy § 8.01-246(2). Virginia courts routinely enforce contracts that comprise multiple writings created at different times,[8] and § 8.01-246 contains no requirement of a single writing for the five year limitations period to apply. Rather, it provides only that such an agreement be "in writing and signed by the party to be charged."[9] I presume the "legislature chose, with care, the words it used when it enacted the relevant statute, and [courts] are bound by those words as [courts] interpret the statute."[10] At the time of its passage, the General Assembly had the opportunity to insert a single written document requirement, but chose not to do so.

In addition, in a case concerning a matter analogous to your credit card scenario, the United States Bankruptcy Court for the Eastern District of Virginia considered whether to apply the five-year limitations period to a line of credit agreement, the terms of which were found across several different documents and business records.[11] There was no single written line of credit agreement entered into between the parties; instead the agreement was evidenced by signed loan request forms, ledger accounts maintained by the lender, and spreadsheet summaries of the accounts maintained by the lender.[12] In applying the five-year statute of limitations period to the line of credit agreement, the Court stated:

> [E]ach loan request form issued by [the borrower] ... states a sum specific and is signed by the companies' chief financial officer ... or an employee under his control. [The lender] recorded all intercompany transfers as receivables in the due from [the borrower] account, and the majority of these cash transfers were designated as loans... Finally these loans were recorded on a spreadsheet that showed interest was applied in a consistent manner. The present writings found in the business records of [the lender]

> and [the borrower] evidence a complete and concluded agreement that leaves nothing open for future negotiation.[13]

Therefore, I conclude that § 8.01-246(2) does not require a written contract to be reduced to a single writing to qualify for the five-year limitations period. Under the facts you present, the requirements of § 8.01-246(2) are satisfied. First, a valid contract is formed between the consumer and the credit card company when the cardholder accepts the credit card company's offer of credit by performing on the contract *(e.g.,* by using the credit card).[14] Also, the signature requirement is met by the consumer's electronic or physical signature on the credit card application, on purchase transaction slips and on the back of a credit card containing reference to the credit card agreement. Finally, together the writings, which are connected by internal references to each other and the credit card agreement, provide all of the essential terms *(e.g.,* interest rate, repayment terms, payment due dates) of the parties' agreement. Thus, because there is written evidence of a complete agreement between the parties,[15] there is no concern that "lost evidence, faded memories or missing witnesses" will prejudice the claim.[16]

CONCLUSION

Accordingly, it is my opinion that the statute of limitations for written contracts applies to credit card agreements in the situation where the agreement consists of a series of documents, provided that at least one of the documents referencing and incorporating the others is signed by the cardholder, and also provided that the written documents evidencing the agreement contain all essential terms of the agreement.

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[1] You state that these courts are foreign courts applying Virginia choice-of-law provisions.

[2] For purposes of this advisory opinion, I assume all of the statements to be true.

[3] The Uniform Electronic Transactions Act permits the use of electronic signatures in electronic transactions in Virginia. *See* VA, CODE ANN. §§ 59.1-480, 59.1-483 and 59.1-485 (2006).

[4] You further state that the federal Truth-in-Lending Act requires periodic billing statements for credit cards to include terms such as the interest rates applicable to each billing period, the outstanding balance for each billing period, the minimum payment due for each billing period, and the due date for each payment. 12 C.F.R. § 226.7 (2011). When credit card accounts are opened, credit card issuers are required to disclose to credit card holders a number of terms, including, but not limited to, the annual percentage interest rate charged on the account and how it will be calculated. 12 C.F.R. § 226.6 (2011).

[5] Marley Mouldings, Inc. v. Suyat, 970 F. Supp. 496, 499 (W.D. Va. 1997).

[6] Newport News, Hampton & Old Point Dev. Co. v. Newport News St. Ry. Co. 97 Va. 19,21,32 S.B. 789, 790 (1899). *See also* Digital Support Corp. v. Avery, 49 Va. Cir. 324, 326 (Fairfax Cnty. 1999) ("In order to constitute a written contract, the 'essential terms of the agreement must be obvious on the face of the writing without recourse to parol evidence."') (quoting Janus v. Sproul, 250 Va. 90, 91, 458 S.E.2d 300,301 (1995)).

[7] *Id.* at 22, 32 S.E.2d at 790 (written agreement to donate a sum of money expressly left to future agreement of the parties the conditions upon which the donation was to be made). *See also Marley Mouldings, Inc.,* 970 F.Supp. at 499-500 (deeming a contract unwritten for statute of limitations purposes because it left open essential terms such as subject matter, consideration to be paid for services and the duration of the services).

[8] *See, e.g.,* J.M. Turner & Co. v. Delaney, 211 Va. 168, 171-72, 176 S.E.2d 422, 425 (1970) (considering two separate letters, agreed to at different times, to be one contract); Pro-Football, Inc. v. Paul, 39 Va. App. 1, 8-10, 569 S.E.2d 66, 70 (2002) (finding that a professional football player's contract of employment included not only the original contract, but also a third-party trade agreement and satisfaction of conditions precedent); Farenth v. Windson Dev. Corp., 21 Va. Cir. 216,217-18 (Fairfax Cnty. 1990) (construing together as one contract separate agreements for the purchase of real property and for the purchase of extras pertaining to the property).

[9] VA. CODE ANN. § 8.01-246(2) (2007).

[10] City of Va. Beach v. ESG Enters, Inc., 243 Va. 149, 153,413 S.E.2d 642, 644 (1992) (quoting Barr v. Town & Country Props., 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990)).

[11] Cohen v. UN-Ltd. Holdings, Inc. (In re NELCO, Ltd.) 264 B.R. 790 (Bankr. E.D. Va. 1999).

[12] *Id.* at 796.

[13] *Id.* at 803

[14] *See* Sharp Elecs. Corp. v. Deutsche Fin. Servs. Corp., 216 F.3d 388, 394 (4th Cir. 2000); Bank of Va. v. Lentz, 8 Va. Cir. 407, 408 (Richmond City 1987). *See also* Whitman v. Capital One Bank (USA), N.A., 2009 U.S. Dist. LEXIS 108203 6-7 (Md. 2009) ("Courts have consistently held that '[t]he use of [credit] cards amounts to the acceptance of the terms of the cardholder agreements.'") (quoting Fahey v. O.S. Bank Nat'l Assoc., 2006 U.S. Dist. LEXIS 70956 (E.D. Mo. 2006) and citing cases).

[15] If, however, a court were to hold that one or more essential contractual terms were missing from the writings, or that parol evidence was required to fully establish a missing term, it would conclude that the requirements of § 8.01-246(2) were not met, and apply the three-year statute of limitations for unwritten contracts. *See supra* note 7 and accompanying text. Courts in other jurisdictions have followed this approach in credit card cases. *See, e.g.,* Portfolio Acquisitions, LLC v. Feltman, 909 N.E.2d 876, 884 (Ill. 2009) (parol evidence needed to establish all essential terms and conditions of agreement and the relationship between the parties); Colo. Nat'l Bank of Denver v. Story, 862 P.2d 1120, 1122 (Mont. 1993) (signed credit card application and billing statements, in and of themselves, do not establish written contract); Jenkins v. Gen. Collection Co., 538 F. Supp.2d 1165, 1173-74 (D. Neb. 2008) (credit card company failed to produce receipts signed by cardholder).

[16] *See supra* note 5 and accompanying text.

OP. NO. 10-115

COMMONWEALTH PUBLIC SAFETY: DEPARTMENT OF CRIMINAL JUSTICE SERVICES – PRIVATE SECURITY BUSINESSES

When an employee who is installing wiring or equipment has access to "confidential information concerning the design, extent, status . . . or location of an end user's electronic security equipment," the contractor or subcontractor employing this individual must obtain a license from the Department of Criminal Justice Services

THE HONORABLE WILLIAM K. BARLOW
MEMBER, HOUSE OF DELEGATES
FEBRUARY 25, 2011

ISSUES PRESENTED

You pose two questions regarding licensing through the Department of Criminal Justice Services pursuant to §§ 9.1-138 through 9.1-150. Specifically, you ask

whether a license is required for the installation of wiring and/or equipment[1] which may ultimately be used to support "electronic security equipment."[2] You further inquire as to whether an independent contractor must be licensed when installing, maintaining, modifying or repairing "electronic security equipment" when the prime contractor is licensed under § 9.1-138.

RESPONSE

It is my opinion that when an employee who is installing wiring or equipment has access to "confidential information concerning the design, extent, status . . . or location of an end user's electronic security equipment," the contractor or subcontractor employing this individual must obtain a license from the Department of Criminal Justice Services as required by § 9.1-138, *et seq*.

BACKGROUND

Your question centers on a business that primarily provides wiring and data services, including the installation and maintenance of business telephone and data systems, wiring and computer networks. You state that this business "certainly provide[s] wiring and data services that could, and no doubt are used by others, such as licensed alarm companies, to support . . . security equipment" and that the business "does not always know in advance which of the wires it installs will be used to support which device." You relate that the business installs wiring that "although they may not be aware of it, might very well be used for security devices such as cameras, motion detectors, and the like." You also note that this business performs maintenance and repair work on "electronic security equipment" as a subcontractor for a prime contractor who is licensed under § 9.1-139.

APPLICABLE LAW AND DISCUSSION

Virginia law requires persons who "engage in the private security services business" to be licensed through the Department of Criminal Justice Services.[3] The statutory definitions that govern your inquiry are as follows:

> "Private security services business" means any person engaged in the business of providing, or who undertakes to provide . . . electronic security employees, electronic security sales representatives or electronic security technicians and their assistants to another person under contract, express or implied.
>
> "Electronic security employee" means an individual who is employed by an electronic security business in any capacity which may give him access to information concerning the design, extent, status, password, contact list, or location of an end user's electronic security equipment.
>
> "Electronic security business" means any person who engages in the business of or undertakes to (i) install, service, maintain, design or consult in the design of any electronic security equipment to an end user . . . or (iii) have access to confidential information concerning the design, extent,

> status, password, contact list, or location of an end user's electronic security equipment.[4]

The statute does not distinguish between contractors and subcontractors. What matters under the plain language of the statute is whether the individual who is performing the work has access to confidential information concerning the "end user's electronic security equipment."[5] If that is the case, the individual performing the installation or repair is deemed an "electronic security employee" who is employed by an "electronic security business." That, in turn, means that the business employing this individual is a "private security services business" that must obtain a license under § 9.1-139.[6]

If the employee of a contractor or subcontractor does not have "access to information concerning the design, extent, status . . . or location of an end user's electronic security equipment," he would not be classified as an "electronic security employee."[7] The inquiry is fact specific. The fact that the services provided *might* be used for a security system does not trigger the requirement for a license. But in cases where the employee has access to confidential information concerning the design, extent, status . . . or location of an end user's electronic security equipment," the contractor or subcontractor employing this individual must obtain the required license.

CONCLUSION

Accordingly, it is my opinion that when an employee who is installing wiring or equipment has access to "confidential information concerning the design, extent, status . . . or location of an end user's electronic security equipment," the contractor or subcontractor employing this individual must obtain a license from the Department of Criminal Justice Services as required by § 9.1-138, *et seq*.

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[1] Your inquiry identifies the following examples: "telephones, computers, dial tone, telephone lines, Cat 5-e wiring, fiber optic cabling, COAX cabling, patch panels, 66-M150 connecting blocks, RJ-45, RJ-14, RJ-21X, and RJ-31X jacks, network routers, Ethernet switches, internet access, electronics, network circuits, and associated terminal equipment."

[2] *See* VA. CODE ANN. § 9.1-138 (Supp. 2010).

[3] Section 9.1-139(A) (Supp. 2010)

[4] Section 9.1-138.

[5] *See id*.

[6] You note that the business you describe often does precisely the same work as Verizon and other large telephone companies. The licensing requirement of § 9.1-139, however, is subject to a limited exception. "Unarmed regular employees of telephone public service companies" need not be licensed, provided that "the regular duties of such employees consist of protecting the property of their employers and investigating the usage of telephone services and equipment furnished by their employers, their employers' affiliates, and other communications common carriers." Section 9.1-140(11) (Supp. 2010).

[7] Section 9.1-138.

OP. NO. 11-065

CONSTITUTION OF THE UNITED STATES

CONSTITUTION OF VIRGINIA

Ordinance requiring Impounding of animals running at large is constitutional.

Ordinance prohibiting discharge of a firearm on roadways or near buildings is constitutional.

Ordinance restricting animal noise is constitutional.

THE HONORABLE CHRISTOPHER K. PEACE
MEMBER, HOUSE OF DELEGATES
JUNE 22, 2011

ISSUES PRESENTED

You inquire whether three ordinances of Hanover County are constitutional under the constitutions of Virginia and of the United States. The first ordinance prohibits the owner of agricultural animals to run at large in the county. The second ordinance prohibits the discharge of weapons in or along roads or within one hundred yards of a building. The third ordinance is a noise control ordinance that prohibits certain animal noises at certain times.

RESPONSE

It is my opinion that none of the ordinances suffers from constitutional infirmity.

APPLICABLE LAW AND DISCUSSION

Before addressing the specific ordinances, I note the settled principle of law that "all statutes and ordinances are presumed to be constitutional, and that if there is any doubt such doubt should be resolved in favor of their constitutionality."[1]

The first ordinance about which you inquire, Hanover County Code § 4-8 provides as follows:

> It shall be unlawful for the owner of any agricultural animal to allow such agricultural animal, except for poultry, to run at large in the county. It shall be the duty of the animal control officer or other officer who finds any agricultural animal, except for poultry, running at large in violation of this section, to take the agricultural animal, except for poultry, into custody and impound same.

This ordinance regulates private property. Property rights certainly benefit from constitutional protection and constitute a cornerstone of our prosperity as a Nation. Property rights, however, are not absolute. A locality, when authorized by the legislature, can enact ordinances designed to regulate property to protect the health and safety of its citizens. Where, as here, a policy or regulation does not infringe upon a suspect class, such as race, or a fundamental right, such as freedom of speech, the standard of review is highly deferential toward the locality.[2] The courts must

defer to legislative judgments "if there is any reasonably conceivable set of facts that could provide a rational basis for the" measure under review.[3]

Virginia has long allowed localities to enact laws requiring animals to be kept inside a fence.[4] Animals that are left to wander can damage or destroy property and crops belonging to others, threaten other animals or human life, and can pose a danger to traffic on the County's roads. In 1872, the Supreme Court of Indiana bemoaned the fact that

> [t]here are many persons . . . that seem to act upon the theory that their cows, and in many instances their hogs, may rightfully roam at large, and obtain a scanty subsistence upon the highways and neighboring unenclosed lands, thereby making it necessary for every one to guard his premises with much vigilance and expense, from the depredations of these marauding and vagrant animals that are thus permitted to wander in quest of food.[5]

Plainly, the County has a rational basis for enacting this ordinance and, therefore, it is constitutional.

I further note that there is no plausible constitutional objection to impounding animals in these circumstances, both for the safety of others and for the protection of the animals themselves.

The second ordinance you ask about, Hanover County Code § 24-4, provides as follows:

> If any person discharges or shoots any firearm or other weapon in or along any public road or street or within one hundred (100) yards thereof or within one hundred (100) yards of any building occupied or used as a dwelling or place where the public gathers, not his own dwelling or residence, except in the lawful defense of his own person or property or that of a member of his family, he shall be guilty of a Class 1 misdemeanor.

The right to bear arms is protected by the Constitutions of Virginia[6] and of the United States.[7] The United States Supreme Court has recognized that the Second Amendment of the United States protects an *individual* right to bear arms[8] and, further that this right operates as a restriction on the States as well as the federal government.[9] The protections afforded by the Virginia Constitution in this area are co-extensive with those of the Second Amendment.[10]

The law is not settled at this time with respect to how strictly courts will evaluate restrictions on the use of firearms. We know that the right to bear arms is "not unlimited, just as the First Amendment's right of free speech was not."[11] Although the right is broader than merely protection of the home, at its core the Second Amendment protects "the right of law-abiding, responsible citizens to use arms in defense of hearth and home."[12]

Here in the Fourth Circuit, federal courts will apply a two part test to evaluate the validity of restrictions on bearing or using firearms. The first question is "whether the challenged law imposes a burden on conduct falling within the scope of the Second Amendment's guarantee."[13] This is a "historical inquiry," which "seeks to determine whether the conduct at issue was understood to be within the scope of the right at the time of ratification. If it was not, then the challenged law is valid."[14] If the law at issue burdens conduct that was within the scope of the Second Amendment as historically understood, then the court will apply "an appropriate form of means ends scrutiny."[15] "[U]nless the conduct at issue is not protected by the Second Amendment, the Government bears the burden of justifying the constitutional validity of the law."[16]

In conducting this review, the United States Court of Appeals for the Fourth Circuit has noted that

> [t]he Second Amendment is no more susceptible to a one-size-fits-all standard of review than any other constitutional right. Gun-control regulations impose varying degrees of burden on Second Amendment rights, and individual assertions of the right will come in many forms. A severe burden on the core Second Amendment right of armed self-defense should require strong justification. But less severe burdens on the right, laws that merely regulate rather than restrict, and laws that do not implicate the central self-defense concern of the Second Amendment, may be more easily justified.[17]

In light of these principles, I conclude that the ordinance does not violate the constitutional right to bear arms.[18] First, it specifically exempts from its scope actions taken in defense of self, others or property. Therefore, it does not implicate one of the core concerns of the right to bear arms. Second, it does not preclude anyone from carrying a firearm. Instead, it simply prohibits certain *uses* of a firearm. Moreover, the ordinance serves a proper purpose, to protect the public safety, by prohibiting firearm discharges on roads or near occupied buildings.

In addition, this ordinance does not violate any property rights. Under a highly deferential "rational basis" review, courts easily would sustain this ordinance against a challenge that it infringed on property rights.

The final ordinance about which you inquire is a component of a noise control ordinance, Hanover County Code § 16-8(8). It provides in relevant part that

> The following acts are declared to be noise disturbances in violation of this chapter, provided that this list shall not be deemed to be an exclusive enumeration of those acts which any constitute noise disturbances and that an act not listed below may nevertheless constitute a violation of section 16-7.
>
> (8) Allowing an animal to create howling, barking, whining, meowing, squawking or other such noises which are plainly audible across a property

> boundary or through partitions common to two (2) residences within a building and that take place continuously or repeatedly (k) during a period of at least fifteen (15) minutes in duration between 7:00 a.m. until 10:00 p.m. or (ii) during a period of at least 10 minutes in duration between 10:00 p.m. and 7:00 a.m., provided, however, that animal noises on property subject to a special exception for a commercial kennel or conditional use permit for a public animal shelter shall be governed exclusively by the conditions of the special exception or conditional use permit.

Noise control ordinances have been invalidated when they are unconstitutionally vague, or when they unduly restrict protected constitutional rights like freedom of speech.[19] The ordinance above does not suffer from either defect. It states in precise terms what is forbidden. Therefore, persons "of common intelligence" are not required to "necessarily guess at [the] meaning [of the language] and differ as to its application."[20] In addition, animal noises are not constitutionally protected speech, so there is no free speech issue with this subpart of the ordinance.

Finally, I again note that under the "rational basis" test detailed above, courts would sustain this ordinance against any challenge that it unconstitutionally interferes with property rights. For good or for ill, courts in recent decades have been highly deferential toward legislatures and governing bodies in reviewing ordinances and statutes that to some degree or another restrict the use of property. I am duty bound to provide advice based on the law as it presently exists.

CONCLUSION

Accordingly, it is my opinion that none of the ordinances about which you inquire suffers from constitutional infirmity.

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[1] Town of Ashland v. Bd. of Spvsrs., 202 Va. 409, 416, 117 S.E.2d 679, 684 (1961).

[2] Advanced Towing Co. v. Fairfax Cnty. Bd. of Spvsrs., 280 Va. 187, 191, 694 S.E.2d 621, 623 (2010).

[3] *Id.* at 192, 694 S.E.2d at 624.

[4] Under current law, localities expressly are authorized to enact ordinances governing "the running at large and the keeping of animals." VA. CODE ANN. § 3.2-6544 (2008). *See also* Poindexter v. May, 98 Va. 143, 145, 34 S.E. 971, 972 (1900) (tracing the history of such regulations to the common law of England).

[5] Indianapolis, Cincinnati & Lafayette R.R. Co. v. Harter, 38 Ind. 557, 559 (1872).

[6] "[T]he right of the people to keep and bear arms shall not be infringed[.]" VA. CONST. art. I, § 13.

[7] "[T]he right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. The Second Amendment applies to the States as well as to the United States government. McDonald v. City of Chicago, 130 S. Ct. 3020, 3026 (2010) (quotations and citations omitted).

[8] District of Columbia v. Heller, 554 U.S. 570, 606 (2008). *McDonald*, 130 S. Ct. at 3026 (quotations and citations omitted).

[9] *McDonald*, 130 S. Ct. at 3026 (quotations and citations omitted).

[10] DiGiacinto v. Rector & Visitors of George Mason Univ., 281 Va. 127, 133-34, 704 S.E.2d 365, 368-69 (2010).

[11] *Heller*, 554 U.S. at 595.

[12] *Id.* at 635. In addition to self-defense, an armed citizenry serves as a check upon tyranny. *See* JOSEPH STORY, A FAMILIAR EXPOSITION OF THE CONSTITUTION OF THE UNITED STATES § 450, p. 246 (1840) ("One of the ordinary modes, by which tyrants accomplish their purposes without resistance, is, by disarming the people, and making it an offense to keep arms."). An armed citizenry also will serve as a deterrent to foreign invasion – a less likely prospect in modern times, but one that has occurred repeatedly throughout our history. As the Continental Congress noted, "Men trained to Arms from their Infancy, and animated by the Love of Liberty, will afford neither a cheap or easy Conquest." Journals of the Continental Congress, Petition to the King (July 8, 1775), *available at* http://avalon.law.yale.edu/18th_century/contcong_07-08-75.asp.

[13] United States v. Chester, 628 F.3d 673, 680 (4th Cir. 2010).

[14] *Id.*

[15] *Id.*

[16] *Id.*

[17] *Id.* at 682 (quoting United States v. Skoien, 587 F.3d 803, 813-14 (7th Cir. 2009), vacated, 614 F.3d 638 (7th Cir. 2010) (en banc)).

[18] I note parenthetically that VA. CODE ANN. § 15.2-915(A) (Supp. 2010) does not apply to this ordinance. That statute prohibits a locality from adopting ordinances governing the "purchase, possession, transfer, ownership, carrying, storgage or transporting of firearms. . . ." The County ordinance prohibits, in limited fashion, the discharge of a firearm, but it does not prohibit the purchase, possession, transfer, ownership, carrying or transporting of a firearm.

[19] Tanner v. City of Virginia Beach, 277 Va. 432, 674 S.E.2d 848 (2009) (invalidating a noise control ordinance as unconstitutionally vague); U.S. Labor Party v. Pomerleau, 557 F.2d 410 (4th Cir. 1977) (invalidating a noise-ordinance as unconstitutional because of its impact on free speech).

[20] *Tanner*, 277 Va. at 439, 674 S.E.2d at 852 (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)).

OP. NO. 11-001

CONSTITUTION OF THE UNITED STATES: DEFENSE/MILITIA POWERS

The Constitution of the United States expressly reserves to the States the power to appoint officers to the state militias, which includes the modern National Guard.

The power to determine which state Guard officers are eligible for service in the overlapping National Guard of the United States rests with Congress.

CONSTITUTION OF THE UNITED STATES: SPENDING CLAUSE

Congress, through its spending power, can condition the use of federal funds on the States' acceptance of "Don't Ask, Don't Tell" policy.

THE HONORABLE BILL JANIS
MEMBER, HOUSE OF DELEGATES
JANUARY 25, 2011

ISSUE PRESENTED

You inquire whether the Virginia General Assembly has the authority to mandate that the Virginia National Guard continue the "Don't Ask, Don't Tell" policy ("DADT") in the aftermath of recent Congressional action and, if so, you inquire about the limits and parameters of that authority.

RESPONSE

I am unable to answer your questions because the federal regulations repealing DADT have not been issued. Regardless of what form those regulations take, the Constitution expressly reserves to the States the power to appoint officers to the state militias, and that includes the modern National Guard. The power to determine which state Guard officers are eligible for service in the overlapping National Guard of the United States, however, rests with Congress. Moreover, Congress, through its spending power, can condition the use of federal funds on the States' acceptance of DADT. Should the General Assembly wish to avoid the conditions attached to these funds, it can raise, equip and fund an independent Virginia militia entirely from state revenues.

BACKGROUND

Under the DADT statute, a person who, among other things, engaged in a "homosexual act or acts" or who "stated that he or she is a homosexual or bisexual" was to be "separated from the armed forces."[1] The United States Congress has now repealed DADT.[2] The repeal, however, is not effective immediately. Instead, the repeal will go into effect after the Department of Defense has prepared the required regulations and policies.[3] These regulations and policies have not been finalized as of the time this writing. Until then, DADT remains the law.

APPLICABLE LAW AND DISCUSSION

To better understand the authority of the General Assembly in this area, it is helpful to review the historical backdrop leading up to the present system. State militias trace their roots to the very dawn of the colonial era. The "notion of the people –in-arms springing to the defense of their homeland" was central to the founders.[4] George Mason memorialized this understanding in the Virginia Declaration of Rights by writing that the militia is properly "composed of the body of the people."[5] The practical utility of the militia, however, was on a local basis and for short duration. George Washington, faced with fighting a protracted continental war, described militia troops as a "broken staff."[6] The debates over the Constitution pitted the anti-federalists, who saw a standing army as the blunt and expensive instrument of tyranny, against the federalists, who recognized that the defense of the nation could not be adequately sustained solely by the militia.

In addition to limiting army appropriations to two years, the powers of Congress set forth in Art.1, § 8, of the Constitution reflect a compromise over these two conflicting themes.

> On the one hand, there was a widespread fear that a national standing Army posed an intolerable threat to individual liberty and to the sovereignty of the

> separate States, while on the other hand, there was a recognition of the danger of relying on inadequately trained soldiers as the primary means of providing for the common defense. Thus, Congress was authorized both to raise and support a national army and also to organize "the Militia."[7]

Consistent with the power given to Congress to "provide for the common Defence" of the United States and to declare war,[8] the United States Constitution confers broad power to the United States government with respect to military matters in general and with respect to control over state militias more specifically.[9] The Constitution authorizes Congress to "provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States."[10] Congress also can "provide for the calling forth the Militia to execute the laws of the Union, suppress Insurrections, and repel invasions."[11] Therefore, the power of the General Assembly to regulate the militia is limited by these express textual provisions. The Constitution reserves to the States the "Appointment of the Officers, and the Authority of training the Militia according to the discipline prescribed by Congress."[12]

For the first century of the Nation's existence, Congress did not exercise its authority to regulate the state militias.[13] At the turn of the twentieth century, Congress enacted a series of reforms that produced the modern National Guard system.[14] Congress created "'two overlapping but distinct organizations' . . . the National Guard of the various States and the National Guard of the United States."[15] Under this system, "persons who [] enlist[] in a state National Guard unit simultaneously enlist[] in the National Guard of the United States."[16] State guardsmen are both members of the organized militia and a reserve component of the armed forces of the United States. "[A] member of the Guard who is ordered to active duty in the federal service is thereby relieved of his or her status in the state Guard for the entire period of federal service."[17] In other words, Guardsmen "keep three hats . . . a civilian hat, a state militia hat, and an army hat – only one of which is worn at any particular time."[18]

Under the present system, the power of appointing or terminating a state National Guard officer is left to the States.[19] Appointment in the state National Guard, however, is distinct from what is required to become commissioned in the National Guard of the United States. Congress regulates the commissioning of officers in the National Guard of the United States through the process of federal recognition.[20]

"Federal recognition is the acknowledgment by the Federal Government that an officer [of the state militia] appointed, promoted or transferred to an authorized grade or position vacancy in the . . . National Guard [of the United States] meets the prescribed laws and regulation[s] governing the [appointment, promotion, or transfer.]."[21] Once a state officer receives a federal commission, the officer's "capacity and general fitness" to retain federal recognition can be investigated at any time by a board composed of commissioned officers of the Regular Military, the United States National Guard, or both.[22] Given the current dual enlistment system, it is not surprising that under current law the Governor of Virginia is given the power and the duty "to issue such orders and to prescribe such regulations relating to the

organization of the armed forces of the Commonwealth as will cause the same at all times to conform to the federal requirements of the United States government relating thereto."[23]

One final aspect of the modern dual system bears mentioning. Congress provides extensive funding for the training and equipment of state guard units. As the United States Supreme Court has noted, "[t]he Federal Government provides virtually all of the funding, the material, and the leadership for state Guard units."[24] Congress can and has conditioned those funds upon conformity with federal policy. "States that fail to comply with federal regulations risk forfeiture of federal funds allocated to organize, equip and arm state Guards."[25]

The dual enlistment system, and the federal recognition process, combined with Congress's spending power, has meant in practice that Congress set the standards and policy for state Guard units. Although the present system has been criticized for straying far from what the Framers originally intended for the militia, it has been upheld against repeated challenges.[26]

From this backdrop, several legal conclusions follow. First, the States can continue to hold the power to appoint officers to the state Guard. This power of appointing officers is secured by the express provisions of Article I, § 8, reserving to the States the power to "Appointment of the Officers."[27] Second, Congress will continue to determine the criteria for who is eligible for federal recognition in the National Guard of the United States. Third, Congress, through its spending power, can condition the use of federal funds on the States' acceptance of DADT. Should the General Assembly wish to evade the conditions attached to federal funding, the General Assembly can raise, equip and fund an independent Virginia militia entirely from state revenues.[28]

CONCLUSION

At the present time, I am unable to answer your questions regarding the General Assembly's authority to retain a DADT policy because the federal regulations repealing DADT have not been issued. Regardless of what form those regulations take, the Constitution expressly reserves to the States the power to appoint officers to the state militias, and that includes the modern National Guard. The power to determine which state Guard officers are eligible for service in the overlapping National Guard of the United States, however, rests with Congress. Moreover, Congress, through its spending power, can condition the use of federal funds on the States' acceptance of DADT. Should the General Assembly wish to avoid the conditions attached to these funds, it can raise, equip and fund an independent Virginia militia entirely from state revenues.

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[1] 10 U.S.C. § 654.

[2] Don't Ask, Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515 (to be codified at 10 U.S.C. § 654).

[3] *Id.*

[4] ALLAN R. MILLETT, PAPERS ON THE CONSTITUTION 95 (John W. Elsberg, ed. 1990).

[5] VA. CONST. art. 1, § 13.

[6] Frederick B. Wiener, *The Militia Clause of the Constitution,* 54 Harv. L. Rev. 181, 182-83 (1940) (citing Letter, Washington to the President of Congress, Sept. 24, 1776, p. 106 in The Writings of George Washington (1932)).

[7] *Perpich v. Dep't of Def.,* 496 U.S. 334, 340 (1990).

[8] *Id.*

[9] U.S. CONST. art. I, § 8.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Perpich*, 496 U.S. at 341.

[14] *See id*. at 342-45 (tracing the history of Congressional regulation of state Militias). *See also* Patrick T. Mullins, Note, *The Militia Clauses, The National Guard, and Federalism: A Constitutional Tug of War*, 57 GEO. WASH. L. REV. 328, 332-44 (1988) (tracing the history of the integration of state militias into the national military).

[15] *Perpich*, 496 U.S. at 345.

[16] *Id*.

[17] *Id*. at 346.

[18] *Id.* at 348.

[19] MacFarlane v. Grasso, 696 F.2d 217, 226 n.4 (2d Cir. 1982).

[20] 32 U.S.C. § 307(d).

[21] Frey v. California, 982 F.2d 399, 401 n.3 (9th Cir.), *cert. denied*, 509 U.S. 906 (1993).

[22] 32 U.S.C. § 323(b).

[23] VA. CODE ANN. § 44-9 (2002).

[24] *Perpich*, 496 U.S. at 351.

[25] Charles v. Rice, 28 F.3d 1312, 1315-16 (1st Cir. 1994) (citing 32 U.S.C. §§ 101, 107, 108 and 501).

[26] *Perpich*, 496 U.S. at 347-48 (rejecting an attack on the "Montgomery Amendment," which provided authority for federal training of the National Guard without a Governor's consent); Selective Draft Cases, 245 U.S. 366, 368, 389-89 (1918) (upholding the power of the President to draft members of the state militia).

[27] U.S. CONST. art. I, § 8.

[28] *Perpich*, 496 U.S. at 352.

OP. NO. 11-105

CONSTITUTION OF THE UNITED STATES: FIRST AMENDMENT, ESTABLISHMENT CLAUSE – LEGISLATIVE PRAYER

Whether any particular prayer containing the words "Jesus Christ" would violate the United States Constitution turns on contextual facts.

THE HONORABLE DANNY W. MARSHALL, III
THE HONORABLE DONALD W. MERRICKS
MEMBERS, HOUSE OF DELEGATES
DECEMBER 9, 2011

ISSUE PRESENTED

You inquire regarding the constitutional limits on public prayer at meetings of the Pittsylvania County Board of Supervisors. Specifically, you ask whether opening invocations at the Pittsylvania Board of Supervisors meetings that refer to Jesus Christ constitute a violation of the United States Constitution.

RESPONSE

It is my opinion that whether any particular prayer containing the words "Jesus Christ" would violate the United States Constitution turns on contextual facts not contained in your letter. Nonetheless, I provide general guidance on the subject.

BACKGROUND

You indicate that your inquiry is prompted by a letter written by the American Civil Liberties Union. The letter alleges that, because the "opening invocations at the Pittsylvania Board of Supervisors meetings are consistently Christian in nature; that is, they explicitly refer to Jesus Christ[,]" such conduct by the Board constitutes a violation of the Establishment Clause of the United States Constitution.

APPLICABLE LAW AND DISCUSSION

Prayers at sessions of legislative bodies are deeply woven into the historical fabric of this country. The same session of the First Congress that passed the Bill of Rights adopted a policy of electing chaplains to open its sessions with a prayer.[1] "A statute providing for the payment of these chaplains was enacted into law on September 22, 1789."[2] Within days of that enactment, the First Amendment passed through Congress and was sent to the States.[3] Ever since then, the practice of legislative invocations has been considered valid, as the Unites States Supreme Court recognized in *Marsh v. Chambers*.

As the ACLU notes in its letter, the Court in *Marsh* cautioned that the practice of legislative prayer that it was upholding occurred in a context where it was not being used improperly to proselytize or advance or disparage a faith or belief. But the Court also said that courts should not closely review the content of prayer.

> The content of the prayer is not of concern to judges where, as here, there is no indication that the prayer opportunity has been exploited to proselytize or advance any one, or to disparage any other, faith or belief. That being so, it is not for us to embark on a sensitive evaluation or to parse the content of a particular prayer.[4]

To the extent that the Supreme Court commented on the content of the prayers at issue, it was to note that the plaintiff complained "that the prayers are in the Judeo-

Christian tradition" – a fact that did not trouble the Court at all.[5] Moreover, the United States Court of Appeals for the Eleventh Circuit recently upheld legislative prayers led by rotating volunteers even though they contained clearly sectarian content.[6]

The Fourth Circuit, in whose jurisdiction Virginia lies, has repeatedly reaffirmed that legislative prayers are constitutional.[7] Nonetheless, when the court has found that such invocations advanced a particular religion, it has held policies governing legislative prayers unconstitutional as applied. For example, in *Wynne v. Town of Great Falls*, the Fourth Circuit found the policy in question unconstitutional because it required the invocation of the name Jesus Christ.[8] Further, in *Joyner v. Forsyth County*, a two-judge majority recently found the policy of a North Carolina county unconstitutional because it resulted in practice in an overwhelming number of sectarian prayers.[9]

Even so, the majority opinion in *Joyner* notes that "[t]he bar for" a locality in permitting legislative invocations "is hardly a high one."[10] The majority opinion approves of two approaches. First, a locality may request ministers to use nonsectarian prayers.[11] The majority assures localities that if some sectarian references nonetheless are made, that courts are not "in the business of policing prayers for the occasional sectarian reference."[12] Second, a locality may cast its net widely enough so that "leaders of all faiths . . . come forth."[13] In that circumstance, the use of "ordinarily . . . brief sectarian terms, such as references to 'Jesus,' 'Allah,' 'God of Abraham, Isaac and Jacob,' 'Mohammed,' and 'Heavenly Father'" will not be unconstitutional because "the prayers, taken as a whole [do] not advance any particular faith."[14] Ultimately, the majority found that precedent "require[es] legislative prayers to embrace a non-sectarian ideal."[15]

As the dissent points out, however, the majority may be misapplying the precedent of *Marsh* and *Simpson*,[16] thereby rendering an inconsistent analysis. As a result, the majority opinion, while acknowledging that references to specific sectarian terms is generally permissible, requires legislative bodies to continuously review the content of offered prayers to ensure they are not overwhelmingly identifiable as Christian.[17] According to the dissent, the majority overemphasizes the voluntary individual invocations that result from the county's policy over the policy itself, which is the only government action before the Court and which the majority concedes is neutral.[18] Further, as the dissent notes, because the majority offers no standard or formula for determining at what point the practice of voluntary sectarian prayer renders the neutral policy unconstitutional,[19] courts will be required to be "in the practice of policing prayers" in opposition to *Marsh*. The dissent suggests, that in effect, to follow the majority, the only means to ensure no constitutional violation would be to eliminate legislative prayer all together, a result in direct contradiction to the traditions of this nation and one, as much precedent has demonstrated, not required by the Establishment Clause.[20]

Nonetheless, despite the sharp criticism of the majority by the dissent, unless that opinion is subsequently, authoritatively limited,[21] along the lines stated in the dissent,

it would be imprudent for a Virginia locality or officers to act other than in accordance with it. In giving this opinion, I do not suggest that the Establishment Clause requires nonsectarian prayer at legislative meetings in the manner and to the extent required by the *Joyner* majority opinion; however, that opinion is currently binding in the Fourth Circuit.

CONCLUSION

Accordingly, while the determination of whether any particular prayer containing the words "Jesus Christ" would violate the United States Constitution turns on contextual facts not contained in your letter, it is my opinion that governmental bodies and officers should take heed of recent cases decided in the Fourth Circuit.

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[1] Marsh v. Chambers, 463 U.S. 783, 787-78 (1983).

[2] *Id*. at 788.

[3] H.R. Jour., 1st Cong., 1st Sess. 121; S. Jour., 1st Cong., 1st Sess. 88.

[4] *Marsh*, 463 U.S. at 795-95.

[5] *Id*. at 793.

[6] Pelphrey v. Cobb Cnty., 547 F.3d 1263 (11th Cir. 2008).

[7] Joyner v. Forsyth Cnty., 653 F.3d 341, 346 (4th Cir. 2011) ("we have followed the Supreme Court's guidance in repeatedly upholding the practice of legislative prayer."); Turner v. City Council, 534 F.3d 352, 356 (4th Cir. 2008) ("The Council's decision to open its legislative meetings with non-denominational prayers does not violate the Establishment Clause."); Simpson v. Chesterfield Cnty. Bd. of Sprvrs., 404 F.3d 276, 282 (4th Cir. 2005) ("legislative invocations . . . constitute a tolerable acknowledgement of beliefs widely held among the people of this country."); Wynne v. Town of Great Falls, 376 F.3d 292, 302 (4th Cir. 2004).

[8] *Wynne*, 376 F.3d at 301.

[9] *Joyner*, 653 F.3d at 353-55.

[10] *Id*. at 354.

[11] *Id*. at 352. *See, e.g., Simpson*, 404 F.3d at 276.

[12] *Joyner*, 653 F.3d at 351.

[13] *Id*. at 352.

[14] *Id*. at 353 (internal quotation marks and citations omitted).

[15] *Id*. at 347.

[16] *See id*. at 362 (Niemeyer, J., dissenting).

[17] *Id*. at 364-66.

[18] *Id*. at 358-59.

[19] *See id*. at 361-62, 365.

[20] *Id*. at 364, 366-67.

[21] I note that Forsyth County's petition for writ of certiorari is currently pending in the Supreme Court of the United States. *See* http://www.supremecourt.gov/Search.aspx?FileName=/docketfiles/11-546.htm.

OP. NO. 11-032

CONSTITUTION OF VIRGINIA: CONSERVATION – RIGHT TO HUNT

GAME, INLAND FISHERIES AND BOATING: WILDLIFE AND FISH LAWS – HUNTING AND TRAPPING

The prohibition on hunting on Sundays does not transgress the constitutional right to hunt and fish.

THE HONORABLE J. CHAPMAN PETERSEN
MEMBER, SENATE OF VIRGINIA
APRIL 1, 2011

ISSUE PRESENTED

You inquire whether the prohibition on hunting on Sundays is constitutionally valid under Article XI, § 4 of the Constitution of Virginia, which provides that "[t]he people have a right to hunt, fish, and harvest game, subject to such regulations and restrictions as the General Assembly may prescribe by general law."

RESPONSE

It is my opinion that the prohibition on hunting on Sundays does not transgress the constitutional right to hunt and fish.

APPLICABLE LAW AND DISCUSSION

Article XI, § 4 establishes and protects in our foundational charter of government a right to hunt and fish. Like other constitutional rights, it is not unlimited. Here, the constitutional text expressly allows the General Assembly to restrict this right by general law. Section 29.1-521(A) prohibits hunting on a Sunday. Such a statute is permissible under the express language of Article XI, § 4 as regulation or restriction enacted by the General Assembly.

Moreover, the restriction on hunting on Sundays is a longstanding one,[1] and the General Assembly, when it proposed amending the Constitution of Virginia in 2000 to protect a right to hunt and fish, was presumed to be aware of this statute.[2] The framers of the constitutional amendment did not use any language indicative of a purpose to nullify this statute.[3] It is probable that had the General Assembly wished to restrict such laws, such an intent would have been expressed in the text of the amendment.[4] The fact that the General Assembly did not repeal the prohibition on hunting on Sundays in the wake of the passage of the constitutional amendment is a further indication that no conflict exists.[5]

CONCLUSION

Accordingly, it is my opinion that the prohibition on hunting on Sundays does not transgress the constitutional right to hunt and fish.

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[1] The restriction dates back to at least the turn of the past century. *See* VA. CODE ANN. § 2070a(3) (1904) (making it unlawful to "shoot or otherwise . . . hunt any game in this State on Sunday.").

[2] Blake v. Marshall, 152 Va. 616, 625-26, 148 S.E. 789, 791 (1929).

[3] *Id.*

[4] *Id.*

[5] *Id.*

OP. NO. 11-002

CONSTITUTION OF VIRGINIA: LEGISLATURE – APPROPRIATIONS TO RELIGIOUS OR CHARITABLE ORGANIZATIONS

Two specific proposed budget amendments, while noble in purpose and salutary in effect, are precluded by operation of Article IV, § 16 of the Constitution of Virginia, which prohibits appropriations to religious or charitable bodies.

THE HONORABLE JOHN M. O'BANNON, M.D.
MEMBER, HOUSE OF DELEGATES
JANUARY 28, 2011

ISSUE PRESENTED

You inquire whether certain proposed budget amendments calling for appropriations to be made to two charitable institutions are permissible under the Constitution of Virginia.

RESPONSE

It is my opinion that the proposed budget amendments, while noble in purpose and salutary in effect, are precluded by operation of Article IV, § 16 of the Constitution of Virginia.

BACKGROUND

The budget proposed by the Governor for the 2011 General Assembly includes an amendment to the state budget appropriating $500,000 for Operation Smile. Operation Smile is a nonprofit organization located in Virginia that is devoted to providing free reconstructive surgery and other healthcare to persons who suffer from facial deformities, such as cleft lips, cleft palates, tumors and burns. Operation Smile also trains local medical professionals and donates medical equipment. The proposed amendment

> Provides general fund support for Operation Smile. Operation Smile is an international medical humanitarian organization dedicated to raising awareness of this life-threatening issue and providing lasting solutions that will allow children to be healed, regardless of financial standing, well into the future.[1]

The Governor proposed another amendment to the current biennial budget to provide an additional $500,000 in state funding for the Federation of Virginia Food Banks. The amendment would be used to support the Kids BackPack initiative, which ensures nutritious meals for low-income children when school is not in session. This amendment

> Provides funding for the Federation of Food Banks to purchase food, which will be distributed to needy Virginians through the Commonwealth's network of food banks. This support will assist food banks across the state meet increasing demands. It is estimated that Virginia's food banks are giving out over twenty percent more food than a year ago. None of the funding provided can be used for administrative or overhead purposes.[2]

Such appropriations are not a new phenomenon. Past Governors and General Assemblies have enacted similar measures for some time. For example, in the last dozen years, the Virginia General Assembly has appropriated public funds for such groups as SERVE Homeless Shelter to provide food and shelter for those in need (FY 2007),[3] Virginia Quality of Life to construct a center for medical and other services in rural Virginia (FY 2000, 2001, 2003, 2007),[4] Virginia Waterfront International Arts Festival to promote the region as a cultural tourism destination (FY 2001),[5] Maryview Foundation Healthcare Center for medical services and medication assistance for indigent and uninsured persons (FY 2007),[6] and Special Olympics of Virginia for a year-round sports training and athletic competition (FY 1999, 2000, 2001, 2003, 2007).[7]

APPLICABLE LAW AND DISCUSSION

The Virginia Constitution forbids the General Assembly from making "any appropriation of public funds, personal property, or real estate . . . to any charitable institution which is not owned or controlled by the Commonwealth."[8] Several exceptions to this rule exist. The General Assembly can make "appropriations to nonsectarian institutions for the reform of youthful criminals and may also authorize counties, cities, or towns to make appropriations to any charitable institution or association."[9] Furthermore, the General Assembly may assist non-state educational institutions of higher education with borrowing money for the construction of facilities, provided that the Commonwealth is not liable for the debt.[10] The term "charitable institution" is not defined in the Constitution.

The purpose of Article IV, § 16, as its plain language indicates, is "to prohibit the appropriation of public funds . . . for charitable purposes."[11] When an appropriation runs afoul of constitutional strictures, the Supreme Court of Virginia does not hesitate to strike down the appropriation, however noble its purpose might be. The Court invalidated a law that sought to create a relief fund "to be used by disabled firemen and relief of widows and dependent children of deceased firemen."[12] It also declared invalid a law designed to provide educational opportunities for orphans of veterans killed during World Wars I and II.[13] In each case, the Court looked to whether the purpose and effect of the appropriation was to provide a direct benefit to the charity.[14]

Although the text of the provision and the cases interpreting make it clear that appropriations to charities are not permitted, I further note that the Commission on Constitutional Revision in 1968-69 considered whether to redraft this provision. The Commission recognized that "[p]rivate charitable organizations often perform functions that, were they not the subject of private initiative, would surely have to be performed by public bodies at public expense."[15] Therefore, "[a] reasonable argument could be made that at least some appropriations would be in the public interest."[16] The Commission found that "the problem lay in fashioning a constitutional provision which would allow selective and limited appropriations in legitimate cases without opening the floodgates to demand by, and appropriations to, the vast number of private groups that would consider themselves equally entitled to share in the public largess."[17] The Commission – and, of course, ultimately, the people who ratified the Constitution – left the existing provision banning all such appropriations essentially undisturbed from the prior Constitution.[18] Although one could, like the Commission, ponder whether this provision should remain in the Constitution, there is no escaping the fact that the provision was retained in the Constitution and is, therefore, binding.

The Virginia Constitution does not prohibit categorically all payments to charities from the State. The General Assembly can establish a program to provide services to its residents, and make appropriations to state agencies that, in turn, result in payments to charitable entities for goods purchased or services provided. For example, a state program designed to provide medical care for indigents could appropriate money to a state agency, which then pays a non-profit hospital for services it provided under the program.[19] The budget amendments at issue, however, do not fit this paradigm. They are direct appropriations to a charity for benevolent purposes.

The question is not whether these proposed amendments serve noble purposes and that they would provide needed relief – unquestionably, they are and they would. The question is one of fidelity to the text of our constitution. And where the Constitution commands or forbids, the government must obey.

CONCLUSION

Accordingly, it is my opinion that the proposed budget amendments, while noble in purpose and salutary in effect, are precluded by operation of Article IV, § 16 of the Constitution of Virginia.

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[1] Executive Amendments to the 2010-12 Biennial Budget, B-107 (Dec. 17, 2010). This document is available at http://dpb.virginia.gov/budget/buddoc11/pdf/budgetdocument2011.pdf

[2] *Id.*

[3] 2007 Va. Acts ch. 781, Item 481.

[4] HB 1600 and SB 800, Item 571, 2001 Reg. Sess. (Va.); 2003 Va. Acts ch. 1042, Item 532; 2007 Va. Acts ch. 781, Item 481.

[5] HB 1600 and SB 800, Item 571.

[6] 2007 Va. Acts ch. 781, Item 481.

[7] 2000 Va. Acts ch. 1073, Item 571; HB 1600 and SB 800, Item 571; 2001 Reg. Sess. Va.; 2003 Va. Acts ch. 1042, Item 532; 2007 Va. Acts ch. 781, Item 481.

[8] VA. CONST. art. IV, § 16.

[9] *Id*. The General Assembly has enacted enabling legislation that permits such donations by localities. VA. CODE ANN. § 15.2-953 (Supp. 2010) (authorizing counties to make appropriations and donations to charities located within their jurisdiction).

[10] VA. CONST. art. VIII, § 11.

[11] Commonwealth v. Nat'l Fire Ins. Co. of Hartford, 161 Va. 737, 744, 172 S.E.2d 448, 451 (1934).

[12] *Nat'l Fire Ins. Co. of Hartford,* 161 Va. at 740, 172 S.E.2d at 450.

[13] Almond v. Day, 197 Va. 419, 422, 89 S.E.2d 851, 854 (1955).

[14] *Nat'l Fire Ins. Co. of Hartford,* 161 Va. at 746, 172 S.E.2d at 452; *Almond v. Day*, 197 Va. at 428, 89 S.E.2d at 857.

[15] I A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA 551 (1974).

[16] *Id*.

[17] *Id.*

[18] *Id.*

[19] Persuasive authority from other States illustrates this concept. *See* Nebraska v. Smith, 353 N.W.2d 267 (Neb. 1984) (grants and contracts regarding medical research for cancer and smoking diseases were not prohibited by Nebraska constitutional provision prohibiting "appropriation of public funds . . . to any school or institution of learning not owned or exclusively controlled by the state", NEB. CONST. art. VII, § 11); Pennsylvania Ass'n of State Mental Hosp. Physicians. v. Commonwealth, 437 A.2d 1297 (Pa. 1981) (payment of public funds to a private medical college pursuant to a contract for management of the state's psychiatric institute did not violate Pennsylvania's constitutional prohibition forbidding appropriations to "any charitable or educational institution not under the absolute control of the Commonwealth . . . ." PA. CONST. art. III, § 30).

OP. NO. 11-089

CONSTITUTION OF VIRGINIA: LEGISLATURE – APPROPRIATIONS TO RELIGIOUS OR CHARITABLE ORGANIZATIONS.

CONSTITUTION OF VIRGINIA: CONSERVATION

Article IV, § 16, which prohibits appropriations to charitable institutions not owned or controlled by the Commonwealth, applies to nonprofits that are devoted to land conservation.

Article XI, §§ 1 and 2, which address land conservation, do not remove the specific bar on charitable appropriations.

While the General Assembly cannot make appropriations in the nature of gifts to nonprofits engaged in land conservation, it can sign contracts or leases with such entities.

THE HONORABLE DOUGLAS W. DOMENECH
SECRETARY OF NATURAL RESOURCES
SEPTEMBER 13, 2011

ISSUE PRESENTED

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

RESPONSE

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

BACKGROUND

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

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

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

> for threatened or endangered species, fish and wildlife habitat, natural areas, agricultural and forestal lands and open space.

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

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

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

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

In addition, you observe that it also can be argued that the function of the Foundation and the issuance of these grants is a means of achieving the purposes espoused in Article XI of the Virginia Constitution. In light of the constitutional policy to protect the Commonwealth's environment, you ask whether the constitutional prohibition against appropriations to charitable institutions applies to land conservation being furthered through grants to land trusts, where the direct benefit of these actions accrues to the Commonwealth through the conservation of its natural resources and open space in perpetuity and not to the land trust that is largely serving as the agent for the transaction.

You state that at its May 3, 2011 meeting, the Board of Trustees of the Virginia Land Conservation Foundation, following a lengthy discussion of this Office's January 28, 2011 Opinion, instructed staff to initiate a grant round under which land trusts will

remain eligible for funding. As grant awards will not be made by the Board until its September meeting, the Board discussed the need for clarification of the Opinion from the Attorney General prior to the distribution of such awards.

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

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

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

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

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

additional revenue from removing the cap may only be used for the monitoring and enforcing of these easements.

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

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

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

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

APPLICABLE LAW AND DISCUSSION

I. SCOPE OF THE CONSTITUTIONAL PROHIBITION

A. *Scope of the Prohibition on Appropriations to "Charitable Institutions"*

The Virginia Constitution forbids the General Assembly from making "any appropriation of public funds, personal property, or real estate . . . to any charitable institution which is not owned or controlled by the Commonwealth."[6] The purpose of

Article IV, § 16, as its plain language indicates, is "to prohibit the appropriation of public funds . . . for charitable purposes."[7]

A threshold question is whether nonprofit groups devoted to land conservation constitute "charitable institutions" within the intendment of Article IV, § 16. If they do not, the General Assembly is free to appropriate funds to those organizations, or to authorize state agencies to appropriate funds to them. "The [Virginia] Constitution is not a grant of power, but only the restriction of powers otherwise practically unlimited, and except as far as restrained by the Constitution of this State and the Constitution of the United States, the legislature has plenary power."[8]

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

Dictionaries from the period broadly defined the term "charity."[9] I also find instructive the discussion of charitable trusts in *Allaun v. First & Merchants National Bank of Richmond*:[10]

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

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

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

> [I]f you ever depart from the principle and do not have the State control the money that is wrung from the people of Virginia in the way of taxes you are

> going to start a state of things in Virginia to which there will be no stop, because if you appropriate one dollar of the money of the people to support one private institution any other private institution has exactly the same right to come and demand aid at the hands of the Legislature. What I want to impress on the Convention is that if one has a right to demand it the other has a right to demand it; and they are demanding it every time the Legislature comes here. About half the time of the Legislature is taken up by appeals and applications to have appropriations made for the benefit of different institutions. So far as I am concerned, I want to cut it off.[14]

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

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

B. *Gifts versus Contracts*

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

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

Article XI, § 1 of the Virginia Constitution states that

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

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

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

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

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

II. APPLICATION OF THOSE PRINCIPLES TO THE THREE PROPOSED ACTIVITIES

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

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

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

B. *Activity 3: Federal Grant Programs*

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

III. PUBLIC PROCUREMENT AND THE VIRGINIA CONSTITUTION

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

CONCLUSION

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

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[1] 2011 Op. Va. Att'y Gen. No. 11-002, *available at*

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

[2] VA. CODE ANN. §§ 10.1-1017 through 10.1-1026 (2006 & Supp. 2011).

[3] I note that a "holder" may acquire a conservation easement by gift, purchase, devise or bequest. Section 10.1-1010 (2006).

[4] 2011 Va. Acts ch. 890.

[5] 2010 Va. Acts ch. 874.

[6] VA. CONST. art. IV, § 16.

[7] Commonwealth v. Nat'l Fire Ins. Co. of Hartford, 161 Va. 737, 743-44, 172 S.E.2d 448, 451 (1934).

[8] City of Newport News v. Elizabeth City Cnty., 189 Va. 825, 831, 55 S.E.2d 56, 60 (1949).

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

[10] 190 Va. 104, 56 S.E.2d 83 (1949).

[11] *Id*. at 108, 56 S.E.2d at 85 (quotation marks omitted).

[12] Almond v. Day, 197 Va. 419, 425-26, 89 S.E.2d 851, 855 (1955).

[13] *See* I Report of the Proceedings & Debates of the Constitutional Convention, June 12, 1901 to June 26, 1902, at 783-818 (1906).

[14] *Id*. at 815.

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

[16] *Id*. at 790.

[17] *Id*. at 789.

[18] *Id*.at 790.

[19] *Id*.

[20] *Id*. at 791.

[21] *Id*. at 798.

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

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

[24] VA. CODE ANN. § 2.2-4303(A) (Supp. 2011).

[25] *See, e.g.,* 1983-84 Op. Va. Att'y Gen. 290.

OP. NO. 11-049

CONSTITUTION OF VIRGINIA: LEGISLATURE – FORM OF LAWS

The enactment of § 3-6.03 of House Bill 1500 is consistent with Article IV, § 12 of the Constitution of Virginia.

THE HONORABLE ROBERT G. MARSHALL
MEMBER, VIRGINIA HOUSE OF DELEGATES
MAY 13, 2011

ISSUE PRESENTED

You inquire whether § 3-6.03 of House Bill 1500 is consistent with the requirements of Article IV, § 12 of the Constitution of Virginia.

RESPONSE

It is my opinion that the enactment of § 3-6.03 of House Bill 1500 is consistent with Article IV, § 12 of the Constitution of Virginia.

APPLICABLE LAW AND DISCUSSION

Section 18.2-270.01(A) imposes a $50 fee for persons convicted of certain crimes. It provides that

> [T]he court shall order any person convicted of a violation of §§ 18.2-36.1, 18.2-51.4, 18.2-266, 18.2-266.1 or § 46.2-341.24 who has been convicted previously of one or more violations of any of those sections or any ordinance, any law of another state, or any law of the United States substantially similar to the provisions of those sections within 10 years of the date of the current offense to pay $50 to the Trauma Center Fund for the purpose of defraying the costs of providing emergency medical care to victims of automobile accidents attributable to alcohol or drug use.

Section 3-6.03 of the 2011 House Bill 1500, the Appropriations Act, provides that "[n]otwithstanding § 18.2-270.01 of the Code of Virginia, the driver's license reinstatement fee payable to the Trauma Center Fund shall be $100."

In reviewing the constitutionality of laws duly enacted by the General Assembly,

> [e]very presumption is made in favor of the constitutionality of an act of the legislature. A reasonable doubt as to its constitutionality must be solved in favor of the validity of the law . . . and it is only in cases where the statute in question is plainly repugnant to some provisions of the Constitution that the courts can declare it to be null and void.[1]

The second clause of Article IV, § 12 of the Virginia Constitution specifies that no law shall "be revived or amended with reference to its title, but the act revived or the section amended shall be reenacted and published at length." In examining a Michigan constitutional provision similar to Virginia's Article IV, § 12,[2] Justice Cooley of the Supreme Court of Michigan explained the purpose behind the adoption of such clauses:

> The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws. An amendatory act which purported only to insert certain words, or to substitute one phrase for another in an act or section which was only referred to but not republished, was well calculated to mislead the careless as to its effect, and was, perhaps sometimes drawn in that form for that express purpose. Endless confusion was introduced into the law, and the constitution wisely prohibited such legislation.[3]

The Supreme Court of Virginia has noted that the "single object" rule of Article IV, § 12 is "to be liberally construed and treated, so as to uphold the law, if practicable," and the same logic applies to the second clause of Article IV, § 12.[4] Article IV, § 12 is not a substantive modification on the power of the General Assembly. Rather, it imposes a procedural requirement, when it applies.

Section 3-6.03 plainly does not "revive" a law. The question then is whether it "amends" a particular law. As you note, by its plain text, § 3-6.03 does not purport to amend § 18.2-270.01(A). The language in the budget bill, however, unquestionably does have an *impact* on the application of § 18.2-270.01(A) by effectively raising the fee from $50 to $100. The net *effect* of § 3-6.03 is to neutralize the $50 fee imposed in § 18.2-270.01(A) and substitute for it a higher fee. To fall within the constitutional prohibition, however, the statute must literally amend a specific Code provision.

One could argue that, by displacing the fee imposed in § 18.2-270.01(A), and replacing it with a different ee, § 3-6.03 violates the *spirit* animating Article IV, § 12. Citizens reading § 18.2-270.01(A) may conclude that the fee is $50, when, in fact, a

separate enactment makes the fee higher. Under existing case law, however, courts have allowed legislatures to enact a separate statute that neutralizes or modifies another law, so long as it does not literally amend the actual text of the previously enacted statute, in this case § 18.2-270.01(A).

Beale v. Pankey[5] illustrates the difference between what is prohibited and the scenario at issue here. In *Beale*, the Supreme Court of Virginia held that the General Assembly had infringed upon the predecessor to Article IV, § 12 when it voted to pass "[a]n act to amend and re-enact" a prior statute incorporating the town of Pamplin City. The act at issue, however, did so without republishing the prior statute. In other words, the act expressly set about to amend and re-enact a specific prior law, and ran afoul of Article IV, § 12 when it did not republish the entire law being amended. It did not, as here, enact a separate law that has the effect of altering a separate provision of the Code.

One reason for the broad latitude courts have afforded to legislatures in this area is a practical concern: if the General Assembly were required to "publish at length" a statute that is greatly impacted by another statute, bills would become unwieldy and voluminous. As the Supreme Court of Illinois remarked,

> [a]ny new law may, in a sense, be said to change the prior system of laws, and wherever there is a conflict between two acts, the rule is that the later act prevails, and if not amendatory in form it is not within the prohibition of the constitution. Were it to be held that whenever a new act is passed all prior acts indirectly modified or affected by it shall be re-enacted and published at length, such rule would require that at each session of the legislature a large part of the entire statute must be re-published, some parts many times.[6]

Finally, I note that an abundance of persuasive authority from other jurisdictions supports the conclusion that the enactment of § 3-6.03 does not violate Article IV, § 12, because § 3-6.03 is not expressly amendatory of § 18.2-270.01(A).[7] In other words, to fall within the Constitutional prohibition, the General Assembly would have had to modify the actual text of § 18.2-270.01(A) without republishing it "at length."

CONCLUSION

Accordingly, it is my opinion that the enactment of § 3-6.03 of House Bill 1500 is consistent with Article IV, § 12 of the Constitution of Virginia.

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[1] City of Charlottesville v. DeHaan, 228 Va. 578, 584, 323 S.E.2d 131, 133 (1984) (quoting *Ex Parte* Settle, 114 Va. 715, 719, 77 S.E. 469, 497 (1913)).

[2] *See* MICH. CONST. art. IV, § 25. The provision at issue was amended to its current form, but the amendment does not affect the analysis here.

[3] People *ex rel*. Drake v. Mahaney, 13 Mich. 481, 497 (1885).

[4] Commonwealth v. Brown, 91 Va. 762, 772, 21 S.E. 357, 360 (1895).

[5] 107 Va. 215, 219, 57 S.E. 661, 662 (1907).

[6] Illinois v. Milauskas, 149 N.E. 294, 297 (Ill. 1925). *See also* Evernham v. Hulit, 45 N.J.L. 53, 56-57 (N.J. 1883) (noting the "most embarrassing results" that would flow from a requirement that "the legislature can pass no act changing any part of the statute law in force in this state without re-enacting at length every section in the whole body of existing statutes that might be affected by the new legislation.").

[7] *See Ex Parte* Pollard, 40 Ala. 77, 100 (1866) (the Constitutional "prohibition is directed against the practice of amending or revising laws by additions, or other alterations, which without the presence of the original are usually unintelligible. If a law is in itself complete and intelligible, and original in form, it does not fall within the meaning and spirit of the Constitution."). *See also Milauskas*, 149 N.E. at 296-97; *Mahaney*, 13 Mich. at 496-97; *Evernham*, 45 N.J.L. at 55-60; Home Ins. Co. v. Taxing Dist., 72 Tenn. 644 (1880); Snyder v. Compton, 28 S.W. 1061 (Tex. 1894); Spokane Grain & Fuel Co. v. Lyttaker, 109 P. 316 (Wash. 1910).

OP. NO. 11-075

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT – COUNTY, CITY, AND TOWN GOVERNING BODIES

ELECTIONS: ELECTION DISTRICTS, PRECINTS, AND POLLING PLACES – REAPPORTIONMENT OF LOCAL ELECTION DISTRICTS

Virginia law mandates that the Board of Supervisors take affirmative action to reapportion the magisterial districts for the county in this tenth year since the last reapportionment using the most recent decennial population figures.

An action in mandamus lies in favor of any citizen of the county to compel the performance by the Board of Supervisors its duty under Article VII, § 5 and § 24.2-304.1.

KAREN T. MULLINS, ESQUIRE
COUNTY ATTORNEY, WISE COUNTY
JUNE 22, 2011

ISSUE PRESENTED

You inquire as to the status of voting districts in Wise County in light of the fact that the Wise County Board of Supervisors has not adopted a reapportionment plan following the 2010 decennial census.

RESPONSE

It is my opinion that Article VII, § 5 of the Virginia Constitution and § 24.2-304.1 of the Code mandate that the Board take affirmative action to reapportion the magisterial districts for Wise County in this tenth year since the last reapportionment using the most recent decennial population figures. Further, it is my opinion that an action in mandamus lies in favor of any citizen of Wise County to compel the performance by the Board of its duty under Article VII, § 5 and § 24.2-304.1, and that in such an action my Office will review any papers filed to represent the interests of the Commonwealth to work towards an appropriate remedy.

BACKGROUND

You state that in 2001 the Wise County Board of Supervisors (the "Board") adopted an ordinance setting forth four magisterial districts each electing two supervisors as well as School Board members in Wise County (the "County"). You further state that these districts were precleared by the United States Department of Justice as required by § 5 of the Federal Voting Rights Act of 1965, as amended.[1] Upon review of the 2010 decennial census data, County officials concluded that there had not been sufficient population changes to require the 2001 district boundaries to be redrawn to maintain proportional representation among the four districts. You state, however, that the Board did consider two redistricting plans that would have reunited certain towns divided by the 2001 plan, and that both of these failed on a 4-4 vote. At the same meeting, a motion to readopt or reaffirm the 2001 district boundaries failed on a 1-7 vote of the Board.

APPLICABLE LAW AND DISCUSSION

The Virginia Constitution provides that if the governing body of a county is elected by district:

> [T]he district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district. When members are so elected by district, the governing body of any county, city, or town may, in a manner provided by law, increase or diminish the number, and change the boundaries, of districts, and shall in 1971 and every ten years thereafter, and also whenever the boundaries of such districts are changed, reapportion the representation in the governing body among the districts in a manner provided by law. Whenever the governing body of any such unit shall fail to perform the duties so prescribed in the manner herein directed, a suit shall lie on behalf of any citizen thereof to compel performance by the governing body.[2]

"'[E]very word employed in the Constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify, or enlarge it.'"[3] The use of the word "shall" in the Constitution or a statute generally indicates that the procedures are intended to be mandatory, rather than permissive or directive.[4] The language in Article VII, § 5 plainly and unambiguously mandates that the governing body of any county, city or town whose members are elected by district "shall in 1971 and every ten years thereafter . . . reapportion the representation in the governing body among the districts in a manner provided by law." The term "reapportion" means "to apportion (as a house of representatives) anew . . . to make a new apportionment."[5] Thus, in order to satisfy the mandate of Article VII, § 5, the Board must take an affirmative action to reapportion the County's magisterial districts in this tenth year since the last reapportionment, irrespective of whether the most recent decennial population figures for each of those districts would necessitate any boundary adjustments. Section 24.2-304.1(C) of the *Code of Virginia* imposes the ancillary requirement that the reapportionment be based on "the most recent decennial

population figures for such county, city or town from the United States Bureau of the Census . . . ."

The Constitutional provision applies to those localities that elect members of their governing bodies on a district basis. You report that Wise County previously adopted an ordinance providing for election of its Board by four two-member districts and that the County's 2001 reapportionment was approved by the Department of Justice as required by Section 5 of the Federal Voting Rights Act and was then used for subsequent County elections. I note that, under prior law, the Board's inaction and failure to adopt a reapportionment plan may have resulted in a reversion to at-large elections,[6] but under current law and after enactment of the Voting Rights Act, such a default position is no longer an option.

In addition to being governed by Constitutional and statutory requirements, local elections are subject to the State Board of Elections, which oversees elections in the Commonwealth and provides guidance to localities in conducting their redistricting and all other election matters.[7] In a memorandum dated March 25, 2011, the State Board of Elections highly recommended that localities submit their redistricting plans by April 29, 2011. This date was determined to be the final date on which a locality could submit a reapportionment plan for preclearance by the Department of Justice sufficiently in advance of the upcoming deadlines and requirements associated with the 2011 Primary Election. Here, the County failed to adopt a redistricting plan, and therefore did not submit any plan to the Department of Justice. In addition to submission to the Department of Justice, a locality is required to send copies of its local redistricting changes to its local electoral board, the State Board of Elections, and the Division of Legislative Services.[8]

As set forth above, the Board is specifically tasked with reapportioning the districts every ten years. The General Assembly anticipated the possibility that governing bodies might fail to perform this duty and, therefore, consistent with the right conferred by Article VII, § 5 upon citizens to bring suit to compel performance, enacted statutory authorization for a citizen living within an affected district to bring an action before the local circuit court for a writ of mandamus.[9] This writ of mandamus compels performance of the duty and threatens any individual officer failing to comply with its dictates as being in contempt of court. In such an action, the Attorney General must be notified and "shall review the papers in the civil action and may represent the interests of the Commonwealth in developing an appropriate remedy that is consistent with requirements of law."[10]

The State Board of Elections also is authorized to seek a writ of prohibition or mandamus from a circuit court or the Supreme Court of Virginia "for the purpose of ensuring that elections are conducted as provided by law"[11] and thereby has the power to ask a court to compel the governing body to carry forth its constitutional and statutory duties in the interest of fair and uniform elections.

CONCLUSION

Accordingly, it is my opinion that Article VII, § 5 of the Virginia Constitution and § 24.2-304.1 of the Code mandate that the Board take affirmative action to reapportion the magisterial districts for Wise County in this tenth year since the last reapportionment using the most recent decennial population figures. Further, it is my opinion that an action in mandamus lies in favor of any citizen of Wise County to compel the performance by the Board of its duty under Article VII, § 5 and § 24.2-304.1, and that in such an action my Office will review any papers filed to represent the interests of the Commonwealth to work towards an appropriate remedy.

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[1] Section 5 of the Voting Rights Act requires that any change in state or local election laws or voting practices or procedures, before such change may be implemented, be submitted by jurisdictions covered by the Act to the Department of Justice or a three-judge District Court for the District of Columbia for review and evaluation as to whether it has the purpose or will have the effect of denying or abridging the right to vote on account of race or color. 42 U.S.C. § 1973c.

[2] VA. CONST. art. VII, § 5.

[3] Lipscomb v. Nuckols, 161 Va. 936, 945, 172 S.E. 886, 889 (1934) (quoting Quesinberry v. Hull, 159 Va. 270, 274-75, 165 S.E. 382, 383 (1932)) (further citation omitted). *See also* 2008 Op. Va. Att'y Gen. 33, 34.

[4] *See* Andrews v. Shepherd, 201 Va. 412, 414-15, 111 S.E.2d 279, 282 (1959) ("use of the word 'shall' in statute indicates legislative intent to impose an imperative duty on the city council to create an additional election district whenever the number of voters in a district exceeds the limit set forth in the statute"); Schmidt v. City of Richmond, 206 Va. 211, 218, 142 S.E.2d 573, 578 (1965) ("the word 'shall' in a statute generally is used in an imperative or mandatory sense"; trial court erred in eminent domain suit when it failed to comply with statute requiring that it "shall summon nine disinterested freeholders"). *See also* 2008 Op. Va. Att'y Gen. at 34-35 (use of the word "shall" in Article X, § 7-A of the Virginia Constitution mandates that the General Assembly establish a Lottery Proceeds Fund into which net lottery proceeds are deposited and appropriate such funds to Virginia localities and the school divisions thereof).

[5] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 973 (10th ed. 1994). *See also* BLACK'S LAW DICTIONARY 1379 (9th ed. 2009) (the term "reapportionment" means "[r]ealignment of a legislative district's boundaries to reflect changes in population and ensure proportionate representation by elected officials").

[6] *See* Brown v. Saunders, 159 Va. 28, 47, 166 S.E. 105, 111 (1932) (holding under prior law that, where a reapportionment plan was invalid, nine congressional representatives should be elected at-large); Wilkins v. Davis, 205 Va. 803, 813, 139 S.E.2d 849, 856 (1965) (under prior law, until valid reapportionment, only at-large elections may be held for members of Congress from Virginia).

[7] *See* VA CODE ANN. §§ 24.2-103 (Supp. 2010) (general powers to oversee elections to ensure they are conducted pursuant to law) and 24.2-306 (2006) (requiring local redistricting plans be submitted to the State Board of Elections).

[8] Section 24.2-306.

[9] Sections 24.2-304.4 (2006); VA. CODE ANN. § 15.2-857 (2008).

[10] Sections 24.2-304.5 (2006); 2.2-508 (2008).

[11] Section 24.2-103(D).

OP. NO. 11-099

CONSTITUTION OF VIRGINIA: LOCAL GOVERNMENT – MULTIPLE OFFICES

EDUCATION: SCHOOL BOARDS, SELECTION QUALIFICATION AND SALARIES OF MEMBERS

ADMINISTRATION OF GOVERNMENT: STATE AND LOCAL CONFLICT OF INTERESTS ACT

A town councilman may serve on the county school board, provided all other eligibility requirements are met.

MR. WILLIAM A. BELL, JR.
SECRETARY, ISLE OF WIGHT COUNTY ELECTORAL BOARD
SEPTEMBER 30, 2011

ISSUE PRESENTED

You ask whether a citizen concurrently may serve on the county school board and as a member of a town council of a town located within that county.

RESPONSE

It is my opinion that a town councilman may serve on the county school board, provided all other eligibility requirements are met.

APPLICABLE LAW AND DISCUSSION

Article VII, § 6 of the Virginia Constitution restricts dual office holding. A person is prohibited from simultaneously holding more than one of the offices listed in Article VII,[1] and no member of a governing body is eligible to hold concurrently an office filled by that governing body.[2]

This constitutional provision poses no bar to a town councilman serving on the county school board. Article VII addresses the governing bodies of towns,[3] but it does not mention school boards,[4] which are established pursuant to Article VIII.[5] In addition, the town council has no appointment authority over the county school board. Therefore, the office holding restrictions of Article VII, § 6 do not apply in the matter presented.

Section 22.1-30(A) of the *Code of Virginia* provides that "no member of a governing body of a county, city or town . . . may, during his term of office, be appointed as a member of the school board for such county, city or town[.]" That members of town councils generally are precluded from serving on appointed school boards is further evidenced by § 22.1-30(A)(12), which provides a limited exemption for council members serving towns within certain counties.

This prohibition, however, is limited in two ways. First, as a previous opinion of this Office concludes, § 22.1-30 applies only to appointed school boards, not to those whose members are elected.[6] Additionally, a member of a governing body is precluded from being appointed to "the school board for such county, city or town" that he serves. Thus, § 22.1-30 provides that a town councilman may not be appointed to the school board of the town he serves, but it does not limit his service, whether by appointment or election, on a county school board. Had the General Assembly intended to adopt this prohibition, it knew how to do so. I note, however, that certain other eligibility restrictions apply to service on a school board.[7]

Members of both town councils and local school boards are subject to restrictions imposed by the State and Local Government Conflict of Interests Act ("Act").[8] The Act provides minimum rules of ethical conduct for state and local government officers and employees and contains three general types of restrictions and prohibitions: (1) it details certain types of conduct that are improper for such officers and employees;[9] (2) it restricts the ability of such officers and employees to have personal interests in certain contracts with their own or other governmental agencies;[10] and (3) it restricts the participation of such officers and employees in transactions of their governmental agencies in which they have a personal interest.[11] Assuming the compensation for service on either the town council or county school board exceeds $10,000 annually, a personal interest in the governmental agency arises.[12] Thus, although the Act does not preclude simultaneous service, the potential interaction between the two bodies requires that any person so serving remain alert to any possible contractual and transactional conflicts that may arise.

I therefore conclude that no constitutional or statutory provision prohibits a member of a town council from simultaneously serving as a member of the county school board of the county in which the town served is located.

CONCLUSION

Accordingly, it is my opinion that a town councilman may serve on the county school board of the county in which the town he serves is located, provided all other eligibility requirements are met.

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[1] VA. CONST. art. VII, § 6.

[2] *Id*.

[3] VA. CONST. art. VII, § 5.

[4] *Id*.

[5] VA. CONST. art. VIII, § 7.

[6] 2011 Op. Va. Att'y Gen. No. 11-071, *available at* http://www.oag.state.va.us/Opinions%20and%20Legal%20Resources/Opinions/2011opns/11-071-Britton.pdf.

[7] *See* VA. CODE ANN. §§ 22.1-29 (2006) (providing residency requirements); 22.1-36.1 (2006) (imposing limitation on composition of county school board when county contains a town that constitutes a separate school division).

[8] VA. CODE ANN. §§ 2.2-3100 through 2.2-3131 (2011).

[9] Section 2.2-3103 (2011).

[10] Section 2.2-3106(A), (B) (2011). Section 2.2-3101 (2011).

[11] Section 2.2-3112(A)(1) (2011).

[12] *See* § 2.2-3101.

OP. NO. 11-094

COUNTIES, CITIES, AND TOWNS: BUDGETS, AUDITS AND REPORTS

While a locality is required to provide for the annual audit of its constitutional officers, an audit performed by the Auditor of Public Accounts can satisfy that requirement.

The authority of the APA to perform an audit of constitutional officers is not limited to those instances provided in § 15.2-2511(B).

THE HONORABLE GORDON F. ERBY
CLERK OF COURT, LUNENBURG CIRCUIT COURT
AUGUST 5, 2011

ISSUES PRESENTED

You inquire regarding the audit of the office of Clerk of Court. Specifically, you ask whether § 15.2-2511 requires the governing body to provide for the audit of such offices and whether § 15.2-2511 authorizes the Auditor of Public Accounts to perform such audits of constitutional officers in instances other than those listed in § 15.2-2511(B).

RESPONSE

It is my opinion that, although § 15.2-2511 requires a locality to provide for the annual audit of its constitutional officers, an audit performed by the Auditor of Public Accounts can satisfy that requirement. It is further my opinion that the authority of the APA to perform an audit of constitutional officers is not limited to those instances provided in § 15.2-2511(B).

APPLICABLE LAW AND DISCUSSION

While your inquiry focuses on the application of § 15.2-2511, I note that a variety of statutes address audits for local government officials, including clerks of court. Statutes are not to be read in isolation; rather the principles of statutory construction require that statutes related to a similar subject be construed together in order to achieve a harmonious result.[1]

Section 15.2-2511(A) provides, in relevant part:

> Localities shall have all their accounts and records, including all accounts and records of their constitutional officers, audited annually as of June 30 by an independent certified public accountant in accordance with the specifications furnished by the Auditor of Public Accounts. . . . Every locality shall contract for the performance of the annual audit not later than April 1 of each fiscal year[.] . . . The accounts and records of any county or city officer listed in Article VII, Section 4 of the Constitution of Virginia, hereinafter referred to "constitutional officers," shall be subject to the provisions of this section.

When a statute is unambiguous, it is to be interpreted according to its plain language.[2] The use of word "shall" "should be given its ordinary and usually accepted meaning of a command and should be construed as mandatory unless a different intention is fairly manifest."[3] Furthermore, the text explicitly includes "constitutional officers."

Accordingly, I conclude § 15.2-2511 requires localities to provide for the annual auditing of constitutional offices.[4]

This duty is reiterated in §§ 15.2-417, 15.2-538, 15.2-636 and 15.2-844,[5] which provide that county boards "shall require an annual audit of the books of every county officer who handles public funds[.]" These sections further provide, however, that "[a]n audit made by the Auditor of Public Accounts . . . may be considered as having satisfied [this requirement.]"

Section 15.2-2511(B) provides that

> The Auditor of Public Accounts shall audit the accounts of local governments and constitutional officers only when (i) special circumstances require an audit, or (ii) there is suspected fraud or inappropriate handling of funds which may affect the financial interests of the Commonwealth. In all instances, such audits shall be carried out with the approval of the Joint Legislative Audit and Review Commission.

This statute could be read to mean that the APA's ability to audit local officers is limited to the instances the subsection specifically mentions. Notwithstanding the duty imposed on localities in Title 15.2, however, the General Assembly also has provided that "[a]t least once in every two years, and at other times as the Governor directs, the Auditor of Public Accounts . . . *shall* audit all accounts and records of every city and county official and agency in the Commonwealth handling state funds . . . ."[6] The legislature's use of the term "official" in this context includes constitutional officers.[7] Additionally, § 15.2-2511(A) expressly provides that "[i]n the event a locality fails to obtain the annual audit prescribed in this subsection, the Auditor of Accounts may undertake the audit[.]" Clearly, the Code contemplates that the APA would be conducting audits of constitutional officers, including clerks of court.

The effect of these statutes, when read together, is that under § 15.2-2511, the APA is not charged with performing an *annual* audit of local government officers, including clerks of court, who receive funds from state government, but that under § 30-134, the APA must perform an audit at least every other year. When the APA does perform an audit, the locality need not engage the services of an accountant to perform a redundant audit. When the locality fails to have an annual audit performed, § 15.2-2511(A) permits, but does not require, the APA to conduct the audit. Under § 15.2-2511(B), however, the APA is *required* to perform an audit when special circumstances are present or there is suspected fraud or inappropriate handling of funds.

CONCLUSION

Accordingly, it is my opinion that, although § 15.2-2511 requires a locality to provide for the annual audit of its constitutional officers, an audit performed by the Auditor of Public Accounts can satisfy that requirement. It is further my opinion that the authority of the APA to perform an audit of constitutional officers is not limited to those instances provided in § 15.2-2511(B).

[1] 2010 Op. Va. Att'y Gen. 173, 176 (citing Prillaman v. Commonwealth, 199 Va. 401, 405, 100 S.E.2d 4, 7 (1957) ("statutes are not to be considered as isolated fragments of law, but as a whole, or as parts of . . . a single and complete statutory arrangement")).

[2] *See, e.g.,* Signal Corp. v. Keane Fed. Sys., Inc., 265 Va. 38, 46-47, 574 S.E.2d 253, 257 (2003).

[3] Andrews v. Shepard, 201 Va. 412, 414, 111 S.E.2d 279, 281 (1959).

[4] *See also* 1993 Op. Va. Att'y Gen. 59, 67 (noting that predecessor statute empowered county to conduct a financial audit of the records of the commissioner of the revenue); 1997 Op. Va. Att'y Gen. 46, 47 (noting that 1993 amendments to predecessor statute make clear that the local government audit is to include the accounts of constitutional officers).

[5] These provisions apply to the various optional forms of county government.

[6] VA. CODE ANN. § 30-134 (2009) (emphasis added).

[7] Local constitutional officers occupy a unique place in state government. Cases and statutes use the term "official" and "officer" interchangeably to refer to government officials who work for the locality as well as constitutional officers. Indeed, § 30-134 is captioned "[a]udit of accounts of city and county *officers* handling state funds" but the statutory text employs the word "*official*." *See, e.g.,* Bd. of Supvrs. v. Marshall, 215 Va. 756, 760, 214 S.E.2d 146, 149 (1975) (referring to the clerk of court as a "county officer.").

OP. NO. 11-015

COUNTIES, CITIES, AND TOWNS: JOINT ACTIONS BY LOCALITIES

CONSTITUTION OF VIRGINIA: EDUCATION

When school divisions are consolidated, the Composite Index to be applied to the consolidated school division is the lower of the Composite Indices established for the two governmental entities.

State funding for consolidated school divisions should not be less than that achieved for a period of five years.

THE HONORABLE CLARENCE E. "BUD" PHILLIPS
MEMBER, HOUSE OF DELEGATES
MARCH 22, 2011

ISSUE PRESENTED

You ask whether the local composite index of a school division resulting from the consolidation of two existing school divisions is based upon the lower composite index of the two merged divisions.

RESPONSE

It is my opinion that, should two existing school divisions be consolidated, the Composite Index to be applied to the consolidated school division is the lower of the Composite Indices established for the two governmental entities, and that the state

funding for the consolidated school divisions should not be less than that achieved by this means for a period of five years.

APPLICABLE LAW AND DISCUSSION

The Constitution of Virginia directs the General Assembly to "provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth."[1] The Constitution also charges the legislature with the duty to "determine the manner in which funds are to be provided for the cost of maintaining an educational program meeting the prescribed standards of quality, and [to] provide for the apportionment of the cost of such program between the Commonwealth and the local units of government comprising such school divisions."[2]

In order to ensure a quality education, the General Assembly has established a "Composite Index of Local Ability-to-Pay," which is computed for each locality.[3] Localities whose indices demonstrate a lesser ability to contribute toward the cost of education receive a larger share of state funding.

In so directing the state-local apportionment of the financial burden of public education, the General Assembly has provided for the possibility of the merger of school divisions, either separate from, or as part of, the merger of the applicable local governments. The 2010-2012 appropriations act provides:

> In the event that two or more school divisions become one school division, whether by consolidation of only the school divisions or by consolidation of the local governments, such resulting division shall be paid Standard of Quality payments for all pupils in the combined division on the basis of a composite index established by the Board of Education, which shall equal the lowest composite index of any of the individual school divisions involved in such consolidation. In the event of a consolidation of local governments which shall include the transition of a city to town status, this index shall remain in effect for a period of fifteen years, unless a lower composite index is calculated for the combined division through the process for computing an index figure as set forth above. The Governor shall approve the composite index determined by the Board of Education prior to disbursement of funds under such index. The department shall report to the Chairmen of the House Appropriations and Senate Finance Committees the composite indices approved by the Governor and the Board in the event this provision is implemented.[4]

You state that local officials are discussing the possible consolidation of the school divisions of Wise County and the City of Norton rather than merger of the local governments themselves. Should that merger occur, the Appropriations Act provides for state funding "on the basis of a composite index established by the Board of Education, which shall equal the lowest composite index of any of the individual school divisions involved in such consolidation."[5] I therefore conclude that the lower of the composite indices for Wise County and the City of Norton is, under current

law, the index to be used for the consolidated school divisions of the two governments.

Although the Appropriations Act specifies that the index should be the lower of the composite indices, it does not specify the *duration* of this index for the consolidation situation under consideration in Wise and Norton. The Appropriations Act provides that, "[i]n the event of a consolidation of local governments which shall include the transition of a city to town status, this index shall remain in effect for a period of fifteen years, unless a lower composite index is calculated for the combined division through the process for computing an index figure as set forth above."[6] Because the Appropriations Act is silent with respect to the duration of the composite index, we must turn to applicable statutes.

Section 15.2-1302 provides that:

> Any state funds that were distributed to a locality, including a local school board, in support of a governmental program or function prior to a consolidation of such program or function or the governmental consolidation of the entities providing such programs or functions, shall continue to be distributed to the entity or entities carrying out the program or function after consolidation in accordance with the following schedule:
>
> 1. If the consolidation results in the governmental consolidation of the entities into a single locality, the state funds shall not be reduced below the amounts that would have been received by each entity from the Commonwealth for the governmental program or function computed on the premise that no consolidation occurred for a period of twenty fiscal years following the consolidation.
>
> 2. If the consolidation results in the consolidation of constitutional officers of the entities and the consolidation of school divisions and local school boards of the entities, the state funds shall not be reduced below the amounts that would have been received by each entity from the Commonwealth for the governmental program or function computed on the premise that no consolidation occurred for a period of fifteen fiscal years following the consolidation.
>
> 3. In all other consolidations, the state funds shall not be reduced below the amounts that would have been received by each entity from the Commonwealth for the governmental program or function computed on the premise that no consolidation occurred for a period of five fiscal years following the consolidation.
>
> This section shall not prohibit the Commonwealth from terminating or modifying any program or function under which distribution to a locality, including a local school board, has been made, and if so terminated or modified all obligations hereunder shall cease or be reduced in proportion with such modifications, as the case may be.[7]

This statute protects the level of state funding for twenty, fifteen, or five years, depending upon the type of consolidation. The first of these is the "governmental consolidation of the entities into a single locality."[8] The facts you present relate to the consolidation of the school boards only, and not of the localities themselves. Norton and Wise would remain distinct localities, albeit with consolidated schools. Thus, it is my opinion that this provision of the statute would not apply to the situation in Wise and Norton.

The second is the "consolidation of constitutional officers of the entities and the consolidation of school divisions and local school boards of the entities."[9] Although you advise that the consolidation of the local school boards is under consideration, the facts you present do not suggest that the action contemplated will also result in the consolidation of the constitutional officers of the entities involved. Thus, it is my opinion that this provision of the statute likewise does not apply.

The final provision governs "all other consolidations."[10] The consolidation you propose does not fall within either the first or second class, and, therefore, it falls by default under this provision. Consequently, should Norton and Wise consolidate their schools, the level of state funding, pursuant to § 15.2-1302, would remain at not less than the amounts each locality would have received from the Commonwealth had no consolidation occurred for a period of five fiscal years following the consolidation.

CONCLUSION

Accordingly, it is my opinion that, should Wise County and the City of Norton consolidate their school divisions, the Composite Index to be applied to the consolidated school division is the lower of the Composite Indices established for the two governmental entities, and that the state funding for the consolidated school divisions should not be less than that achieved by this means for a period of five years.

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[1] VA. CONST. art. VIII, § 1.

[2] VA. CONST. art. VIII, § 2.

[3] The Composite Index currently is calucated as:

> the sum of 2/3 of the index of wealth per pupil in unadjusted March 31 ADM reported for the first seven (7) months of the 2007-2008 school year and 1/3 of the index of wealth per capita (population estimates for 2007 as determined by the Weldon Cooper Center for Public Service of the University of Virginia) multiplied by the local nominal share of the costs of the Standards of Quality of 0.45 in each year. The indices of wealth are determined by combining the following constituent index elements with the indicated weighting: (1) true values of real estate and public service corporations as reported by the State Department of Taxation for the calendar year 2007 - 50 percent; (2) adjusted gross income for the calendar year 2007 as reported by the State Department of Taxation - 40 percent; (3) the sales for the calendar year 2007 which are subject to the state general sales and use tax, as reported by the State Department of Taxation - 10 percent. Each constituent index element for a locality is its sum per March 31 ADM, or per capita, expressed as a percentage of the state average per March 31 ADM, or per capita, for the same element. A locality whose composite index exceeds 0.8000 shall be considered as

> having an index of 0.8000 for purposes of distributing all payments based on the composite index of local ability-to-pay. Each constituent index element for a locality used to determine the composite index of local ability-to-pay for the current biennium shall be the latest available data for the specified official base year provided to the Department of Education by the responsible source agencies no later than November 15, 2009.

2010 Va. Acts ch. 874, item 132, ¶ A.4.a.

[4] *Id*. item 132, ¶ A.4.c.(1).

[5] *Id*. I note that "[i]n the event of any inconsistency between the statutory authorization and the appropriation, the Appropriations Act, which has the effect of law and which is the most recent expression of legislative intent, controls." 1976-77 Op. Va. Att'y Gen. 301, 301-02.

[6] *Id.*

[7] VA. CODE ANN. § 15.2-1302 (2008).

[8] *Id.*

[9] *Id.*

[10] *Id.*

OP. NO. 11-063

COUNTIES, CITIES, AND TOWNS: LOCAL CONSTITUTIONAL OFFICERS, COURTHOUSES AND SUPPLIES

COUNTIES, CITIES, AND TOWNS: BUDGETS, AUDITS AND REPORTS

A Clerk of Court can close the office when a county has failed to adopt a budget and the Clerk cannot pay his employees.

A Clerk, or the employees of the Clerk's office, can volunteer to continue serving until the budget impasse is resolved.

To the extent particular functions can continue in the absence of funding from the County and without staffing, or with volunteer staffing, the Clerk should continue to keep such systems operational.

THE HONORABLE JACK KENNEDY
CLERK OF THE CIRCUIT COURT
WISE COUNTY AND CITY OF NORTON
JUNE 22, 2011

ISSUES PRESENTED

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

RESPONSE

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

APPLICABLE LAW AND DISCUSSION

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

By statute, Clerks of the circuit court are required to keep their offices open during weekdays.[3] At the same time, employees cannot be forced to work without pay. Without a County budget, Clerks cannot pay their employees or cover the expenses of running the office.[4] Furthermore, a County is forbidden from paying out any funds until they have been appropriated.[5] Clerks are also dependent on localities for their offices[6] and supplies.[7]

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

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

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

CONCLUSION

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

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

[2] VA. CODE ANN. § 17.1-330 (2010).

[3] Section 17.1-207(A) (2010).

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

[5] Section 15.2-540 (2008).

[6] Section 15.2-1638 (2008).

[7] Section 15.2-1656 (2008).

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

OP. NO. 11-088

COUNTIES, CITIES, AND TOWNS: LOCAL CONSTITUTIONAL OFFICERS, COURTHOUSES AND SUPPLIES

The Board of Supervisors may authorize a 5% salary supplement to constitutional officers and their employees to be paid out of county funds.

DENNIS E. JONES, ESQUIRE
COUNTY ATTORNEY FOR RUSSELL COUNTY
JULY 8, 2011

ISSUE PRESENTED

You inquire whether the Board of Supervisors has the authority to award Russell County constitutional officers and their employees a 5% salary increase.

RESPONSE

It is my opinion that under § 15.2-1605.1, the Board of Supervisors may authorize a 5% salary supplement to constitutional officers and their employees to be paid out of county funds.

APPLICABLE LAW AND DISCUSSION

The salaries of constitutional officers, including those serving counties that have adopted the board form of government,[1] are set by the Compensation Board, subject to appropriation by the General Assembly.[2] Once set by the Board, unless overturned, the Board's decision sets the minimum amount such officers can be paid. Local governing bodies may not set a lower compensation level than that set by the State Compensation Board for these officers.[3] The General Assembly, however, has provided that:

> Notwithstanding any other provision of law, the governing body of *any* county or city, in its discretion, *may supplement the compensation* of the sheriff, treasurer, commissioner of the revenue, director of finance, clerk of the circuit court, or attorney for the Commonwealth, or any of their deputies or employees, above the salary of any such officer, deputy or employee, *in such amounts as it may deem expedient*. Such additional compensation shall be wholly payable from the funds of any such county or city.[4]

Virginia adheres to the Dillon Rule of strict construction, which provides that "[local governing bodies] have only those powers which are expressly granted by the state legislature, those powers fairly or necessarily implied from expressly granted powers, and those powers, which are essential and indispensable."[5] The plain language of § 15.2-016.05.1 makes clear that a county Board of Supervisors may supplement the compensation of a constitutional officer out of the county's funds.[6] The Board is free in future years to increase, decrease, or eliminate such a supplement.[7]

CONCLUSION

Accordingly, it is my opinion that the Russell County Board of Supervisors may authorize a 5% salary supplement to constitutional officers and their employees to be paid out of county funds.

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[1] VA. CODE ANN. § 15.2-404 (2008).

[2] Sections 15.2-1608.2 (2008) (county treasurers); 15.2-1609.2 (2008) (county sheriffs and deputies); 15.2-1627.1 (2008) (Commonwealth's attorneys and assistant Commonwealth's attorneys); 15.2-1636.2 (2008) (commissioners of the revenue); 15.2-1636.8 (2008) (Compensation Board to set salaries of constitutional officers).

[3] 1978-79 Va. Att'y Gen. Op. 56.

[4] Section 15.2-1605.1 (2008) (emphasis added).

[5] Arlington Cnty. v. White, 259 Va. 708, 712, 528 S.E.2d 706, 708 (2000) (alteration in original) (quoting City of Va. Beach v. Hay, 258 Va. 217, 221 (1999)).

[6] That a county operates under the board form of government is of no consequence. Section 15.2-403(A) grants the board of supervisors of a county with the board form of government "all the rights and powers conferred on boards of supervisors by general law[.]"

[7] 1986-87 Op. Va. Att'y Gen. 87, 88. *See also* 1974-75 Va. Att'y Gen. Op. 340, 342. The extent to which a locality wishes to maintain parity between the salaries paid to constitutional officers and their staff and county employees is a matter within the discretion of the locality.

OP. NO. 11-047

COUNTIES, CITIES, AND TOWNS: LOCAL CONSTITUTIONAL OFFICERS, COURTHOUSES AND SUPPLIES – COMPENSATION BOARD GENERALLY

MOTOR VEHICLES: DEPARTMENT OF MOTOR VEHICLES

A county Board of Supervisors is required to appropriate to the office of a constitutional officer who is serving as a license agent for DMV 80 percent of the funds remitted by DMV to the county for DMV transactions processed by the office of the constitutional officer.

Monies so appropriated may not be used to supplant existing local funding for such office, nor to reduce the local share of the Compensation Board-approved budget for such office below the level established pursuant to general law.

THE HONORABLE RAYMOND A. HUNLEY, MCR
COMMISSIONER OF THE REVENUE, MATHEWS COUNTY
AUGUST 19, 2011

ISSUE PRESENTED

You ask whether a local Board of Supervisors may use the monies received by employees of constitutional officers for services provided to the Department of Motor Vehicles ("DMV") to supplant existing local funding or to reduce the local share of the Compensation Board-approved budget.

RESPONSE

It is my opinion, based on language in Item 441, subsection C of both the 2010 Appropriations Act and the 2011 Appropriations Act, that a county Board of Supervisors is required to appropriate to the office of a constitutional officer such as a Treasurer or Commissioner of the Revenue who is serving as a license agent for DMV, 80 percent of the funds remitted by DMV to the county for DMV transactions processed by the office of the constitutional officer, and that the monies so appropriated may not be used to supplant existing local funding for such office, nor to reduce the local share of the Compensation Board-approved budget for such office below the level established pursuant to general law.

APPLICABLE LAW AND DISCUSSION

Item 441, subsection C of both the 2010 Appropriations Act and the 2011 Appropriations Act[1] ("Appropriations Acts") provides:

> In order to provide citizens of the Commonwealth greater access to the Department of Motor Vehicles, the agency is authorized to enter into an agreement with any local constitutional officer or combination of officers to act as a license agent for the department, with the consent of the chief administrative officer of the constitutional officer's county or city, and to negotiate a separate compensation schedule for such office other than the schedule set out in § 46.2-205, Code of Virginia. *Notwithstanding any other provision of law, any compensation due to a constitutional officer serving as a license agent shall be remitted by the department to the officer's county or city on a monthly basis, and not less than 80 percent of the sums so remitted shall be appropriated by such county or city to the office of the constitutional officer to compensate such officer for the additional work involved with processing transactions for the department. Funds appropriated to the constitutional office for such work shall not be used to supplant existing local funding for such office, nor to reduce the local share of the Compensation Board-approved budget for such office below the level established pursuant to general law.* (Emphasis added.)

The positions of Commissioner of the Revenue and County Treasurer are constitutional offices created pursuant to Article VII, § 4 of the Constitution of Virginia.[2] The process for establishing the budget of a constitutional officer, including a County Commissioner of the Revenue or County Treasurer is provided by general law. Generally, the officer prepares the budget for his office and submits it to the Compensation Board for review, possible modification, and approval.[3] Such budget includes salaries, permitted expenses, and other allowances necessary for operating the office of the Commissioner of the Revenue or Treasurer.[4] A copy of the proposed budget is submitted concurrently to the governing body of the locality.[5] Once the budget is set, and subject to appropriated funds, the Commonwealth and locality participate in funding the approved budget, with certain exceptions.[6] In the event of disagreement, the constitutional officer, the locality, or the Commonwealth may appeal the decision of the Compensation Board.[7]

"In the event of any inconsistency between [a] statutory authorization and the appropriation, the Appropriations Act, which has the effect of law and which is the most recent expression of legislative intent, controls."[8] Section 4-12.00 of the appropriations acts provides:

> Notwithstanding any other provision of law, and until June 30, 2012, the provisions of this act shall prevail over any conflicting provision of any other law, without regard to whether such other law is enacted before or after this act; however, a conflicting provision of another law enacted after this act shall prevail over a conflicting provision of this act if the General Assembly has clearly evidenced its intent that the conflicting provision of such other law shall prevail, which intent shall be evident only if such other law (i) identifies the specific provision(s) of this act over which the

> conflicting provision of such other law is intended to prevail and (ii) specifically states that the terms of this section are not applicable with respect to the conflict between the provision(s) of this act and the provision of such other law.

The General Assembly does not define the term "supplant" as it is used in the Appropriations Acts. Consequently, the term must be given its ordinary meaning within the statutory context.[9] "Supplant" generally means "to supersede (another)"; "to take the place of and serve as a substitute for esp. by reason of superior excellence or power."[10] The term "supersede" generally means "to cause to be set aside"; "to take the place, room or position of."[11]

The intent of the Appropriations Act is clear. Based on the plain language of Item 441, subsection C, I conclude that any compensation due to a constitutional officer serving as a license agent for DMV shall be remitted by DMV to the officer's county or city on a monthly basis, and not less than 80 percent of the sums so remitted shall be appropriated by such county or city to the office of the constitutional officer to compensate the officer for the additional work performed in processing transactions for DMV. The language clearly provides that compensation from DMV is intended to serve as compensation for additional work performed for processing DMV transactions. This principle is further clarified and supported by the language of the 2010 and 2011 Appropriations Acts mandating that the funds appropriated to the constitutional office for such work shall not be used to supplant existing local funding for such office, nor to reduce the local share of the Compensation Board-approved budget for such office below the level established pursuant to general law.

Adopting a resolution that provides for the use of DMV funds to offset the salaries of the employees of the offices of the Treasurer and Commissioner of the Revenue, as a result of the state budget cuts, is not only contrary to the principle that constitutional offices receive compensation for the additional work their employees have performed in processing transactions as DMV license agents, but is contrary to the clear dictates of the Appropriations Acts. Using DMV funds to offset salaries of employees of the Treasurer and Commissioner of the Revenue constitutes an action that uses the funds to supplant or replace the existing local funding for such offices, in direct contravention of the Appropriations Act. Furthermore, assuming the Board has not appealed pursuant to § 15.2-1636.9 the budget for the offices of the County Treasurer and Commissioner of the Revenue established by the Compensation Board, the use of DMV compensation to offset the salaries of employees of those offices results in a impermissible reduction of the local share of the Compensation Board-approved budget for such offices.

CONCLUSION

Accordingly, it is my opinion, Board of Supervisors is required to appropriate to the office of a constitutional officer such as a Treasurer or Commissioner of the Revenue, serving as a license agent for DMV, 80 percent of the funds remitted by DMV to the county for DMV transactions processed by the office of the constitutional officer, and that the monies so appropriated may not be used to supplant existing local funding for

such office, nor to reduce the local share of the Compensation Board-approved budget for such office below the level established pursuant to general law.

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[1] *See* 2010 Va. Acts, ch. 874; 2011 Va. Acts, ch. 890.

[2] *See* Ops. Va. Att'y Gen.: 2008 at 44, 45; 2002 at 58, 59; 1977-78 at 466, 467. *See also* VA. CODE ANN. § 15.2-102 (defining "constitutional officer") (2008).

[3] *See* VA. CODE ANN. §§ 15.2-1636.7, 15.2-1636.8 (2008).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] Section 15.2-1636.9 (2008).

[8] *See* 1976-77 Op. Va. Att'y Gen. 301, 301-02.

[9] *See* Grant v. Commonwealth, 223 Va. 680, 684, 292 S.E.2d 348, 350 (1982) (citing Loyola Fed. Savings & Loan Ass'n v. Herndon Lumber & Millwork, Inc., 218 Va. 803, 805, 241 S.E.2d 752, 753 (1978)).

[10] WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1185-86 (1990).

[11] *Id.* at 1185.

OP. NO. 11-091

COUNTIES, CITIES, AND TOWNS: LOCAL CONSTITUTIONAL OFFICERS, COURTHOUSES AND SUPPLIES – SHERIFFS

A processing fee may be assessed only when a person is admitted, or re-admitted, to jail *after* conviction. If a person is convicted, but is not admitted or readmitted to jail following conviction, the fee may not be assessed.

THE HONORABLE REX A. DAVIS
CLERK OF THE CIRCUIT COURT, NEWPORT NEWS
JULY 22, 2011

ISSUE PRESENTED

You inquire whether § 15.2-1613.1 allows a processing fee to be assessed only for defendants who are processed or re-processed into a jail following conviction, for service of an active sentence, or whether the fee applies to any defendant who underwent jail processing prior to conviction.

RESPONSE

It is my opinion that § 15.2-1613.1 authorizes the fee to be assessed only when a person is admitted, or re-admitted, to jail *after* conviction. If a person is convicted, but is not admitted or readmitted to jail following conviction, the fee may not be assessed.

APPLICABLE LAW AND DISCUSSION

The General Assembly has authorized localities to enact an ordinance imposing

> a processing fee not to exceed $25 on any individual admitted to a county, city, or regional jail following conviction. The fee shall be ordered as a part of court costs collected by the clerk, deposited into the account of the treasurer of the county or city and shall be used by the local sheriff's office to defray the costs of processing arrested persons into local or regional jails. If processing costs are incurred by a regional jail rather than a local sheriff's office, the fees collected pursuant to such ordinance may be used by the regional jail to defray the costs of processing arrested persons. Where costs are incurred by a sheriff's office and a regional jail the fees collected pursuant to such ordinance may be divided proportionately as determined by the local governing body or bodies, between the sheriff's office and the regional jail. Where costs are incurred by a police department for booking or fingerprinting services, the fees collected pursuant to such ordinance may be divided proportionately as determined by the local governing body or bodies, between the sheriff's office and the police department.[1]

"In deciding the meaning of the statute, we must consider the plain language that the General Assembly employed when enacting this statute."[2] Here, the first sentence is the key. It provides that a locality may enact an ordinance authorizing recovery of a fee for "any individual admitted to a county, city or regional jail following conviction." To assess the fee, it is not sufficient that the individual was admitted to the jail *before* conviction. Rather, the individual must be "admitted to jail . . . following conviction." In situations where an individual spent some time in jail pretrial, but is not sent back to the jail "following conviction," either because his sentence did not involve any jail time, he received a suspended sentence, or he was sentenced to time served, the individual is not "admitted to the . . . jail *following* conviction" and no fee can be assessed.

CONCLUSION

Accordingly, it is my opinion that § 15.2-1613.1 authorizes the fee to be assessed only when a person is admitted, or re-admitted, to jail after conviction. If a person is convicted, but is not admitted or readmitted to jail following conviction, the fee may not be assessed.

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[1] VA. CODE ANN. § 15.2-1613.1 (Supp. 2011).

[2] Haislip v. So. Heritage Ins. Co., 254 Va. 265, 268, 492 S.E.2d 135, 137 (1997).

OP. NO. 11-027

COUNTIES, CITIES, AND TOWNS: VIRGINIA WATER AND WASTE AUTHORITIES ACT

COUNTIES, CITIES, AND TOWNS: FRANCHISES; SALE AND LEASE OF CERTAIN MUNICIPAL PUBLIC PROPERTY; PUBLIC UTILITIES – GENERAL PROVISIONS FOR PUBLIC UTILITIES

A water authority may record its liens prior to obtaining a judgment and without first seeking to collect such debt from any tenant who received services from the authority.

The clerk's office has no need to require proof of any such judgment or collection efforts by a water authority.

THE HONORABLE JOHN BARRETT CHAPPELL, JR.
CLERK OF COURT, DINWIDDIE COUNTY CIRCUIT COURT
APRIL 8, 2011

ISSUES PRESENTED

You inquire whether the Dinwiddie County Water Authority ("DCWA") may record liens on real property for unpaid services used by a tenant without first obtaining a court judgment or attempting to collect the debt from the former tenant to whom services were provided. You also ask whether, prior to recording liens in the judgment book, the clerk's office should require proof that a judgment has been obtained and proof that attempts have been made to collect such debt from the former tenant.

RESPONSE

It is my opinion that the DCWA may record its liens prior to obtaining a judgment and without first seeking to collect such debt from any tenant who received services from the authority, provided DCWA follows appropriate statutory requirements. It therefore is my further opinion that the clerk's office has no need to require proof of any such judgment or collection efforts.

APPLICABLE LAW AND DISCUSSION

The DCWA, as a water authority created pursuant to § 15.2-5102,[1] is governed by the Virginia Water and Waste Authorities Act.[2] As "an instrumentality exercising public and essential governmental functions to provide for the public health and welfare,"[3] DCWA is authorized to fix, charge and collect rates, fees and charges for the use of, or for the services furnished by . . . any facilities or systems owned, operated or financed by the authority."[4] Such fees and charges are chargeable to and collectable from "any person contracting for any such services and/or [] the owners or tenants who own, use or occupy any real estate . . . served by . . . such facilities or systems[.]"[5]

Section 15.2-5139 provides that "[t]here shall be a lien upon real estate" for any delinquent fees or charges assessed against the owner, lessee or tenant of the real estate for the use of services on that property "from the time when the fees, rents or charges are due[.]" The statute further provides that a lien "may be placed by an authority" for up to three months of unpaid charges if the authority

> (i) has advised the owner of such real estate at the time of initiating service to a lessee or tenant of such real estate that a lien will be placed on the real estate if the lessee or tenant fails to pay any fees, rents or other charges when due for services rendered to the lessee or tenant; (ii) has mailed to the

> owner of the real estate a duplicate copy of the final bill rendered to the lessee or tenant at the time of rendering the final bill to such lessee or tenant; and (iii) employs the same collection efforts and practices to collect amounts due the authority from a lessee or a tenant as are employed with respect to collection of such amounts due from customers who are owners of the real estate for which service is provided.[6]

In another part of the Code addressing public utilities,[7] § 15.2-2119 requires service authorities attempting to collect unpaid fees and charges for services rendered to "obtain a judgment in a court of competent jurisdiction against the lessee or tenant who contracted for such services for the amount of any delinquencies" prior to recording a lien against the property owner. The lien may be recorded only after the authority has used reasonable efforts to collect the judgment from the tenant and has thereafter given the property owner 30-days written notice of the recordation.[8]

Although DCWA is a service authority, the provisions of § 15.2-2119 do not apply to its enforcement powers. The Virginia Water and Waste Authorities Act "constitute[s] the full and complete authority, without regard to the provisions of any other law for the doing of the acts [t]herein authorized, and shall be liberally construed"[9] Moreover, "[n]o power . . . granted [in Title 15.2, Chapter 21] shall alter or amend the powers or the duties of any present or future authority created pursuant to the Virginia Water and Waste Authorities Act[.]"[10] Therefore, I conclude that the lien created in § 15.2-5139 may be recorded without a requirement that the authority take the additional steps found in § 15.2-2119.

CONCLUSION

Accordingly, it is my opinion that the DCWA may record its liens without obtaining a judgment and first seeking to collect such debt from a delinquent tenant who received services from the authority, provided DCWA follows appropriate statutory requirements. It therefore is my further opinion that the clerk's office has no need to require proof of any such judgment or collection efforts.

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[1] *See* Dinwiddie County Code, Appendix A.

[2] VA. CODE ANN. §§ 15.2-5100 through 15.2-5158 (2008 & Supp. 2010).

[3] Section 15.2-5114 (Supp. 2010).

[4] Section 15.2-5114(10).

[5] *Id*.

[6] Section 15.2-5139(A).

[7] Title 15.2, Chapter 21, art. 2.

[8] Section 15.2-2119.

[9] Section 15.2-5100.

[10] Section 15.2-2111.

OP. NO. 11-076

COUNTIES, CITIES, AND TOWNS: VIRGINIA WASTE AND WATER AUTHORITIES ACT – FINANCING

CONSTITUTION OF THE UNITED STATES: DUE PROCESS

CONSTITUTION OF VIRGINIA

Requiring landlords to pay and/or collect the debts left by tenants who have contracted with utility providers does not violate the United States Constitution, the Constitution of Virginia or the *Code of Virginia*.

THE HONORABLE GREGORY D. HABEEB
MEMBER, HOUSE OF DELEGATES
JUNE 10, 2011

ISSUE PRESENTED

You inquire whether requiring landlords to pay and/or collect the debts left by tenants who contract with utility providers violates the United States Constitution, the Virginia Constitution, the *Code of Virginia*, or any other applicable law or rule.

RESPONSE

It is my opinion that requiring landlords to pay and/or collect the debts left by tenants who have contracted with utility providers does not violate the United States Constitution, the Constitution of Virginia or the *Code of Virginia*.

APPLICABLE LAW AND DISCUSSION

Section 15.2-5139 provides that "[t]here shall be a lien upon real estate" for any delinquent fees or charges assessed against the owner, lessee or tenant of the real estate for the use of services on that property "from the time when the fees, rents or charges are due[.]" The statute further provides that a lien "may be placed by an authority" for up to three months of unpaid charges if the authority

> (i) has advised the owner of such real estate at the time of initiating service to a lessee or tenant of such real estate that a lien will be placed on the real estate if the lessee or tenant fails to pay any fees, rents or other charges when due for services rendered to the lessee or tenant; (ii) has mailed to the owner of the real estate a duplicate copy of the final bill rendered to the lessee or tenant at the time of rendering the final bill to such lessee or tenant; and (iii) employs the same collection efforts and practices to collect amounts due the authority from a lessee or a tenant as are employed with respect to collection of such amounts due from customers who are owners of the real estate for which service is provided.[1]

In addition, § 15.2-5124 provides that

> Notwithstanding any other provision of this chapter, if the use of any water or sewer system is contracted for by an occupant who is not the owner of the premises and such occupant's premises are separately metered for service, the owner of any such premises shall be liable only for the payment of delinquent rates or charges applicable to three delinquent billing periods, which together shall not exceed a period of ninety days.

Virginia law plainly contemplates that a landlord will be responsible, to some limited degree, for certain water and sewer utilities obtained by a tenant.

Neither the Constitution of Virginia nor of the United States imposes a barrier to such liability. In a variety of contexts, an individual may be financially liable for the acts of others. Under the settled doctrine of *respondeat superior*, for example, a company or other entity, or a public official, may be liable for the acts of others.[2]

In this specific context, the Supreme Court of Virginia has rejected the argument that the imposition of liens and the collection of charges would deprive the landowner of property without due process of law.[3] Other courts, including the Supreme Courts of the United States,[4] of Kansas,[5] and of Kentucky,[6] as well as the Court of Appeals of Ohio[7] specifically have rejected the contention that imposing liability on the landlord for water consumed by a tenant violates the Constitution. The reasoning of the Supreme Court of Kentucky is typical of the reasoning of this line of cases. The court noted that

> [t]he water service is furnished to the property owner. He primarily benefits from this service even though the ultimate consumer is one of his tenants. He is the consumer to the extent water is supplied to and used on his premises. If he requests this service or accepts it, he impliedly agrees to pay the service charge as provided in the ordinance.[8]

I also note that the landowner is not without remedy in this situation. The landowner can, for example, ask for a security deposit and withhold from it payments for utilities owed by the tenant.[9] Although the wisdom of any law may be open to debate, this law's constitutionality is not.

CONCLUSION

Accordingly, it is my opinion that requiring landlords to pay and/or collect the debts left by tenants who have contracted with utility providers does not violate the United States Constitution, the Constitution of Virginia or the *Code of Virginia*.

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[1] VA. CODE ANN. § 15.2-5139(A) (Supp. 2010).

[2] *See, e.g.*, Plummer v. Center Psychiatrists, Ltd., 252 Va. 233, 235, 476 S.E.2d 172, 173 (1996) (stating the doctrine of *respondeat superior*); First Va. Bank-Colonial v. Baker, 225 Va. 72, 79-80, 301 S.E.2d 8, 12-13 (1983) (clerk can be held liable for the negligent performance of a ministerial acts by her subordinates).

[3] Farquhar v. Bd. of Spvsrs., 196 Va. 54, 71, 82 S.E.2d 577, 587 (1954); Myers v. Moore, 204 Va. 409, 411, 131 S.E.2d 414, 416 (1963).

[4] Dunbar v. City of New York, 251 U.S. 516 (1920).

[5] Cook v. City of Enterprise, 666 P.2d 1197, 1200 (Kan. 1983).

[6] Puckett v. City of Muldraugh, 403 S.W.2d 252, 255 (Ky. 1966).

[7] Morrical v. Village of New Miami, 476 N.E.2d 378, 381 (Ohio Ct. App. 1984) (rejecting an equal protection argument under state and federal constitutions).

[8] *Id.*

[9] VA. CODE ANN. § 55-248.15:1(A) (Supp. 2010).

OP. NO. 10-116

COURTS NOT OF RECORD: JUVENILE AND DOMESTIC RELATIONS DISTRICT COURT – IMMEDIATE CUSTODY, ARREST, DETENTION AND SHELTER CARE/DISPOSITION

CRIMINAL PROCEDURE: PROTECTIVE ORDERS FOR STALKING

An emancipated minor may file petitions for protective orders pursuant to the applicable statutes, and a minor may seek an emergency protective order in certain situations, but that a minor who has not been emancipated, however mature that individual may be, can seek a protective order only through a next friend.

Law enforcement officers may file petitions for emergency protective orders on behalf of minors who are victims of family abuse or stalking, sexual assault or other acts of criminal violence.

THE HONORABLE CHARNIELE L. HERRING
MEMBER, HOUSE OF DELEGATES
JANUARY 21, 2011

ISSUES PRESENTED

You ask, based upon four hypothetical factual scenarios, (1) whether a mature or emancipated minor may seek a protective order pursuant to §§ 16.1-253.1, 16.1-253.4, 16.1-279.1, 19.2-152.8, 19.2-152.9, or 19.2-152.10; and (2) whether law enforcement officers may seek emergency protective orders pursuant to §§ 16.1-253.4 and 19.2-152.8 on behalf mature or emancipated minors who are victims of domestic violence (family abuse) or stalking, sexual assault, or other acts of violence.

RESPONSE

It is my opinion that an emancipated minor may file petitions for protective orders pursuant to the applicable statutes, and a minor may seek an emergency protective order in certain situations, but that a minor who has not been emancipated, however mature that individual may be, can seek a protective order only through a next friend. It further is my opinion that law enforcement officers may file petitions for emergency protective orders on behalf of minors who are victims of family abuse or stalking, sexual assault or other acts of criminal violence.

BACKGROUND

For purposes of your request, you define "mature minor" as "a minor who is mature enough and well informed enough to have his or her choices respected independent of third parties." You further define "emancipated minor" as:

> [A] minor emancipated by: (i) entry into a valid marriage, even though the marriage may have been terminated by dissolution; (ii) active duty with any of the Armed Forces of the United States; (iii) willingly living separate and apart from his or her parents or guardian, with the consent or acquiescence of the parents or guardian; or (iv) entry of an order of emancipation pursuant to Article 15 of Title 16.1 of the Code of Virginia (§ 16.1-331 *et seq.*).[1]

Two of your scenarios relate to protective orders issued pursuant to §§ 16.1-253.1, 16.1-253.4 and 16.1-279.1, and the other two refer to §§ 19.2-152.8 through 19.2-152-10. I will describe each in turn.

In the first scenario, a 16-year-old mother, who is living at home, has been punched in the face by the 18-year-old father of her child. The teen mother believes that there is danger of further violence and wants a protective order to prohibit further acts of abuse and to order the batterer to stay away from her home and school. The teen mother's parents believe that she is overreacting and that a protective order is not necessary. You indicate that the teen mother is a "mature minor" based upon your definition. You relate that she is not a "child in need of supervision" and the alleged acts of violence do not constitute child "abuse or neglect" as defined in § 16.1-228.

Next, you relate that a 16-year-old married her 16-year-old boyfriend without the consent of their parents. Although the marriage was void, the couple was allowed to live together as "man and wife" in the house of the boy's parents. Just after they both turned 17, the "husband" began engaging in a pattern of behavior that placed the "wife" in reasonable fear that he would cause her bodily harm.

Turning to §§ 19.2-152.8 through 19.2-152.10, you describe a 17-year-old college freshman, living in an on-campus dormitory, who is from another state and who returns home only on school holidays, but who is a dependent for tax purposes. You state the student is being stalked by a classmate who also lives on campus. A warrant for the arrest of the alleged perpetrator has been issued. The alleged stalker also lives on campus. The student who is being stalked wants the alleged perpetrator to be ordered to stay out of the dorm where the student lives and to stay at least 100 yards away from the student at all times.

In your final scenario, you relate that a 17-year-old high school senior is sexually assaulted by a 17-year-old classmate. A warrant for the arrest of the alleged perpetrator has been issued. The victim's parents are apprehensive about pursuing charges because of the impact it may have on their child's life. The victim, however, wants to pursue the criminal charge and obtain a civil protective order to bar further acts of violence and keep the alleged perpetrator away.

APPLICABLE LAW AND DISCUSSION[2]

Sections 16.1-253.1, 16.1-253.4 and 16.1-279.1 apply to the first two scenarios. These sections authorize the issuance of preliminary, emergency and permanent protective orders, respectively, in cases of family abuse. "Family abuse" is defined as:

> [A]ny act involving violence, force, or threat including, but not limited to, any forceful detention, which results in bodily injury or places one in reasonable apprehension of bodily injury and which is committed by a person against such person's family or household member.[3]

Because the definition of "family and household member" includes "any individual who has a child in common with the person, whether or not the person and that individual have been married or have resided together at any time," the teen mother falls within the scope of the protection afforded by such orders. Also, the underage "wife" will meet the definition as an "individual who cohabits or who, within the previous 12 months, cohabited with the person,"[4] provided she can show that the totality of the circumstances demonstrate the required elements of cohabitation.[5] Therefore, because the young women in the first two scenarios qualify as victims of family abuse, they could be afforded the security of a protective order.

With regard to the final two victims you describe, §§ 19.2-152.8, 19.2-152.9 and 19.2-152.10 authorize the issuance of emergency, preliminary and final protective orders, respectively, in cases of stalking, sexual battery, and criminal offenses resulting in serious bodily injury to the alleged victim. Unlike protective orders issued for family abuse, to obtain a protective order for stalking, sexual battery or serious bodily injury, a warrant first must be issued for the arrest of the alleged offender.[6] You note in both scenarios that the required warrant has been issued.

Whether an individual is entitled to obtain a protective order, however, is a question distinct from whether the person may request the issuance of such an order. Protective order proceedings are civil in nature. In civil matters, minors who have not been legally emancipated are considered to be under a disability.[7] At common law, minors were unable to sue or to be sued in their own capacities.[8] The common law, unless repealed by statute, remains part of the law of Virginia.[9] Section 8.01-8 permits a minor to sue, provided the child does so by his "next friend," who may be one or both of his parents.[10] A minor also may initiate suit if he or she is emancipated.[11] To be deemed emancipated, a minor of at least 16 years of age must demonstrate to the appropriate court that he either has entered into a valid marriage, is on active duty with the U.S. military, or willingly lives separate and apart from his parents or guardian, with their consent or acquiescence, and is self-supporting and can manage his own financial affairs.[12] There is no provision authorizing "mature minors" to initiate a legal action.

Your scenarios do not indicate that any of the victims have been declared emancipated by court order. Although the out-of-state college student lives separate and apart from his parents with their consent, the student is still dependent on them

for his support, so the student cannot be deemed emancipated. Also, although the 16-year-old girl "married" her boyfriend, the marriage is void under Virginia law because their parents did not consent to it.[13] Because emancipation requires a valid marriage, the teen "wife" remains a minor. As such, the persons in the fact patterns you present may be describable as "mature minors," but each remains subject to the established legal disability with respect to minors instituting litigation.

With respect to *emergency* protective orders, the General Assembly expressly has authorized persons who are victims of sexual battery, aggravated sexual battery, stalking or a criminal offense resulting in a serious injury to come before a magistrate and obtain an emergency protective order, provided of course, that the requirements set forth in the statute are met.[14] A person, including a juvenile, who is subjected to family abuse may similarly be able to obtain an emergency protective order from a magistrate.[15]

Other, nonemergency protective orders contemplate the filing of a pleading in court.[16] To file a petition, one must have legal standing to do so. Given the common law rule, absent a statute to the contrary,[17] a minor may not initiate suit on his own behalf without the aid of his next friend. Thus, absent statutory authority allowing a minor to bring a legal action, a mature minor must file the required petition by a next friend. Such petitions can be handled through the Court Service Unit, which is a division of the Department of Juvenile Justice. In sum, aside from an emergency protective order obtained from a magistrate, the juveniles in the scenarios where the parents oppose the issuance of a protective order would be able to obtain a protective order, but they would require a next friend to proceed.

Finally, §§ 16.1-253.4(D) and 19.2-152.8(D) explicitly provide that a "law-enforcement officer may request an emergency protective order pursuant to th[e] section."[18] I therefore conclude that a law-enforcement officer may file a petition for an emergency protective order on behalf of the minor in each of your scenarios.

CONCLUSION

Accordingly, it is my opinion that an emancipated minor may file petitions for protective orders pursuant to the applicable statutes, and a minor may seek an emergency protective order in certain situations, but that a minor who has not been emancipated, however mature that individual may be, can seek a protective order only through a next friend. It further is my opinion that law enforcement officers may file petitions for emergency protective orders on behalf of minors who are victims of family abuse or stalking, sexual assault or other acts of criminal violence.

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[1] I note that your definition tracks the language of § 16.1-241(V), which defines an "unemancipated minor" for purposes of judicial authorization for obtaining an abortion by a juvenile. What constitutes emancipation as a general matter, however, is governed by §§ 16.1-331 through 16.1-334, which additionally provide that the minor living separate and apart from his parents or guardian, with the consent or acquiescence of the parents or guardian must be "capable of supporting himself and competently managing his own financial affairs." VA. CODE ANN. § 16.1-333 (2010).

[2] Although you describe four distinct scenarios, general principles apply to each of them equally.

[3] Section 16.1-228 (2010).

[4] *Id.* (emphasis added).

[5] Rickman v. Commonwealth, 33 Va. App. 550, 557, 535 S.E.2d 187, 191 (2000) (analyzing whether there was sufficient evidence of cohabitation to uphold the defendant's conviction under § 18.2-57.2 for assault and battery against a family or household member). In applying § 16.1-228, the court identified the essential elements of "cohabitation" as "(1) sharing of familial or financial responsibilities and (2) consortium[;]" and in applying a "totality-of-the-circumstances analysis" further guided:

> Possible factors establishing shared familial or financial responsibilities might include provisions for shelter, food, clothing, utilities, and/or commingled assets. Factors that might establish consortium include mutual respect, fidelity, affection, society, cooperation, solace, comfort, aid of each other, friendship, and conjugal relations. Other factors appropriate for consideration include the length and continuity of the relationship.

Id. (citations omitted). These factors, however, are not the only factors for consideration; "they merely provide guidance in assessing the relationship between the abuser and the victim." Cowell v. Commonwealth, 2005 Va. App. Lexis 42, *10, No. 3198-09-1 (Va. Ct. App. 2005) (unpublished).

[6] *See id.*

[7] VA. CODE ANN. § 8.01-2 (2007); *See* § 16.1-334 (2010). *See also* WILLIAM H. BRYSON, BRYSON ON VIRGINIA CIVIL PROCEDURE, § 5.02[5] (4th ed. LexisNexis Matthew Bender 2010) ("A person below the age of eighteen years is an infant. Infants are not sui juris and thus lack the capacity to sue and defend in court without the aid of an adult.").

[8] *See* Lineberry v. Town of Mebane, 13 S.E.2d 429, 430 (N.C. 1941) ("At common law an infant was under disability and without legal capacity to contract or to act in his own name in asserting a right in any legal proceeding. He could neither sue nor defend a suit in his own name.").

[9] VA. CODE ANN. § 1-200 (2008).

[10] Section 8.01-8 (2007). *Cf.* Cook v. Radford Cmty. Hosp., 260 Va. 443, 450, 536 S.E.2d 906, 910 (2010) (rejecting proposition that precedent held that a minor's suit without a next friend was valid).

[11] Section 16.1-334(3).

[12] Section 16.1-333 (2010).

[13] VA. CODE ANN. §§ 20-45.1; 20-48; 20-49 (2008).

[14] VA. CODE ANN. § 19.2-152.8 (Supp. 2010). Specifically, the victim of stalking or sexual battery must state under oath that he or she has been subjected to stalking, sexual battery, aggravated sexual battery or a criminal offense resulting in sexual battery, and the judge or magistrate must find based on the evidence that "(i) there is probable danger of a further offense being committed by the respondent against the alleged victim and (ii) a warrant for the arrest of the respondent has been issued." *Id.*

[15] Section 16.1-253.4(B).

[16] Cases in the juvenile and domestic relations courts are initiated by the filing of a petition. *See* § 16.1-260 (2010). Similarly in general district courts, cases are initiated by the filing of a pleading. Sections 16.1-79; 16.1-81 (2010).

[17] *See, e.g.,* §§ 16.1-241(G) (2010) (petition by a child to obtain required treatment, rehabilitation or other services); 16.1-241(V) (2010) (petition by juvenile seeking judicial authorization for an abortion); 16.1-331 (2010) (petition by minor for order of emancipation).

[18] Sections 16.1-253.4(D) and 19.2-152.8(D).

OP. NO. 11-010

COURTS OF RECORD: SUPREME COURT OF VIRGINIA

CONSTITUTION OF VIRGINIA: JUDICIARY

No constitutional violation occurs when the justices of the Supreme Court of Virginia decline to sign an order or to identify themselves as members of the panel that ruled on a particular matter before the Court.

THE HONORABLE JAMES M. SHULER
MEMBER, HOUSE OF DELEGATES
FEBRUARY 18, 2011

ISSUE PRESENTED

You ask whether the denial of a litigant's request for the names and signatures of the justices who ruled on his pleadings violates the Constitution of Virginia.

RESPONSE

It is my opinion that no constitutional violation occurs when the justices of the Supreme Court of Virginia decline to sign an order or to identify themselves as members of the panel that ruled on a particular matter before the Court.

BACKGROUND

You relate that a panel of justices of the Supreme Court of Virginia denied a litigant's petition for appeal. The Order denying the appeal was endorsed only by the Deputy Clerk of Court. You further relay that the appellant subsequently requested the names of the justices who had sat on the panel that denied the appeal and that they sign the order memorializing the Court's decision. This request also was denied.

APPLICABLE LAW AND DISCUSSION

Article VI of the Virginia Constitution establishes the judicial branch of the Commonwealth's government and creates the Supreme Court of Virginia. It governs the Court's jurisdiction, provides for the composition of the Court and the selection of justices, and requires decisions based on the merits of the cases it hears to be recorded in writing.[1] The Supreme Court, however, is vested with broad "authority to make rules governing the course of appeals and the procedures to be used in the courts of the Commonwealth[.]"[2] This power is limited only in that "such rules shall not be in conflict with the general law as the same shall, from time to time, be established by the General Assembly."[3]

The Court has promulgated no rule requiring its panel members to identify themselves or to sign all orders. Also, although the General Assembly has provided that orders of the circuit courts be signed by the presiding judge,[4] there is no similar provision that applies to the Supreme Court. I therefore conclude that the Court's procedures allowing routine orders to be endorsed by the Clerk's office and permitting the identities of panel members to remain undisclosed pose no constitutional problems.

CONCLUSION

Accordingly, it is my opinion that no constitutional violation occurs when the justices of the Supreme Court of Virginia decline to sign an order or to identify themselves as members of the panel that ruled on a particular matter before the Court.

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[1] VA. CONST. art. VI, §§ 1; 2; 6; 7.

[2] VA. CONST. art VI, § 5.

[3] *Id.*

[4] *See* VA. CODE ANN. § 17.1-123 (2010).

OP. NO. 11-078

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY

CONSTITUTION OF THE UNITED STATES: SECOND AMENDMENT, RIGHT TO BEAR ARMS

EDUCATIONAL INSTITUTIONS: UNIVERSITY OF VIRGINIA

The University of Virginia lawfully may promulgate a policy that prohibits persons from openly carrying a firearm in the buildings that are subject to the policy.

Because the University adopted a policy rather than a regulation, it has not "otherwise prohibited by law" persons with a concealed carry permit from possessing a handgun, so that the policies may not be used to prohibit persons with such a permit from carrying a concealed firearm into the buildings covered by the policy.

THE HONORABLE EMMETT W. HANGER, JR.
MEMBER, SENATE OF VIRGINIA
JULY 1, 2011

ISSUE PRESENTED

You ask whether a policy of the University of Virginia prohibiting the possession of firearms and ammunition by visitors inside University buildings and hospitals without prior written consent of the University's Chief of Police is legal.

RESPONSE

It is my opinion that, under the present state of the law, the University lawfully may promulgate a policy that prohibits persons from openly carrying a firearm in the buildings that are subject to the policy. It is further my opinion that with respect to persons who have a concealed carry permit, because the University adopted a policy rather than a regulation, it has not "otherwise prohibited by law" persons with a concealed carry permit from possessing a handgun, and, therefore, the policies may not be used to prohibit persons with such a permit from carrying a concealed firearm

into the buildings covered by the policy.

BACKGROUND

The University of Virginia has adopted two policies regulating the possession, storage and use of firearms in University buildings and in hospital buildings. Policy SEC-030,[1] among other things, provides with respect to visitors that

> The possession, storage or use of any firearm, weapon, ammunition, or explosives within any University facility by anyone, except a law enforcement officer, without the prior written permission of the University's Chief of Police or his designee is prohibited.

This policy further states that

> For purposes of this policy, University facilities include, but are not limited to, any academic, administration, residential, research, medical, entertainment or sports venues including any amphitheater, arena, classroom, clinic, dormitory or other residential facility, gymnasium, laboratory, office, stadium, theater and the Medical Center.

An additional definition provides that "University Facility" includes "[a]ny defined space of the University, including a room, lab, series of labs, building or controlled outdoor area."

The Medical Center at the University of Virginia also has adopted a policy governing firearms. Policy Number 0174[2] provides in relevant part that

> Patients and visitors to the Medical Center (with the exception of law enforcement officers) are prohibited from possessing, storing or using any firearm, weapon, ammunition, or explosives within any University facility, without the prior written permission of the University's Chief of Police or his designee.

This policy defines "University Facility" as "[a]ny defined space at the University (including all Medical Center facilities), including a room, lab, series of labs, building or controlled outdoor area."

APPLICABLE LAW AND DISCUSSION

The right to bear arms is protected by the Constitutions of Virginia[3] and of the United States.[4] The United States Supreme Court has recognized that the Second Amendment of the United States protects an individual right to bear arms[5] and, further, that this right operates as a restriction on the States as well as the federal government.[6] The protections afforded by the Virginia Constitution in this area are co-extensive with those of the Second Amendment.[7]

The law is not settled at this time with respect to how strictly courts will evaluate

restrictions on the use and possession of firearms. The United States Supreme Court has stated that the right to bear arms is "not unlimited, just as the First Amendment's right of free speech [is] not."[8] In addition, the Court has noted that the government may enact "laws forbidding the carrying of firearms in sensitive places such as schools and government buildings."[9]

With respect to carrying firearms inside university buildings, the Supreme Court of Virginia recently decided *DiGiacinto v. Rector and Visitors of George Mason University*. In that case, the Court held that a regulation promulgated by George Mason University was lawful and satisfied both the Second Amendment of the United States Constitution and Article I, § 13 of the Constitution of Virginia.[10] The regulation at issue in *DiGiacinto* provides as follows:

> Possession or carrying of any weapon by any person, except a police officer, is prohibited on university property in academic buildings, administrative office buildings, student residence buildings, dining facilities, or while attending sporting, entertainment or educational events. Entry upon the aforementioned university property is expressly forbidden.[11]

The Court reasoned that the University

> has 30,000 students enrolled ranging from age 16 to senior citizens, and that over 350 members of the incoming freshman class would be under the age of 18. Also approximately 50,000 elementary and high school students attend summer camps at GMU and approximately 130 children attend the child study center preschool there. All of these individuals use GMU's buildings and attend events on campus. The fact that GMU is a school and that its buildings are owned by the government indicates that GMU is a "sensitive place."[12]

The Court found it significant that the regulation promulgated by George Mason University "does not impose a total ban of weapons on campus."[13] Instead, "the regulation is tailored, restricting weapons only in those places where people congregate and are most vulnerable – inside campus buildings and at campus events."[14] Importantly, "[i]ndividuals may still carry or possess weapons on the open grounds of GMU and in other places on campus not enumerated in the regulation."[15]

Although *DiGiacinto* specifically addressed a regulation of firearms in university buildings rather than medical buildings, the logic of the decision applies with equal force to the policy adopted by the Medical Center. Applying the Court's reasoning to the hospital context, hospitals harbor large numbers of vulnerable patients, including children, the elderly and patients with mental illnesses.

There are two significant differences, however, between the policies at issue here and the regulation at issue in *DiGiacinto*. First, the policies adopted by the University of Virginia and the Medical Center are broader than the regulation at issue in *DiGiacinto*. For example, the Medical Center policy includes within the ban a

"controlled outdoor area" and both policies include virtually all University buildings and property. The Court in *DiGiacinto* noted as a consideration in favor of the constitutionality of George Mason University's regulation the fact that the regulation was "tailored" and allowed individuals to "carry or possess weapons on the open grounds of GMU, and in other places on campus not enumerated in the regulation."[16] Bans that are broader than the one expressly approved by the Supreme Court of Virginia in *DiGiacinto*, while likely facially constitutional, are vulnerable to "as applied" challenges with respect to particular places.

Second, a regulation has the force of law, whereas a policy does not.[17] *DiGiacinto* establishes that a University has the authority to promulgate regulations restricting firearms inside certain buildings. As with regulations, the authority conferred by the General Assembly upon the Board of Visitors of the University includes the authority to create *policies* governing buildings at the University.[18] Unless a policy collides with a law or regulation, a policy may be enforced by the University.

With respect to the general right of "open carry," the University may develop a policy that restricts the right of open carry within certain buildings. Prior opinions of this office have recognized the right, tied to the Second Amendment, to openly carry a firearm.[19] This right to openly carry, like the Second Amendment right generally, may be limited in "sensitive places" like "schools and government buildings."[20] In other words, the right to bear arms does not include an unqualified right to openly carry a firearm in a sensitive place or certain government buildings. No statute or regulation specifically addresses the right to openly carry a firearm. Therefore, the University, which is vested with the authority to promulgate and enforce policies governing its buildings, may enforce this policy. University officials may request that persons who openly carry in buildings covered by the policy abide by the policy. If these persons refuse to follow it, and also refuse to leave, they may be charged with trespass.

Unlike open carry, there is an additional statutory overlay that addresses persons who have received a concealed carry permit. Section 18.2-308(O) provides that "[t]he granting of a concealed handgun permit shall not thereby authorize the possession of any handgun or other weapon on property or in places where such possession is otherwise prohibited by law[.]"[21] A prior opinion of this Office concluded that "[t]he clear intent of the General Assembly is to allow concealed handgun permit holders to carry handguns only in areas where it has not specifically prohibited the carrying of handguns."[22] Where the possession of a handgun is *prohibited by law*, persons with a concealed carry weapon may not bring their weapons to such locations.[23] In *DiGiacinto*, George Mason University promulgated a regulation, which has the force of law, prohibiting a person from carrying a firearm in certain buildings. Therefore, persons with concealed carry permits could not bring them into the specified buildings because doing so under this regulation was "otherwise prohibited by law." The University of Virginia's *policy*, in contrast, is not a regulation and, therefore, does not have the force of law. Consequently, the policy does not fall within the terms of the exception contemplated in § 18.2-308(O). Under § 18.2-308(O), persons with valid concealed carry permits may not, through a policy, as opposed to a

regulation, be prohibited from exercising their right to carry a concealed handgun. To prevent persons who have concealed carry permits from bringing them into University or Medical Center buildings, the University would need to promulgate a regulation tailored to that effect.

In reviewing the legality of the policies, I express no opinion about their wisdom. It certainly can be argued that such policies are ineffectual because persons who wish to perpetrate violence will ignore them, and that the net effect of such policies is to leave defenseless the law-abiding citizens who follow these policies. The task at hand, however, is not to evaluate the desirability of such policies. Instead, the role of the Office is to assess the lawfulness of these policies in light of the law as it presently exists in Virginia.

CONCLUSION

Accordingly, I am compelled to conclude that under its policies, the University lawfully may prohibit persons from openly carrying a firearm in the buildings that are subject to the policy. It is further my opinion that with respect to persons who have a concealed carry permit, because the University adopted a policy rather than a regulation, it has not "otherwise prohibited by law" persons with a concealed carry permit from possessing a handgun, and, therefore, the policies may not be used to prohibit persons with such a permit from carrying a concealed firearm onto the buildings covered by the policy.

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[1] The policy can be found at https://policy.itc.virginia.edu/policy/policydisplay?id=SEC-030.

[2] I was unable to locate this policy in the sections of the University's website that are open to the public. It is attached to this opinion.

[3] "[T]he right of the people to keep and bear arms shall not be infringed[.]" VA. CONST. art. I, § 13.

[4] "[T]he right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

[5] District of Columbia v. Heller, 554 U.S. 570, 606 (2008).

[6] McDonald v. City of Chicago, 130 S. Ct. 3020, 3050 (2010).

[7] DiGiacinto v. Rector & Visitors of George Mason Univ., 281 Va. 127, 133-34, 704 S.E.2d 365, 368-69 (2011).

[8] *Heller*, 554 U.S. at 595.

[9] *Id*. at 625-26.

[10] *DiGiacinto*, 281 Va. at 127, 704 S.E.2d at 365.

[11] *Id.* at 130-31, 704 S.E.2d 365, 367 (quoting 8 VA. ADMIN. CODE § 35-60-20).

[12] *Id*. at 135-36, 704 S.E.2d at 370. Like the Board of Visitors of George Mason University, the Board of Visitors at the University of Virginia is tasked with the "care and preservation of the property belonging to the University." VA. CODE ANN. § 23-76 (2006).

[13] *Id*. at 136, 704 S.E.2d at 370.

[14] *Id*.

[15] The conclusion of the Supreme Court of Virginia generally is consistent with a prior opinion from this Office, which concluded that "[t]he universal prohibition of firearms by properly permitted persons other than students, faculty, administration, or employees . . . is not allowed under the law." 2006 Op. Va. Att'y

Gen. 116, 118. Nevertheless, a university may impose certain regulations or prohibitions concerning firearms to ensure - in its view - the safe operation of the campus. *Id.*

[16] *Id*.

[17] *See* VA. CODE ANN. 2.2-4001 (2008) (defining a "regulation" under the Administrative Process Act as "any statement of general application, *having the force of law*, affecting the rights or conduct of any person, adopted by an agency in accordance with the authority conferred on it by applicable basic laws." *See also* Woods v. Commonwealth, 26 Va. App. 450, 457, n. 3, 495 S.E.2d 505, 509 n. 3 (1998) ("a statement of policy does not have the force of law . . . .") (quoting Shenango Tshp. Bd. of Supvsrs. v. Pa. Pub. Util. Comm'n, 686 A.2d 910, 914 (Pa. Commw. Ct. 1996)).

[18] *DiGiacinto*, 281 Va. at 136, 704 S.E.2d at 370.

[19] 2008 Op. Va. Att'y Gen. 12, 13.

[20] *Heller*, 554 U.S. at 625-26.

[21] I further note that a wide range of persons are automatically disqualified from receiving a concealed carry permit. Persons who have been convicted of certain crimes, including stalking, assault and battery, and public drunkenness, persons who have been subject to restraining orders, who are addicted to controlled substances, persons found by a preponderance of the evidence to be likely to use a weapon unlawfully or negligently to endanger others, or who have had or had certain mental health issues are all ineligible to receive such a permit. *See* VA. CODE ANN. § 18.2-308(E)(1) through (20) (listing persons ineligible for a permit).

[22] 2000 Op. Va. Att'y Gen. 100, 101.

[23] Examples include the prohibition on bringing weapons in courthouses, VA. CODE ANN. § 18.2-283.1 (2009), or in air carrier airport terminals, VA. CODE ANN. § 18.2-287.01 (2009).

OP. NO. 11-043

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY – DANGEROUS USE OF FIREARMS OR OTHER WEAPONS

CONSTITUTION OF THE UNITED STATES: SECOND AMENDMENT (RIGHT TO KEEP AND BEAR ARMS)

CONSTITUION OF VIRGINIA: BILL OF RIGHTS (RIGHT TO KEEP AND BEAR ARMS/RIGHT TO ACQUIRE & POSSESS PROPERTY)

Carrying a weapon for personal protection constitutes a good and sufficient reason to carry a weapon into a place of worship while a meeting for religious purposes is being held there.

Places of worship can restrict or ban firearms from their premises.

THE HONORABLE MARK L. COLE
MEMBER, HOUSE OF DELEGATES
APRIL 8, 2011

ISSUES PRESENTED

You ask whether it is permissible for a citizen to carry his firearm into a place of worship for personal safety purposes under § 18.2-283, which requires a "good and

sufficient reason" for carrying a firearm into "a place of worship while a meeting for religious purposes is being held at such place."[1] You further inquire whether a church may ban weapons on its property. The construction of this statute has been the source of multiple inquiries to this office.

RESPONSE

It is my opinion that carrying a weapon for personal protection constitutes a good and sufficient reason under the statute to carry a weapon into a place of worship while a meeting for religious purposes is being held there. It is further my opinion that places of worship can restrict or ban firearms from their premises.

APPLICABLE LAW AND DISCUSSION

The right to bear arms is protected by the Constitutions of Virginia[2] and of the United States.[3] St. George Tucker, author of the first scholarly commentary on the federal Constitution in 1803, described the right to bear arms as "'the true palladium of liberty.'"[4]

Section 18.2-283 of the Virginia Code provides that "[i]f any person carry any gun, pistol . . . or other dangerous weapon, without good and sufficient reason, to a place of worship while a meeting for religious purposes is being held at such place he shall be guilty of a Class 4 misdemeanor." Section 18.2-283 is a penal statute. "[A] fundamental rule of statutory construction is that penal statutes are to be strictly construed against the Commonwealth and in favor of a citizen's liberty."[5]

The right of self-defense lies at the heart of the right to keep and bear arms. As the United States Supreme Court has recognized,

> [s]elf-defense is a basic right, recognized by many legal systems from ancient times to the present day, and in *Heller*,[6] we held that individual self-defense is the *central component* of the Second Amendment right . . . Thus, we concluded, citizens must be permitted to use handguns for the core lawful purpose of self-defense.[7]

Given the strict construction of penal statutes and the pedigree of the right to self-defense, I conclude that lawfully carrying a firearm for self-defense and personal protection constitutes a "good and sufficient" reason within the intendment of § 18.2-283.

With respect to your second question, the church can ban guns on its property if it so chooses. The Constitution of Virginia protects the right to bear arms, but it also recognizes the importance of property rights.[8] Moreover, the Second Amendment acts as a restraint on government, not private parties. Churches, synagogues, mosques and other religious entities can, like any other owner of property, restrict or ban the carrying of weapons onto their private property.

CONCLUSION

Accordingly, it is my opinion that carrying a weapon for personal protection constitutes a good and sufficient reason under the statute to carry a weapon into a place of worship while a meeting for religious purposes is being held there and it is further my opinion that places of worship can restrict or ban firearms from their premises.

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[1] I will assume for purposes of this opinion that the citizen wishing to carry a concealed weapon has an appropriate permit.

[2] "[T]he right of the people to keep and bear arms shall not be infringed[.]" VA. CONST. art. I, § 13.

[3] "[T]he right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II. The Second Amendment applies to the States as well as to the United States government. McDonald v. City of Chicago, 130 S. Ct. 3020, 3026 (2010) (quotations and citations omitted).

[4] District of Columbia v. Heller, 554 U.S. 570, 606 (2008) (quoting 1 Blackstone's Commentaries, app. 300, Note D, "View of the Constitution of the United States" (1803)).

[5] Fullwood v. Commonwealth, 279 Va. 531, 536, 689 S.E.2d 742, 746 (2010).

[6] *Heller*, 554 U.S. at 570 (recognizing that the Second Amendment protects an individual right to bear arms).

[7] *McDonald*, 130 S. Ct. at 3036 (quotations and citations omitted).

[8] VA. CONST. art. I, § 1 (recognizing the right of "acquiring and possessing property" as one of the inherent rights of mankind).

OP. NO. 11-018

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING HEALTH AND SAFETY – OTHER ILLEGAL WEAPONS

CRIMINAL PROCEDURE: CENTRAL CRIMINAL RECORDS EXCHANGE

When issuing a concealed weapon permit, the clerk of court has no duty to verify with the general district or the juvenile and domestic relations court whether the applicant has any criminal charges or protective orders pending against him in those courts.

The failure of a clerk to detect any existing protective orders or criminal charges does not constitute gross negligence, provided the clerk has followed the statutory requirements governing the issuance of a concealed weapon permit.

THE HONORABLE JACK KENNEDY
CLERK OF THE CIRCUIT COURT
WISE COUNTY AND CITY OF NORTON
MAY 13, 2011

ISSUES PRESENTED

You inquire whether, prior to issuing a concealed handgun permit, the issuing court must verify with the local general district and juvenile and domestic relations courts the existence or non-existence of any criminal charges or restraining or protective orders against the applicant pending in those courts. You further inquire whether a

failure to detect pending charges constitutes gross negligence pursuant to § 18.2-308(D). In particular, you are concerned about disqualifying events that may occur during the period between obtaining the Central Criminal Exchange Records Exchange ("CCRE") report and the actual issuance of the permit.[1]

RESPONSE

It is my opinion that, when issuing a concealed weapon permit, the clerk of court has no duty to verify with the general district or the juvenile and domestic relations court whether the applicant has any criminal charges or protective orders pending against him in those courts. It further is my opinion that the failure of a clerk to detect any existing protective orders or criminal charges does not constitute gross negligence, provided the clerk has followed the statutory requirements governing the issuance of a concealed weapon permit.

BACKGROUND

You relate that, as the Clerk of the Court for Wise County and the City of Norton, you have been delegated the responsibility of reviewing applications for concealed weapon permits. You note that applications for such permits must include only the information necessary to determine eligibility for the permit. You advise that, to date, the Wise County and City of Norton Circuit Court requires the following: (1) a completed application made under oath, (2) proof of valid handgun training, (3) a criminal history report from the CCRE based upon the applicant's name, date of birth, and/or social security number which the Sheriff verifies by signature, and (4) verification of pending charges in the Circuit, General District and Juvenile and Domestic Relations Court which are verified by signature of a clerk of the respective court. You further report, however, that both the General District and the Juvenile and Domestic Relations Courts have been advised that they should no longer provide verification of pending charges because such verification creates a risk of liability.

APPLICABLE LAW AND DISCUSSION

Section 18.2-308 of the *Code of Virginia* prohibits the carrying of a concealed weapon by all citizens other than certain enumerated classes of individuals and those to whom a concealed weapon permit has been issued. Individuals may obtain a permit pursuant to § 18.2-308(D), which provides in relevant part that

> Any person 21 years of age or older may apply in writing to the clerk of the circuit court of the county or city in which he resides . . . for a five-year permit to carry a concealed handgun . . . . The application shall be made under oath before a notary or other person qualified to take oaths and shall be made only on a form prescribed by the Department of State Police . . . requiring only that information necessary to determine eligibility for the permit. . . . The court shall consult with either the sheriff or police department of the county or city and receive a report from the Central Criminal Records Exchange.

The Code also authorizes the circuit court to delegate to the clerk responsibility for issuance of the permit:

> A court may authorize the clerk to issue concealed handgun permits, without judicial review, to applicants who have submitted complete applications, for whom the criminal history records check does not indicate a disqualification and, after consulting with either the sheriff or police department of the county or city, about which there are no outstanding questions or issues concerning the application.[2]

Within 45 days of receiving a completed application, the "court shall issue the permit and notify the State Police of the issuance of the permit . . . unless it is determined that the applicant is disqualified."[3] Section 18.2-308(E) provides, in relevant part, that

> The following persons shall be deemed disqualified from obtaining a permit: . . .
>
> 5. An individual who is subject to a restraining order, or to a protective order and prohibited by § 18.2-308.1:4 from purchasing or transporting a firearm. . . .
>
> 14. An individual who has been convicted of any assault, assault and battery, sexual battery, discharging of a firearm in violation of § 18.2-280 or 18.2-286.1 or brandishing of a firearm in violation of § 18.2-282 within the three-year period immediately preceding the application.
>
> 15. An individual who has been convicted of stalking. . . .
>
> 17. An individual who has a felony charge pending or a charge pending for an offense listed in subdivision 14 or 15.

The applicant must state under penalty of perjury whether he has any pending criminal charges or is the subject of a restraining or protective order.[4] The court then, in determining eligibility, verifies the petitioner's application by comparing his statements to the information provided by the CCRE and by consultation with law enforcement. The CCRE is the "sole criminal record keeping agency of the Commonwealth,"[5] and is charged with collecting and keeping records pertaining to "arrests, detentions, indictments, informations, or other formal charges" and oversees the state's Protective Order Registry, which functions as "a central repository of information regarding outstanding, valid protective orders."[6]

A previous opinion of the Attorney General explained the process for verification for eligibility:

> Pursuant to the clear language of Section 18.2-308(D), the decision of the circuit court must be based only on information required on the application form prescribed by the Supreme Court, on information received from local law-enforcement officials, on any sworn statements submitted by local law-enforcement officials, and on information contained in the report from the Central Criminal Records Exchange.[7]

The mention of one thing in a statute implies the exclusion of another.[8] A statute limiting a thing to be done in a particular manner, or by a prescribed person or tribunal, implies that it shall not be done otherwise, or by a different person or tribunal.[9] Section 18.2-308(D) specifies that verification is to be made through local law enforcement personnel and the CCRE report, which is typically obtained by the sheriff. The statute does not specify that the clerk or judge must further inquire with the general district or juvenile and domestic relations courts concerning pending charges.

You express a concern about disqualifying events that occur after the CCRE report has been received but before issuance of the permit. I note that the permitting statute is designed with significant safeguards to ensure that only qualified persons receive and hold permits. If an individual incurs a criminal charge or is the subject of a protective order after permit is issued, the permit will be revoked or forfeited.[10] The applicant is aware of this potential result because the application form prescribed by the Department of State Police specifically inquires as to the existence of any restraining orders, protective orders and pending charges.[11] Materially false statements in the application process are not only subject to penalties for perjury,[12] but also result in forfeiture of the permit.[13] Additionally, the Code requires the application review process to be completed within 45 days,[14] which minimizes the potential for applicants to incur a disqualifying event after submitting their petition and before the issuance of the permit.

To ensure that the report from the CCRE fully reflects current restraining orders, protective orders and any pending charges, the best practice is to eliminate any delay between issuing the permit and receiving the CCRE and the required input from local law enforcement. The criminal records maintained in the Exchange are available to criminal justice entities on the state and national level 7 days a week, 24 hours a day. Generally, an immediate response concerning an individual's criminal history record is available.[15] The type of information available depends on the status of the inquirer and the reason for the inquiry. A simple criminal inquiry by law enforcement should capture all necessary information for a criminal records check. An inquiry using purpose code "F" provides automated records of all state or federal crimes committed by the applicant, as well as pending criminal charges, protective orders, and mental health history.[16] Nonetheless, if delay is a concern, you are not precluded from requesting an updated report immediately prior to issuing the permit or from inquiring with a court not of record for any pending charges.

With respect to your question about clerk liability, clerks of court specifically are exempt from suit "arising from any acts or omissions relating to the issuance of concealed handgun permits without judicial review . . . unless the clerk was grossly negligent or engaged in willful misconduct."[17] As a constitutional officer, considerable deference is given to ministerial decisions made by circuit court clerks unless such actions are contrary to law.[18] Gross negligence has been defined as "the heedless and palpable violation of legal duty respecting the rights of others which amounts to the absence of slight diligence, or the want of even scant care."[19] It is

such negligence as would shock fair-minded people, although it is something less than willful recklessness.[20]

Accordingly, it is my opinion that if a clerk adheres to the statutory requirements regarding the procedure for verifying eligibility for concealed weapon permits, a failure to detect any pending criminal charges or protective orders does not constitute gross negligence. The clerk may rely on the CCRE report and consultation with local law enforcement to discharge his statutory duties. The clerk may, but is not required to, inquire with courts not of record concerning pending charges or restraining or protective orders.

CONCLUSION

Accordingly, it is my opinion that, when issuing a concealed weapon permit, the clerk of court has no duty to verify with the general district or juvenile and domestic relations court whether the applicant has any criminal charges or protective orders pending against him in those courts. It further is my opinion that the failure of a clerk to detect any existing protective orders or criminal charges does not constitute gross negligence, provided the clerk follows the statutory requirements governing the issuance of a concealed weapon permit.

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[1] You also inquire about the duties of judges and sheriffs in this setting. My response is limited to the duties of the clerk. By statute, the Attorney General cannot issue an opinion to a local official unless that opinion "is directly related to the discharge of the duties of the official requesting the opinion." VA. CODE ANN. § 2.2-505(B) (2008).

[2] VA. CODE ANN. § 18.2-308(D) (Supp. 2010). The clerk, however, should not issue the permit without judicial review if "the sheriff, chief or police, or attorney for the Commonwealth [has] submit[ted] to the court a written statement . . . indicating that the applicant is likely to use a weapon unlawfully or negligently to endanger others."

[3] *Id.*

[4] *See* SP- 248 (7-1-2010), question 8.F, 8K and signature block.

[5] VA. CODE ANN. § 19.2-387 (2009).

[6] Section 19.2-387.1 (2009).

[7] 1995 Op. Va. Att'y Gen. 130, 131. This situation is distinguished from that in which a court seeks to add requirements, other than those enumerated, to issue a handgun permit.

[8] *Id. See also* 2A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION 47.23 (5th ed. 1992 & Supp. 1995).

[9] 1981 Op. Va. Att'y Gen. 190, 1991 Op. Va. Att'y Gen. 91, 92.

[10] Section 18.2-308(D). Section 18.2-308(J) (requiring the Central Criminal Records Exchange to notify the court having issued a permit of any disqualifying arrest, conviction or other event).

[11] *See* Virginia Department of State Police Form 248 (7-1-2010), questions 8(F), 8(K) and signature block.

[12] *Id. See also* § 18.2-308(F).

[13] Section 18.2-308(J).

[14] Section 18.2-308(D).

[15] *See* VIRGINIA STATE POLICE, *Central Criminal Records Exchange (CCRE), available at* http://www.vsp.state.va.us/CJIS_CCRE.shtm (last visited March 3, 2011).

[16] According to Captain Thomas Turner, Criminal Justice Information Systems (CJIS) Officer for the Virginia State Police, a request for a criminal records check using purpose code "F" will supply all data needed to complete the required verification under § 18.2-308(D).

[17] Section 18.2-308(D).

[18] 2009 Va. Att'y Gen. 40 (citing 2003 Op. Va. Att'y Gen. 60).

[19] Chapman v. City of Virginia Beach, 252 Va. 186, 190, 475 S.E.2d 798, 801 (1996) (quoting Town of Big Stone Gap v. Johnson, 184 Va. 375, 378, 35 S.E.2d 71, 73 (1945)). *See also* Frazier v. City of Norfolk, 234 Va. 388, 393, 362 S.E.2d 688, 691 (1987).

[20] Ferguson v. Ferguson, 212 Va. 86, 92, 181 S.E.2d 648, 653 (1971); Clark v. Clark, 216 Va. 539, 543, 221 S.E.2d 123, 126 (1976); 1980-81 Op. Va. Att'y Gen. Va. 152.

OP. NO. 11-086

CRIMES AND OFFENSES GENERALLY: CRIMES INVOLVING MORALS AND DECENCY – GAMBLING

Application of gambling laws to specific scenarios to determine whether they run afoul of the prohibition on gambling, but insufficient information is provided to reach a firm conclusion.

THE HONORABLE G. MANOLI LOUPASSI
MEMBER, HOUSE OF DELEGATES
AUGUST 12, 2011

ISSUES PRESENTED

You present three scenarios involving sweepstakes and you inquire whether each scenario is legal under Virginia law. The first fact pattern involves charitable donations made in terminals installed in convenience stores or stand alone businesses that would accept donations and allow persons donating money to participate in a sweepstakes. The second scenario involves political donations made from computers, and which also would permit the person donating money to enter into sweepstakes. In the final fact pattern, a business provides on-site computer services and allows customers to enter into a sweepstakes when they purchase telephone cards or time on a computer.

RESPONSE

It is my opinion the scenarios may or may not run afoul on the prohibition on gambling, but I lack sufficient information to reach a firm conclusion.

BACKGROUND

You relate three specific hypothetical situations.[1] Each scenario has the following common features. First, an individual can obtain at least one free entry each day, at each location, without any requirement of a donation or purchase. In each instance, an individual can obtain an unlimited number of free entries by mail when requested

in accord with the rules. You posit that customers seek free entries, both by mail and in person. Some of the individuals who request and obtain entries without purchase actually win prizes. The winning entries can be redeemed for a predetermined cash prize in accordance with the posted odds.

Each scenario entails a series of sweepstakes. The total cash prizes to be awarded, the number of entries and the particular cash prize value for each entry are determined at the beginning of each sweepstake and prominently disclosed to all participants as the odds of the game. A person receiving an entry by any method can immediately discover the value of his prize by asking the sales clerk to reveal that information. Alternatively, persons receiving entries by any method immediately can discover the value of the prize by using an "instant reveal" button on one of the computer terminals at the business.

In addition, participants in the sweepstakes can use one of the computer terminals at the business to reveal the predetermined value of his entry by using entertainment software programmed on the terminal. Some of the entertainment software displays games that mimic familiar games of chance. You note that the participant who uses the entertainment software will receive exactly the same prize that he would have received had he asked the store clerk to disclose to him the value of the prize associated with his entry or had he used the "instant reveal" option on the terminal. The participant's odds of winning do not change by playing the games; instead, you state that the games are "an entertaining method of revealing the prize that the participant already has won (if any.)"

1. Charitable donations at computer terminals

Against this common backdrop, the first scenario you inquire about involves charitable donations. In addition to the free entries noted above, an individual can make a cash donation to a charitable organization that is tax exempt under the Internal Revenue Code. The donated proceeds go to the charity designated by the customer, minus administrative costs. Administrative costs are reported in compliance with all applicable laws, and the business complies with all Virginia laws related to charitable donations.

You indicate that terminals are installed in stand-alone businesses, but also may be installed in establishments such as convenience stores. You posit that the intended clientele comprises persons likely to have an interest in charity and persons with ties to the particular charitable entities supported by the enterprise. The participant selects the charity to which he wants to donate from a list of charities offered by the computer terminal. The terms and rules of the sweepstake – including clear instructions regarding how to avail oneself of the standing offer of free participation, and the odds of the game are displayed prominently at the location and on the terminal. By "click-wrap acceptance,"[2] patrons acknowledge the rules when they access the terminal.

2. Political contributions made from computers in business establishments

You indicate that in this scenario, businesses provide televisions tuned to news stations such as Fox News Channel or MSNBC. Customers use computers to read political blogs and websites. The establishments host election night parties where customers can watch election returns with others who are interested in politics. Persons frequenting these establishments can donate to political parties from a computer terminal. Proceeds are donated to the political party designated by the customer, minus administrative costs. Administrative costs are reported in accordance with applicable laws. The businesses comply with all Virginia laws relating to political donations. When operated as stand-alone businesses, the businesses prominently display a tally of contributions to each party, so as to incentivize supporters of a party to donate.

The terms of the sweepstake, including clear instructions about how to avail oneself of the standing offer of free participation and the odds of the game are displayed prominently at the location and on the terminal. By "click wrap acceptance," patrons acknowledge the rules when they access the terminal.

3. Sale of a valuable product or service.

In this scenario, persons can purchase a prepaid, rechargeable telephone card and/or computer work station time. The prepaid phone cards provide local and nationwide long distance talk time at a rate of $.03 per minute. You note that this rate compares favorably with comparable but non-rechargeable prepaid telephone calling cards that are commonly sold in the absence of promotional games of chance. The cards are not codes printed on cash register receipts, but instead are durable plastic rechargeable cards. The business tracks the use of the phone cards and can show that phone cards are used by customers in substantial amounts.

With respect to computer workstations, you note that customers are charged $7.50 per hour. You indicate that this rate compares favorably with rates for high-speed internet access commonly paid at internet cafés and business centers in the absence of a promotional game of chance. Using the computer work stations for the entertaining method of revealing entries does not reduce entitlement to work station time, telephone talk time or any other product or service for which the customer has paid. The customers purchasing computer work station time have not only internet access, but also are provided access to an office productivity suite (including word processing, spreadsheet and other programs).

For businesses selling only computer work station time and not prepaid telephone calling cards, you note that the computer work stations are user-friendly and include educational programs such as encyclopedias, news programs, and "just-for-fun" amusement games. The computers also have programs available to provide tutorials on computer use. Staff members at these businesses are trained to assist customers in operating the computers. You indicate that these workstations are designed to respond to the needs of persons who lack a computer in the home and that such persons are part of the intended clientele. In this scenario, the businesses track the use of the

computer workstations and can show that customers use the internet and office programs on these workstations.

These businesses provide the terms and rules of the sweepstakes, including clear instructions on how to avail oneself of the standing offer of free participation and the odds of the game offered to all, and these terms are displayed prominently at the location and on the workstation. By "click-wrap acceptance," customers acknowledge the rules when they access the workstation.

APPLICABLE LAW AND DISCUSSION

Before proceeding with the analysis, I must make clear at the outset that the application of various elements of a criminal offense to a specific set of facts rests with the Commonwealth's attorney, the grand jury and the trier of fact. Furthermore, while opinions of the Attorney General are given respectful consideration by the courts, they are not binding upon the courts.[3] Ultimately, whether a particular factual scenario constitutes illegal gambling turns on actual, rather than hypothetical, facts.

I also note that, with respect to the political and charitable fundraising scenarios you posit, constitutional considerations do not alter the legal analysis. Political and charitable solicitations can "'involve a variety of speech interests ... that are within the protection of the First Amendment.'"[4] There is a difference however, between laws purporting to directly regulate charities and charitable solicitation, and the gambling and gambling device laws here which do not purport to regulate speech. As the United States Court of Appeals for the Seventh Circuit noted:

> [W]agering money is an activity-just as the business of leasing property is not speech and may be regulated by zoning laws and the like, even if the lessee wants to put on a play or open a newsstand. Gambling has traditionally been closely regulated or even forbidden, without anyone suspecting that these restrictions violate the first amendment. . . . [P]ersons who seek to engage in speech cannot avoid the application of state laws that are neutral with regard to the content and viewpoint of their expression. The state may collect income taxes, which reduce the resources at the command of speakers, but laws indifferent to the content or even existence of speech pose no constitutional difficulties. The state may collect income taxes, which reduce the resources at the command of speakers, but laws indifferent to the content or even existence of speech pose no constitutional difficulties . . . . [The state] statute regulates the process of wagering rather than expression that may accompany gambling.
>
> To put this in doctrinal terms:
>
> A regulation that serves purposes unrelated to the content of expression is deemed neutral, even if it has an incidental effect on some speakers or messages but not others . . . . Government regulation of expressive activity is content neutral so long as it is "*justified* without reference to the content of the regulated speech."

> [The State's] regulation of gambling is unrelated to the content of any expression. It is justified without reference to that expression . . . .[5]

In short, if a person is engaged in illegal gambling, he is not exempt from civil or criminal prohibitions on gambling simply because he ostensibly raises funds for charities or political organizations.

With a few limited exceptions, gambling is illegal in Virginia.[6] Gambling devices also are illegal.[7] It is well settled that "an activity constitutes illegal gambling when the elements of prize, chance and consideration are present together."[8] Prize and chance are present in all three scenarios. Nevertheless, this Office has long recognized that certain sweepstakes are legal. Past opinions reason that the element of consideration is missing in situations where a purchase is unnecessary to win.[9] The question common to all three scenarios you present is whether the computer terminals that allow customers to play games and win sweepstakes prizes constitute legal sweepstakes or illegal gambling.

Courts have grappled over the years with drawing the line between legal sweepstakes and illegal gambling that purports to function as a sweepstakes.[10] I find persuasive the decision of the Court of Appeals of Texas, which concluded that "the decision turns on whether the sweepstakes was intended to promote the sale of [a product or service] or whether the [products or services] were there as an attempt to legitimize an illegal gambling device."[11] The court persuasively observed that "the mere pretense of free prizes, designed to evade the law, would not negate the element of consideration."[12] Ultimately, that court upheld the jury's conclusion that the defendant's sale of telephone cards in that case did not alter the fact that the defendant had engaged in illegal gambling. The court found that the evidence had established that

> the main purpose and function of the machines, and the business, was to induce people to play the game, agreeing to gain or lose something of value at least partially by chance, and not to promote telephone cards; that it was [the defendant's] intent to structure the business to entice players to exchange money for chances to play, which they did; and that the telephone cards were not the primary subject of the transaction, but mere subterfuge.[13]

I lack sufficient information to determine whether the three proposed scenarios constitute illegal gambling or a lawful sweepstakes because I cannot determine from the facts presented whether the element of consideration is present. It may be that, in fact, the businesses are fundraising for political parties or charities and the sweepstakes serve as a marketing tool for those purposes. Businesses selling telephone cards or computer time also may engage lawfully in sweepstakes. It may be, however, that the true character of these scenarios consists of gambling and that the ostensible fundraising or products constitute a thin veneer designed to obscure the gambling nature of the activity.

You note, for example, with respect to the charitable and political donations scenarios, that the donations are forwarded to the charity or political entity designated by the customer, minus "administrative costs." If the businesses that own these cafés or machines forward an inconsequential portion of the donations to charitable or political causes, it is more likely that a factfinder will be persuaded that such operations violate the prohibition on gambling.

Another distinct feature of the three scenarios you posit is the fact that the entire business model appears to be built upon perpetual sweepstakes. Ordinary sweepstakes are limited in time and attached to a particular marketing campaign for a product that is otherwise sold independently of the sweepstakes. If that model is stood on its head, and the business model effectively consists of persuading individuals to purchase chances to win prizes, with a product or service an afterthought to the chance to win prizes, the element of consideration is present regardless of whether some individuals are offered free entries.

Finally, you note that individuals can obtain free entries either by requesting them in person, or by mail. With a traditional sweepstakes, this feature generally removes the "consideration" element of gambling. That does not in all cases, however, eliminate the element of consideration. For example, the Supreme Court of North Dakota concluded that a "Lucky Strike" game associated with a telephone card dispensing machine constituted an illegal gambling device.[14] In reaching this conclusion, the Court rejected the argument that "there is no consideration because there is no purchase necessary to play the game."[15] The Court reasoned that

> the limited availability of free play does not exempt the Lucky Strike game from being defined as gambling. Sweepstakes that are commonplace as marketing promotion tools are significantly different than the Lucky Strike game. The high pay-out rate of the Lucky Strike game is a distinguishing feature because it goes to the true purpose of the game. Midwestern offers one free Lucky Strike game piece per mailed request and on this basis claims, because no purchase is necessary, it is as acceptable as a retail promotional sweepstakes. However, it does not follow that simply because low-stakes, temporary promotional sweepstakes with pay-out rates of one-half of one percent that offer free play are not pursued as lotteries, we must conclude high-stakes, permanent games with pay-out rates of sixty-five percent are immune from the definition of a lottery because they also offer limited free play.[16]

The ultimate question is whether the sweepstakes is the product, *i.e.* individuals are paying to participate in a game of chance, or whether these scenarios employ sweepstakes legitimately to promote giving or merchandise and services. That question will have to be addressed on a case-by-case basis by each jurisdiction's Commonwealth Attorney and the trier of fact.

CONCLUSION

Accordingly, it is my opinion that the scenarios may or may not run afoul on the prohibition on gambling, but I lack sufficient information to reach a firm conclusion.

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[1]For purposes of this opinion, I base my conclusions solely on the hypothetical facts that you present. Should any of the facts change, the conclusion of the opinion also may change.

[2] The click-wrap method of acceptance "presents the user with a message on his or her computer screen, requiring that the user manifest his or her assent to the terms of the license agreement by clicking on an icon. The product cannot be obtained or used unless and until the icon is clicked." Specht v. Netscape Commc'ns Corp., 150 F. Supp. 2d 585, 594 (S.D.N.Y. 2001), *aff'd by* Specht v. Netscape Communs. Corp., 306 F.3d 17 (2d Cir. 2002).

[3] Twietmeyer v. City of Hampton, 255 Va. 387, 393, 497 S.E.2d 858, 861 (1998).

[4] Riley v. Nat'l Fed'n of the Blind of N.C., Inc. 487 U.S. 781, 788 (1988) (quoting Village of Schaumburg v. Citizens for a Better Env't, 444 U.S. 620, 632 (1980) (ellipses in original).

[5] There to Care, Inc. v. Comm'r of Ind. Dep't of Revenue, 19 F.3d 1165, 1167-68 (7th Cir. 1994) (citations omitted) (emphasis in original).

[6] VA. CODE ANN. §§ 18.2-325 & 18.2-326 (Supp. 2011).

[7] Sections 18.2-331 (2009) (prohibiting illegal gambling devices); 18.2-335(3) (2009) (defining gambling devices).

[8] 2002 Op. Va. Att'y Gen. 144, 146.

[9] *Id*. *See also* 1981-82 Op. Va. Att'y Gen. 175, 175-76 (concluding that consideration is absent when cable television company's offer of entry blank to consumers required no purchase or subscription to cable service); 1977-78 Op. Va. Att'y Gen. 238, 238-39 (concluding that the element of consideration is present where eligibility to receive prize is limited to those who purchase clothing memberships); 1969-70 Op. Va. Att'y Gen. 167, 167 (concluding that consideration is absent when no purchase is required for participating in gas station give-away promotion).

[10] *See* Moore v. Mississippi Gambling Comm'n, 2011 Miss. App. LEXIS 169 (Miss. Ct. App. March 29, 2011) (internet café computer terminals were illegal gambling devices notwithstanding sweepstakes game available to all); Barber v. Jefferson Cnty. Racing Ass'n, Inc., 960 So. 2d 599 (Ala. 2006) (element of consideration was present because the internet time was largely unused and customers instead were flocking to the prize "readers"); Sun Light Prepaid Phonecard Co., Inc. v. South Carolina, 600 S.E.2d 61, 64 (S.C. 2004) (concluding under the facts of the case that phone card dispensers were gambling devices under South Carolina law because they functioned "like slot machines and not traditional vending machines."); Tennessee v. Vance, 2004 Tenn. Crim. App. LEXIS 317 (Tenn. Crim. App. April 8, 2004) (concluding on the facts of the case that the "free spin" machines that dispensed low value baseball cards were illegal gambling devices); MDS Invs, LLC v. City of Boise, 65 P.3d 197 (Idaho 2003) ("free spin" machines constituted illegal gambling devices); Jack Eiser Sales Co., Inc. v. Wilson, 752 N.E.2d 225 (Ind. Ct. App. 2001) ("free spin" machines were prohibited gambling devices). *See also* Ward v. West Oil Co., 692 S.E.2d 516 (S.C. 2010) (concluding that "pull-tab" machines were illegal gambling devices); Animal Prot. Soc. of Durham, Inc. v. North Carolina, 382 S.E.2d 801 (N.C. Ct. App. 1989) (affirming summary judgment against the promoters of a bingo game because the evidence showed that the product being promoted was illegal bingo, not the sale of plastic hair combs and peppermint candies).

[11] Jester v. Texas, 64 S.W.3d 553, 558 (Tex. App. 2001) (upholding jury conviction on gambling charges).

[12] *Id*. (citation omitted).

[13] *Id.* at 558-59.

[14] Midwestern Enters. v. Stenehjem, 625 N.W.2d 234, 241 (N.D. 2001).

[15] *Id*. at 239.

[16] *Id*. at 239-40.

OP. NO. 10-122

EDUCATION: GENERAL POWERS AND DUTIES OF SCHOOL BOARDS

CONSTITUTION OF VIRGINIA: EDUCATION

A school board can consolidate certain functions with a city or a county, but may not abrogate its duties or compromise its independence with respect to its core responsibilities.

Outsourcing certain functions is permissible so long as school boards and localities comply with statutory and constitutional restrictions.

THE HONORABLE T. SCOTT GARRETT, M.D.
MEMBER, HOUSE OF DELEGATES
JANUARY 21, 2011

ISSUE PRESENTED

You ask whether a plan to consolidate certain functions between the school system and a city would result in the school board abrogating its duty and authority with respect to the schools. You further inquire whether certain functions can be "outsourced."

RESPONSE

It is my opinion that a school board can consolidate certain functions with a city or a county, but in doing so the school board may not abrogate its duties or compromise its independence with respect to its core responsibilities. I lack sufficient information, however, to determine whether the plan at issue would impermissibly result in the abrogation of the school board's duties and authority. Finally, outsourcing certain functions is permissible so long as school boards and localities comply with statutory and constitutional restrictions.

BACKGROUND

You relate that the City of Lynchburg and the City of Lynchburg School Board are considering a plan to consolidate certain functions. The information you provide indicates that the City and the School Board have contemplated merging health care plans or back office financial accounting services. One of the contemplated changes would result in the school board relying on the City's Chief Financial Officer to craft the school board's budget.

APPLICABLE LAW AND DISCUSSION

Article VIII, § 7 of the Constitution of Virginia and § 22.1-28 of the *Code of Virginia* provide that "[t]he supervision of schools in each school division shall be vested in a school board." In general, the powers and duties of the school board are set forth in § 22.1-79 of the Code. A school board cannot forfeit its independence to another entity and must retain the ability to fulfill its responsibilities.[1]

School boards and cities or counties can agree to exercise certain functions jointly as a cost-saving measure. Prior opinions of this Office have concluded that localities could require all purchases of supplies and equipment for a school board to be performed by a central purchasing agent.[2] School boards, however, must retain the authority to decide what supplies, materials and commodities it may need and the costs for these items.[3] This Office also has concluded that a school board can create with the locality a joint legal entity responsible for certain aspects of personnel, finance, operations, maintenance and construction, facilities' design and engineering, and management information systems.[4] I see little danger to the school board's core responsibilities of overseeing school policy, spending funds for schools, and managing school personnel[5] should it decide to consolidate health plans or back office financial services.[6]

With respect to sharing a chief financial officer, such an arrangement presents a greater danger of restricting the independence of the school board in budgetary matters. Budgetary disputes between localities and school boards occur with regularity throughout the Commonwealth.[7] A shared chief financial officer will find it difficult to act independently with each body. Certainly, the appearance of independence would not be present. In the absence of specific details concerning the arrangement, however, I am unable to conclude absolutely that such an arrangement would be impermissible under Virginia law.

Finally, you inquire whether certain functions can be "outsourced." School boards and local governments can, and often do, contract with outside parties to provide certain services, including maintenance and repair services for vehicles and equipment, and legal services. Such contracts are permissible so long as they abide by statutory and constitutional restrictions.

CONCLUSION

Accordingly, it is my opinion that a school board can consolidate certain functions with a city or a county, but in so doing may not abrogate its duties or compromise its independence with respect to its core responsibilities. I lack sufficient information, however, to determine whether the plan at issue would impermissibly result in the abrogation of the school board's duty and authority. Finally, outsourcing certain functions is permissible so long school boards and localities comply with statutory and constitutional restrictions.

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[1] *See* Evans v. Smyth-Wythe Airport Comm'n, 255 Va. 69, 72-73, 495 S.E.2d 825, 827 (1998) ("In so far as the sovereignty and governmental powers of the State are concerned[,] the object of the ordination of the Constitution is to provide for the exercise thereof and not the abdication thereof.") (quoting Commonwealth v. Newport News, 158 Va. 521, 545-46, 164 S.E.2d 689, 696 (1932)).

[2] 1978-79 Op. Va. Att'y Gen. 234, 234 (citing prior opinions).

[3] *Id.*

[4] 1995 Op. Va. Att'y Gen. 72.

[5] *See* 2010 Op. Va. Att'y Gen. (10-049) (school board is responsible for allocating funds budgeted by locality); 1989 Op. Va. Att'y Gen. 204, 204 ("school boards have considerable authority over the

supervision of schools and the discipline of students"). VA. CODE ANN. § 22.1-313(A) (Supp. 2010) (school board has exclusive final authority over matters concerning employment of personnel).

[6] *See* 1985-86 Op. Va. Att'y Gen. 79 (county and school board employees of three counties can be combined in one group health insurance policy).

[7] *See, e.g.*, 2010 Op. Va. Att'y Gen. (10-118); 2010 Op. Va. Att'y Gen. (10-049); Bd. of Supvrs. v. Sch. Bd., 182 Va. 266, 28 S.E.2d 698 (1944).

OP. NO. 11-003

EDUCATION: PUBLIC SCHOOL FUNDS

The authority to establish payroll dates for school division employees rests with the school board, but the *Code of Virginia* contemplates regular payroll periods.

City school board is not empowered to order the treasurer to disburse a salary advance.

The mechanics of making payroll payments to schools rests with the treasurer.

The treasurer is not required to maintain a separate bank account for school board funds.

THE HONORABLE G. GLENN ODER
MEMBER, HOUSE OF DELEGATES

THE HONORABLE MARTY G. EUBANK
TREASURER, CITY OF NEWPORT NEWS
FEBRUARY 25, 2011

ISSUES PRESENTED

I am in receipt of two overlapping and interrelated official opinion requests addressing the authority of the City school board and the treasurer with respect to the handling of school division funds. Essentially, each opinion request raises two issues. First, with respect to paying school personnel, the letters ask whether the school board or the treasurer has the ultimate authority to establish the payroll dates for the school division, to direct the administrative processes leading to payment of school division employees, and to direct and oversee school division employees' administration of school division payrolls. The requests then inquire whether § 22.1-116 is satisfied if the treasurer maintains the funds of the City and of the school division in a single bank account, but separately accounts for and tracks the funds for accounting purposes, or if that Code provision requires separate bank accounts for school board funds.

RESPONSE

It is my opinion that the authority to establish payroll dates for school division employees rests with the school board, but that the *Code of Virginia* contemplates the establishment of regular payroll periods. It is further my opinion that the mechanics

of making the payments to schools rests with the treasurer of the locality. Finally, it is my opinion that § 22.1-116 is satisfied if the treasurer maintains separate internal accounts of the funds of the City and of the school division for accounting purposes; the treasurer is not required to maintain a separate bank account for school board funds.

APPLICABLE LAW AND DISCUSSION

Article VIII, § 7 of the Constitution of Virginia and § 22.1-28 of the *Code of Virginia* provide that "[t]he supervision of schools in each school division shall be vested in a school board." Section 22.1-89 provides that "[e]ach school board shall manage and control the funds made available to the school board for public schools and may incur costs and expenses." The Code further provides that "[e]ach school board shall provide for the payment of teachers, principals, assistant principals and other employees monthly, semi-monthly or biweekly, as may be determined by the school board."[1]

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."[2] The powers and duties of a local treasurer are set out generally in Article 2, Chapters 31 and 39 of Title 58.1. Section 22.1-116 provides that the "treasurer . . . shall be charged with the responsibility for the receipt, custody and disbursement of the funds of the school board . . . ."

First, given the broad authority afforded to the school board under §§ 22.1-89 and 22.1-296 to manage school funds and to pay school division employees, I conclude that the ultimate authority to determine when school division employees are to be paid rests with the school board. The law expressly provides that "[e]ach school board shall provide for the payment of teachers, principals, assistant principals and other employees monthly, semi-monthly or biweekly, *as may be determined by the school board*."[3] This authority, however, contemplates regular payments on a "monthly, semi-monthly, or biweekly basis." In other words, the school board can choose the date, but its choice must reflect a regularized timetable.[4]

County school boards expressly are given the authority "for the drawing of special warrants in payment of compensation, when such compensation has been earned and is due."[5] This provision effectively allows a county school board the discretion occasionally to deviate from the system of "monthly, semi-monthly or biweekly" payments.[6] No such authority is given to the school boards in *cities*, who, therefore, must follow a system of "monthly, semi-monthly or biweekly" payments. Virginia adheres to the Dillon Rule of strict construction, which provides that "[local governing bodies] have only those powers which are expressly granted by the state legislature, those powers fairly or necessarily implied from expressly granted powers, and those powers, which are essential and indispensable.'"[7] Any doubt as to the existence of a power must be resolved against the locality.[8] The Dillon rule applies to school boards as well as localities.[9] The City school board, therefore, is not statutorily empowered to order the treasurer to disburse a salary advance.

With regard to whether the treasurer or the school board can direct the administrative processes leading to payment of school division employees, and direct and oversee school division employees' administration of school division payrolls, § 22.1-116 provides that the "treasurer . . . shall be charged with the responsibility for the receipt, custody and disbursement of the funds of the school board . . . ." The school board's duty under § 22.1-89 to "manage and control" its funds "must be construed in the context of living within its budgetary limits and its authority to determine how public school monies should be spent within those limits."[10] Therefore, although the school board can decide how to spend the funds, the mechanics of disbursing the funds rest with the treasurer. For example, the treasurer would be responsible for executing the school division's direct deposit ACH payroll file to the bank that facilitates the transmission of the file to the Federal Automated Clearing House. Similarly, the treasurer would be responsible for instituting internal controls to ensure that payrolls are executed in accord with the Code, and ensuring timely and proper communication of payroll needs to avoid any overdraft status.

The final question relates to the requirement that school funds be maintained in a separate account. Section 22.1-116 provides that the treasurer "shall be charged with the responsibility for the receipt, custody and disbursement of the funds of the school board and shall keep such funds in an account or accounts separate and distinct from all other funds." The question is whether this language refers to a separate account in accounting terms, or whether the statute requires a separate bank account for these funds. Section 22.1-116 does not contain language, as many statutes do, requiring that the funds be kept in a separate *bank* account.[11] So long as the funds of the school division are separately tracked and maintained in a distinct "funding account," the mandate of a separate account is satisfied. In other words, a "separate account" is not necessarily a "separate *bank* account." Had the General Assembly wished to specify a separate bank account, it could have done so, as it has in a number of other statutes.

This conclusion is consistent with a prior opinion of this Office. A statute required the treasurer to "keep all money collected by him for dog license taxes in a separate account from all other funds collected by him."[12] The opinion addressed whether this statute imposed a requirement of "a separate bank account for this tax money or whether a separate account maintained within the general fund itself" was sufficient.[13] This Office reasoned that

> [t]he language used is "separate account," not "separate bank account." Use of the latter terminology would require the establishment of a separate bank account for the deposit of monies collected in payment of dog license taxes. The absence of the word "bank" indicates that the General Assembly intended to require only separate bookkeeping entries be made by the Treasurer, so that the manner in which such funds were used would be traceable in case an audit or similar function had to be performed. The purpose of the separate account requirement is to guarantee that the State can apprise itself whether tax monies collected are used as [the law]

> specifies. This purpose is met as adequately by an appropriate bookkeeping entry as by establishing a separate bank account.[14]

I find this reasoning persuasive in the present context.[15] Because the General Assembly did not specify the need for a separate bank account for school division funds, it is sufficient for the treasurer to maintain separate accounts as an accounting matter.

CONCLUSION

Accordingly, it is my opinion that the authority to establish payroll dates for school division employees rests with the school board, but that the *Code of Virginia* contemplates the establishment of regular payroll periods. It is further my opinion that the mechanics of making the payments to school rests with the treasurer of the locality. Finally, it is my opinion that § 22.1-116 is satisfied if the treasurer maintains separate internal accounts of the funds of the City and of the school division; the treasurer is not required to open a separate bank account for school board funds.

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[1] VA. CODE ANN. § 22.1-296 (2006).

[2] *See also* VA. CODE ANN. § 15.2-1600(A) (2008) (parallel statute).

[3] Section 22.1-296 (emphasis added).

[4] To the extent the school board's choice of a payment scheme creates needless additional expense and inconvenience for the locality, the Board of Supervisors or the City Council presumably can take that into account when it prepares the next budget for the schools.

[5] Section 22.1-122(C) (2006).

[6] As a previous opinion from my Office notes, however, this authority is limited to payments for compensation that has been earned. 1985-86 Op. Va. Att'y Gen. 154 (quoting § 22.1-122(C)).

[7] Arlington Cnty. v. White, 259 Va. 708, 712, 528 S.E.2d 706, 708 (2000) (alternation in original) (quoting City of Va. Beach v. Hay, 258 Va. 217, 221, 518 S.E.2d 314, 316 (1999)).

[8] 2004 Op. Va. Att'y Gen. 117, 118.

[9] Commonwealth v. Arlington Cnty. Bd., 217 Va. 558, 232 S.E.2d 30 (1977).

[10] *See* 1982-83 Op. Va. Att'y Gen. 638, 639 (concluding that school board members had no personal liability for investments of idle or excess funds under the control of the school boards because the responsibility for investing such funds rested with the treasurer).

[11] *See* VA. CODE ANN. § 6.2-2005 (2010) (setting forth requirements for agencies providing debt management plans and requiring the funds to be deposited "in separate trust accounts with an FDIC-insured depositary institution"). *See also* VA. CODE ANN. § 38.2-4601.1 (2007) (requiring deposit of funds "in a trust account in a financial institution licensed to do business in this Commonwealth. Such trust account shall be separate from all other accounts held by the agent."); VA. CODE ANN. § 54.1-2353(A) (2009) (requiring a common interest community manager to maintain the funds of an association in a separate trust account or "an FDIC-insured financial institution separate from the assets of the common interest community manager."); § 54.1-2822 (2009) (requiring the deposit "in separate, identifiable trust accounts" funds received in preneed funeral contracts"); VA. CODE ANN. § 55-79.74:01 (2007) (requiring certain condominium association funds be "kept in a fiduciary trust account in a federally insured financial institution separate from other assets . . . ."); § 55-525.24 (Supp. 2010) (requiring funds deposited with a real estate settlement agent in connection with an escrow, settlement, or closing be "deposited in a separate fiduciary trust account or accounts in a financial institution licensed to do business in the Commonwealth").

[12] *See* 1977 Op. Va. Att'y Gen. 134, 135 (quoting repealed VA. CODE ANN. § 29-213.31, now codified at VA. CODE ANN. § 3.2-6534 (2008)).

[13] *Id.*

[14] *Id.*

[15] Furthermore, the General Assembly is presumed to be aware of the Attorney General's opinions. Lee Gardens Arlington Ltd. P'ship v. Arlington Cnty. Bd., 250 Va. 534, 540, 463 S.E.2d 646, 649 (1995) (citing cases). Its failure to amend § 22.1-116 in the face of an opinion construing highly similar language manifests its acquiescence in the Attorney General's construction of such statutes. *Id.*

OP. NO. 11-071

EDUCATION: SCHOOL BOARDS; SELECTION, QUALIFICATIONS AND SALARIES OF MEMBERS

A planning commission member is not precluded from being elected to, and serving on, a school board.

THE HONORABLE MATTHEW J. BRITTON
COMMONWEALTH'S ATTORNEY, KING GEORGE COUNTY
JULY 8, 2011

ISSUE PRESENTED

You inquire whether, under § 22.1-30(A), a person may simultaneously serve both as a county planning commission member and as an elected school board member.

RESPONSE

It is my opinion that under the plain language of § 22.1-30(A), a planning commission member is not precluded from being elected to, and serving on, a school board.

APPLICABLE LAW AND DISCUSSION

Section 22.1-30(A) of the *Code of Virginia* states in relevant part that "[n]o county . . . officer . . . may, during his term of office, be appointed as a member of the school board for each county." As you note, this language raises two questions for a person who currently serves as a county planning commissioner but who also wishes to serve as the member of an elected school board. First, is a planning commissioner an "officer" for purposes of § 22.1-30(A) and, second, does this statute bar his service on the school board if he is elected rather than appointed?

The term "officer" is used in these statutes "to distinguish between an officer of government and an employee of government in applying the prohibition against public officers serving on school boards, with employees being allowed to serve if they are otherwise qualified."[1] For purposes of § 22.1-30,

> [a]n officer is distinguished from an employee in the greater importance and independence of the position and the authority to direct and supervise; a public office is a position created by the Constitution or by statute, with a

> fixed term . . . being a frequent characteristic; and, where the position is created by administrative action, it does not rise to the level of an office.[2]

Applying this criteria, I conclude that a planning commissioner is an "officer."[3]

With respect to your second question, the plain language of the statute provides the answer. "When statutory language is plain and unambiguous, the legislature is presumed to have intended what it plainly has expressed, and statutory construction is unnecessary."[4] The statute prohibits certain individuals from being "appointed" to the school board. It does not prohibit these same individuals from being "elected" to the school board. Had the General Assembly intended to prohibit certain officers for the locality from being *elected* to the school board it knew how to do so. For example, § 22.1-29 requires "[e]ach person appointed or elected to a school board" to meet certain criteria, including a requirement that the person "be a qualified voter and a bona fide resident of the district." In § 22.1-30(A), the General Assembly did not use the "appointed or elected" phrasing, it limited the phrasing to persons who are "appointed" to the School Board.

I also find it significant that the statute was amended in 1993. That year, the General Assembly made the following change to § 22.1-30:

> No state, county, city or town officer, no deputy of any such officer, no member of the governing body of a county, city or town and~~, in counties having a population of more than 100,000 persons,~~ no father, mother, brother, sister, spouse, son, daughter, son-in-law, daughter-in-law, sister-in-law or brother-in-law of a member of the county governing body may, during his term of office, be appointed ~~or serve~~ as a member of the school board for such county, city or town or as tie breaker such school board ....[5]

The deletion of the words "or serve" is significant. Had that language been left in the Code, the listed persons would have been prohibited from serving on the school board, whether elected or appointed. As the statute presently stands, only persons who are appointed to the school board are precluded from also serving as a local officer in the forbidden categories. The language of § 22.1-30(A) is plain: it only prohibits certain officers from being *appointed* to the school board, it does not prohibit officers from being *elected*.

Finally, I can find no other Code or Constitutional provision that would prohibit a planning commission member from being elected to the school board and simultaneously serving in both capacities.[6]

CONCLUSION

Accordingly, it is my opinion that under the plain language of § 22.1-30(A), a planning commission member is not precluded from being elected to, and serving on, a school board.

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[1] 1984-85 Op. Va. Att'y Gen. 276.

[2] *Id.*

[3] This Office, in two prior opinions, has concluded that a planning commission member is an "officer." *See* 1981-82 Op. Va. Att'y Gen. 322 ("A planning commission member is an officer of that county."); 1975-76 Op. Va. Att'y Gen. 406 (members of planning commissions are "officers.").

[4] 1993 Op. Va. Att'y Gen. 139, 140 (citing Town of South Hill v. Allen, 177 Va. 154, 165, 12 S.E.2d 770, 774 (1941)).

[5] 1993 Acts ch. 352.

[6] Article VII, § 6 of the Virginia Constitution prohibits persons from holding "more than one office mentioned in this Article." That provision does not apply here by its plain terms. The prohibition on serving simultaneously in two *elected* offices does not apply, because planning commission members are not elected. *See* VA. CODE ANN. § 2.2-2807 (2008) ("No person shall hold more than one *elected* office at the same time."); VA. CODE ANN. § 15.2-2212 (2008) (planning commission members are appointed). Other statutes prohibit dual office-holding with respect to certain specified offices, but these prohibitions do not apply in this particular situation. *See* § 15.2-1534 (2008) (prohibiting, with a number of exceptions, certain local officials, but not school board members, from holding more than one office at the same time); § 15.2-1534 (2010) (prohibiting, with certain exceptions, members of a local governing body from holding "any office filled by the governing body by election or appointment").

OP. NO. 10-121

EDUCATION: SYSTEM OF PUBLIC SCHOOLS; GENERAL PROVISIONS

CONSTITUTION OF VIRGINIA: EDUCATION

A local school board cannot impose a mandatory fee on students taking advanced placement courses for the required taking of the Advanced Placement Examination.

THE HONORABLE DAVID W. MARSDEN
MEMBER, SENATE OF VIRGINIA
JANUARY 28, 2011

ISSUE PRESENTED

You ask whether a local school board may impose a mandatory charge for students taking advanced placement courses.

RESPONSE

It is my opinion that a local school board cannot impose a mandatory fee on students taking advanced placement courses for the required taking of the Advanced Placement Examination.

BACKGROUND

You relate that Fairfax County Public Schools ("FCPS") offers students the opportunity to enroll in advanced placement classes. Such courses are commonly offered in high schools, and prepare students to take the nationally-administered Advanced Placement Examination. Many colleges permit students achieving sufficiently high scores on the Advanced Placement Examination to satisfy certain curriculum requirements toward their college degrees.

The FCPS requires that students enrolled in advanced placement classes take the Advanced Placement Examination as the end-of-course testing. The College Board, the not-for-profit organization that administers the examination, charges a fee to take the examination. At present the standard fee is $87, although the actual fee may be higher or lower, as where the examination is given outside the United States, or a student demonstrates a financial need.[1] FCPS charges $75 to students taking the advanced placement course to cover the cost of the Advanced Placement Examination.

APPLICABLE LAW AND DISCUSSION

The Constitution of Virginia directs the General Assembly to "provide for a system of free public elementary and secondary schools for all children of school age throughout the Commonwealth."[2] In response, the General Assembly has directed that "[t]he public schools in each school division shall be free to each person of school age who resides within the school division."[3] The legislature further has directed that local school boards are not permitted to levy fees or charge any pupil, except as provided in Title 22.1, or by regulation of the State Board of Education.[4]

No statute authorizes a local school board to impose fees for the taking of tests. According to materials submitted with your request, FCPS asserts that § 22.1-253.13:1(D)(10) authorizes the fees it imposes. That section requires local school boards to implement "[a] plan to notify students and their parents of the availability of dual enrollment and advanced placement classes, the International Baccalaureate Program, and Academic Year Governor's School Programs, the qualifications for enrolling in such classes and programs, and the availability of financial assistance to low-income and needy students to take the advanced placement and International Baccalaureate examinations." It is my opinion that this statute does not provide a local school board with the authority to impose a fee for an advanced placement course or examination, but simply directs the board to provide information on financial assistance available to those wishing to take such examinations.

I note that it is not necessary to take an advanced placement course to take an advanced placement test.[5] Therefore, a logical reading of this section is that a low income student who did not take the AP course can receive financial assistance for taking an AP test that is not part of a class.

The regulations of the Board of Education prohibit fees or charges unless authorized by the Board.[6] The express purposes for which fees may be charged do not include examinations or classes (other than summer school or postgraduate courses).[7] The regulations also provide:

> Nothing in this chapter shall be construed to prohibit the school board of any county, city, or town from making supplies, services, or materials available to pupils at cost. Nor is it a violation to make a charge for a field trip or an educational related program that is not a required activity.[8]

Because the Advanced Placement Examination test is the required end-of-course examination, it cannot reasonably be viewed as a service or program for which a fee may be levied. This view is consistent with prior Opinions of this Office.[9]

Given the absence of express authority to charge a fee for taking an advanced placement test, and the general principle that an elementary and secondary public education is to be free except in limited and delineated circumstances, I conclude that an Advanced Test Placement Examination fee cannot be charged to students who are taking an advanced placement course.

CONCLUSION

Accordingly, it is my opinion that a local school board cannot impose a mandatory fee on students taking advanced placement courses for the required taking of the Advanced Placement Examination.

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[1] http://www.collegeboard.com/student/testing/ap/cal_fees.html (accessed January 3, 2011).

[2] VA. CONST. art. VIII, § 1.

[3] VA. CODE ANN. § 22.1-3(A) (2006).

[4] Section 22.1-6 (2006).

[5] *See* http://www.collegeboard.com/student/testing/ap/about_faq.html. With respect to the International Baccalaureate program, which does require a student to take the course as a prerequisite to taking the tests, a low income student may have expenses associated with testing such as tutoring, or practice test books.

[6] 8 VA. ADMIN. CODE § 20-370-10.

[7] *Id.*

[8] *Id.*

[9] *See*, *e.g.*, 2010 Op. Va. Att'y Gen. 10-014 (no authority to charge fee for the transportation of a student voluntarily enrolled in a specialty program outside the boundaries of the student's base school); 2007 Op. Va. Att'y Gen. 82 (transportation to and from school not a "service" within meaning of the regulation).

OP. NO. 11-011

ELECTIONS: ELECTION DISTRICTS, PRECINTS, AND POLLING PLACES – REAPPORTIONMENT OF LOCAL ELECTION DISTRICTS

Local governing bodies may not exclude out-of-state prisoners housed in state adult correctional facilities from the locality's population for the purposes of the decennial reapportionment if the total population of inmates housed at the state adult correctional center does not exceed twelve percent of the locality's population.

J. VADEN HUNT, ESQUIRE
COUNTY ATTORNEY, PITTSYLVANIA COUNTY
MARCH 1, 2011

ISSUE PRESENTED

You ask whether Commonwealth of Pennsylvania ("Pennsylvania") inmates housed at Green Rock Correctional Center ("Green Rock") are required to be included in Pittsylvania County, Virginia's ("Pittsylvania County") population for the purposes of its 2011 decennial reapportionment of local electoral districts.

RESPONSE

It is my opinion that the General Assembly has not authorized local governing bodies to exclude out-of-state prisoners housed in state adult correctional facilities from the locality's population for the purposes of the decennial reapportionment if the total population of inmates housed at the state adult correctional center does not exceed twelve percent of the locality's population.

BACKGROUND

You relate that all of the population of Pittsylvania County stands at approximately 61,414. You also relate that the Green Rock inmate population of 985 were included in Pittsylvania County's population figures in the 2010 Census, and this inmate population constitutes less than two percent of Pittsylvania's population. The information that you provided indicates that all of the prisoners at the Green Rock facility were transferred to Green Rock after adjudication in Pennsylvania. The information provided indicates these prisoners will remain housed in Pittsylvania County until 2013.

APPLICABLE LAW AND DISCUSSION

Article I, § 2 of the United States Constitution directs the federal government to conduct a decennial census of the population of each state. The United States Supreme Court has concluded that Equal Protection Clause does not require states to rely on total population figures from the federal census when drawing district boundaries for state or local government office holders.[1] For example, under federal law, a state can exclude inmate populations in drawing districts for state or local districts.[2]

Virginia law provides that, if the local governing body's members are elected by district, "the district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the *population* of the district."[3] Section 24.2-304.1(C) provides that governing bodies must reapportion local election districts every ten years using the decennial census population figures provided by the United States Bureau of the Census as a basis for the municipality's population. This same clause allows local governing bodies to exclude inmate populations if the locality contains a state adult correctional facility, and the inmate population of such facility, as determined by information provided by the Department of Corrections, exceeds twelve percent of the total population of the municipality on the date of decennial census.

According to the facts you present, the Green Rock inmate population was included in Pittsylvania County's population in the 2010 United States census. At 985 inmates, this accounts for less than two percent of Pittsylvania County's estimated population

of 61,414. This is below the twelve percent threshold required by § 24.2-304.1(C) to allow a local governing body to exclude inmates housed in a state adult correctional facility from Pittsylvania County's population for purposes of the decennial reapportionment.

CONCLUSION

Accordingly, it is my opinion that the General Assembly has not authorized local governing bodies to exclude out-of-state prisoners housed in a state adult correctional facility from the locality's population for the purposes of the decennial reapportionment if the total population of inmates housed at the facility does not exceed twelve percent of the locality's population.

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[1] Burns v. Richardson, 384 U.S. 73, 91 (1966) ("[w]e start with the proposition that the Equal Protection Clause does not require the States to use total population figures derived from the federal census as the standard by which this substantial population equivalency is to be measured."). *See also* Daly v. Hunt, 93 F.3d 1212 (4th Cir. 1996) (explaining Supreme Court jurisprudence with respect to a state's apportionment of legislative districts for state and local electoral districts).

[2] *Burns*, 384 U.S. at 92 (stating that no Court precedent had "suggested that that the States are required to include aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime, in the apportionment base by which their legislatures are distributed and against which compliance with the Equal Protection Clause is to be measured.").

[3] VA. CONST. art. VII, § 5; VA. CODE ANN. § 24.2-304.1(B) (2006) (emphasis added).

OP. NO. 11-024

ELECTIONS: FEDERAL, COMMONWEALTH, AND LOCAL OFFICERS – CONSTITUTIONAL AND LOCAL OFFICERS

Application of statute providing for reversion to non-staggered terms for Orange County Board of Supervisors members: the entire Board of Supervisors would be elected to a four-year term beginning in 2015.

SHARON E. PANDAK, ESQUIRE
COUNTY ATTORNEY, ORANGE COUNTY
MAY 27, 2011

ISSUE PRESENTED

You inquire as to the proper process Orange County should follow under § 24.2-220 of the *Code of Virginia*, in the event the County changes its method of electing the Board of Supervisors. Specifically, should the County choose to elect all of its Supervisors at the same time for four-year terms, instead of holding the current staggered elections every two years, you ask in what year would all of the Supervisors be elected to four-year terms in a single election if the Board acts now to change the method of election.

RESPONSE

It is my opinion that once the applicable county ordinance is changed properly to eliminate the method of electing Supervisors to staggered four-year terms and to replace that method with an election for all of the Supervisors every four years, the provisions of § 24.2-220 would require that the Supervisors in Districts 2, 3 and 5 be elected to four-year terms in 2011, while the Supervisors in Districts 1 and 4 be elected to a two-year term in 2013, so that the entire Board of Supervisors would be elected to a four-year term beginning in 2015.

BACKGROUND

You relate that Orange County is currently governed by a five-member Board of Supervisors. The Supervisors are elected to four-year terms based on a staggered, two-year, or "biennial" electoral cycle. Under the existing ordinance, three Supervisors' seats, those in Districts 2, 3, and 5, are to be elected to four-year terms in 2011, and the remaining two seats, in Districts 1 and 4, are to be elected to four-year terms in 2013. You indicate that the current Board of Supervisors is considering a proposal to change to non-staggered terms this electoral cycle. In order to implement this change, the Board would amend the applicable Orange County ordinance to repeal the provision for staggered terms and, instead, all Supervisors would be elected to serve four-year terms at the same time every four years, or "quadrennially." You conclude that, pursuant to § 24.2-220, the implementation schedule for changing to a concurrent quadrennial election cycle would provide for three Supervisors elected in 2011 to serve a four year term, for two Supervisors in 2013 to serve a two-year term, and the entire Board of Supervisors serve concurrent four-year terms following the election in 2015.[1]

APPLICABLE LAW AND DISCUSSION

Section 24.2-220 allows for a county board of Supervisors, which by a previously adopted ordinance is elected biennially to staggered four-year terms pursuant to § 24.2-219, to revert to the quadrennial election of all members. The previously adopted ordinance calling for staggered terms for the Supervisors must first be repealed, either by the county's governing body or by a proper petition and referendum by the qualified voters of the county.[2]

Once the existing County ordinance properly is repealed, § 24.2-220 provides that "the successors to those Supervisors whose terms expire in 1995 or any fourth year thereafter shall be elected for a four-year term and immediate successors to those Supervisors whose terms expire in 1993 or any fourth year thereafter shall be elected for a two-year term and all subsequent successors for a four-year term."[3]

Applying this statute, one must first determine which Supervisors are the "successors to those Supervisors whose terms expire[d] in 1995 or any fourth year thereafter." You relate that the Supervisors in Districts 2, 3, and 5 are the successors of the Supervisors whose term expired in 1995. Under § 24.2-220, these Supervisors would be elected in 2011 to "a four-year term." Next, the statute calls for the "immediate successors to Supervisors whose terms expire[d] in 1993 and each fourth year thereafter" to serve a two-year term, so as to even out the previously staggered terms.

You relate that the Supervisors in Districts 1 and 4 are the successors of Supervisors whose terms expired in 1993. Therefore, these Supervisors would be elected to a two year term in 2013.[4] In sum, the Supervisors in Districts 2, 3 and 5 would be elected to four-year terms in 2011, the Supervisors in Districts 1 and 4 would be elected to a two-year term in 2013, and the entire board of Supervisors would be elected to four-year terms beginning in 2015.

CONCLUSION

Accordingly, it is my opinion that once the applicable county ordinance properly is changed to eliminate the method of electing Supervisors to staggered four-year terms and to replace that method with an election for all of the Supervisors every four years, the provisions of § 24.2-220 would require that the Supervisors in Districts 2, 3 and 5 be elected to four-year terms in 2011, while the Supervisors in Districts 1 and 4 be elected to a two-year term in 2013, so that the entire Board of Supervisors would be elected to a four-year term beginning in 2015.

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[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. § 24.2-220 (2006).

[3] *Id.*

[4] "[W]e determine the legislative intent from the words used in the statute, applying the plain meaning of the words unless they are ambiguous or would lead to an absurd result." Wright v. Commonwealth, 278 Va. 754, 759, 685 S.E.2d 655, 657 (2009). "[W]e must give effect to the legislature's intention as expressed by the language used unless a literal interpretation of the language would result in a manifest absurdity." Conyers v. Martial Arts World of Richmond, Inc., 273 Va. 96, 104, 639 S.E.2d 174, 178 (2007). "If a statute is subject to more than one interpretation, we must apply the interpretation that will carry out the legislative intent behind the statute." *Id.* "The plain, obvious, and rational meaning of a statute is to be preferred over any curious, narrow, or strained construction." Commonwealth v. Zamani, 256 Va. 391, 395, 507 S.E.2d 608, 609 (1998).

OP. NO. 11-028

ELECTIONS: THE ELECTION – GENERAL PROVISIONS; POLLING PLACES

Local electoral boards have supervisory authority to govern authorized representatives, subject to the oversight of the State Board of Elections.

Local electoral boards honor the representatives' rights to observe the electoral process as provided for by law.

Officers of election as well as local electoral boards may prevent authorized representatives from causing a disturbance or otherwise interfering with an election.

Authorized representatives may move about a polling place to hear and see what is occurring provided they do not run afoul of statutory prohibitions.

MR. RICHARD E. SINCERE, JR.
CHAIRMAN, CITY OF CHARLOTTESVILLE ELECTORAL BOARD
OCTOBER 6, 2011

ISSUES PRESENTED

You ask on behalf of the City of Charlottesville Electoral Board whether (1) local electoral boards are the final authority on deciding issues regarding authorized representatives and their activities; (2) local electoral boards may prevent authorized representatives from causing a disturbance or otherwise interfering in an election; and (3) authorized representatives may move about a polling place or may they be confined to a designated area by local electoral boards or chief officers of election.

RESPONSE

It is my opinion that (1) local electoral boards have supervisory authority to govern authorized representatives, subject to the oversight of the State Board of Elections, but must honor the representatives' rights to observe the electoral process as provided for by law; (2) officers of election as well as local electoral boards may prevent authorized representatives from causing a disturbance or otherwise interfering with an election as set forth in the Code; and (3) authorized representatives may move about a polling place to hear and see what is occurring provided they do not run afoul of the prohibitions set forth in §§ 24.2-604(D) and 24.2-607 of the *Code of Virginia*.

BACKGROUND

You state that in the City of Charlottesville and other localities, it is common practice to confine authorized representatives to a space immediately behind the registration table where the registered voters' list is kept and where voters come to check in to be authorized to vote. You further state that the traditional role of authorized representatives has been to note the names of voters, to report periodically to their parties the numbers of voters who have turned out, and to suggest names of potential voters who may be called to remind them to vote. You also point out that authorized representatives on "very rare occasion" exercise their rights to challenge a person's right to vote under § 24.2-651.

You further state that the City of Charlottesville Electoral Board has adopted rules requiring authorized representatives (1) to stay in a designated area; (2) to refrain from engaging in conversation with voters and/or officers of election with two exceptions: (a) to request that a name or address be repeated and (b) to exercise a challenge pursuant to § 24.2-651; and (3) to refrain from using cameras, cell phones, or electronic communication devices. You state that these rules have been in place for decades.

You also reference two guidance documents from the State Board of Elections. The November 1994 guidance document provides that

> Each representative shall be provided a chair. The representative may place the chair in a position to observe all activities in the polling place . . . The

> representative should be allowed to change his location subject to all rules [regarding a prohibition on hindering voters or officers of election].[1]

The guidance document issued in July 2010 states in part that,

> The representative **cannot** sit at the registration table with the officers of election but must be placed behind the registration table in a position that enables him to see and hear the voting process.[2]

You indicate that your opinion request is made as a result of an incident that occurred during the election on November 2, 2010. In short, the authorized representatives at Carver Precinct insisted they not be confined behind the table with voting lists. You then received instructions from the State Board of Elections to reverse your long standing practice and to allow representatives to leave their designated areas and follow the movements of the chief election officer.

APPLICABLE LAW AND DISCUSSION

The General Assembly has afforded the State Board of Elections general authority over elections in the Commonwealth. Section 24.2-103 provides that

> The State Board shall supervise and coordinate the work of the county and city electoral boards and of the registrars to obtain uniformity in their practices and proceedings and legality and purity in all elections. It shall make rules and regulations and issue instructions and provide information consistent with the election laws to the electoral boards and registrars to promote the proper administration of election laws.

The local electoral boards, which oversee the conduct of elections,[3] are directed to "follow the (i) elections laws and (ii) the rules and regulations of the Board insofar as they do not conflict with Virginia or federal law."[4] Among the local electoral board's statutory duties is the appointment of the officers of election,[5] to include designating one such officer as the chief officer of election.[6]

Pursuant to § 24.2-604(C),

> The officers of election shall permit one authorized representative of each political party or independent candidate in a general or special election, or one authorized representative of each candidate in a primary election, to remain in the room in which the election is being conducted at all times. . . . The officers shall permit one such representative for each pollbook station. However, no more than one such representative for each pollbook station or three representatives of any political party or independent candidate, whichever number is larger, shall be permitted in the room at any one time. Each authorized representative shall be a qualified voter of any jurisdiction of the Commonwealth. . . . Authorized representatives shall be allowed, whether in a regular polling place or central absentee voter precinct, to be *close enough to the process to be able to hear and see what is occurring*. Any representative who complains to the chief officer of election that he is unable to hear or see the process may accept the chief officer's decision or,

> if dissatisfied, he may immediately appeal the decision to the local electoral board. . . . [Emphasis added].

Such authorized representatives, however, are subject to certain restrictions. For instance, § 24.2-604(D) provides that

> It shall be unlawful for any authorized representative, voter, or any other person in the room to (i) hinder or delay a qualified voter; (ii) give, tender, or exhibit any ballot, ticket, or other campaign material to any person; (iii) solicit or in any manner attempt to influence any person in casting his vote; (iv) hinder or delay any officer of election; or (v) otherwise impede the orderly conduct of the election.[7]

Enforcement of this provision rests with the officers of election, who "may require any person who is found by a majority of the officers present to be in violation of this section to remain outside of the prohibited area."[8]

Thus, it is the officers of election that are generally tasked with maintaining order at elections, which includes the oversight of authorized representatives. Section 24.2-607 provides:

> A. It shall be unlawful for *any person* to hinder, intimidate, or interfere with any qualified voter so as to prevent the voter from casting a secret ballot. The officers of election may order a person violating this subsection to cease such action. If such person does not promptly desist, the officers of election, or a majority of them, may order the arrest of such person by any person authorized by law to make arrests, and, by their warrant, may commit him to the county or city jail, as the case may be, for a period not exceeding twenty-four hours. Any person violating this subsection shall be guilty of a Class 1 misdemeanor. [Emphasis added].
>
> B. *No person* shall conduct himself in a noisy or riotous manner at or about the polls so as to disturb the election or insult or abuse an officer of election. Any person authorized to make arrests may forthwith arrest a person engaging in such conduct and bring him before the officers of the election, and they, by their warrant, may commit him to the county or city jail, as the case may be, for a period not exceeding twenty-four hours; but they shall permit him to vote if he is so entitled. [Emphasis added].

These provisions providing that the officers maintain order apply to all persons, including the authorized representatives.[9]

While the State Board of Elections has issued the two guidance documents you reference in your letter, they offer little assistance to resolving the issues at hand. The 1994 *Handbook for Officers of Election* guidance document predates the current statutory language in § 24.2-604, which has been amended many times since it was enacted. That document states that the representative should be given a chair and may position it to "observe all activities in the polling place."[10] This guidance document has been narrowly construed to confine authorized representatives to a

specific, limited area. The more recent language of § 24.2-604, however, is controlling. It more broadly provides that the representative shall be "close enough to the process to be able to hear and see what is occurring."[11] The 2010 "Dos and Don'ts on Election Day for Campaigners and Authorized Representatives" guidance document does not go into any greater detail with regard to the specific questions presented by this opinion request.

I therefore return to the applicable statutes.[12] With regard to the questions presented, the Code sets forth two basic principles regarding the representatives. First, they must be close enough to the process to hear and see what is occurring.[13] Second, they cannot hinder or delay a qualified voter or the officers of election, provide or exhibit campaign materials, attempt to influence a person voting, or otherwise impede the orderly conduct of the election.[14] In addition, authorized representatives are explicitly afforded one other right, a right that is accorded any qualified voter. Pursuant to § 24.2-651,

> Any qualified voter may, and the officers of election shall, challenge the vote of any person who is listed on the pollbook but is known or suspected not to be a qualified voter. . . . The individual making the challenge shall complete and sign [a] statement on a form provided by the State Board . . . .

Accordingly, there is no authority in the *Code of Virginia* for the officers of election to confine the representatives to a general area. The officers of election must permit the authorized representatives access to the place of the election provided they do not run afoul of the restrictions on their conduct as set forth in §§ 24.2-604(D) and 24.2-607. Thus, the Charlottesville rules confining the representatives to a specific area and prohibiting cell phone usage are contrary to the *Code of Virginia*.[15] Because the electoral process does not take place only at the pollbook, the officers of election must give the authorized representatives leeway to perform their role as observers. With regard to your specific question about whether an authorized representative should be able to observe a phone call by an officer of election, if it is within the area where the election is taking place, the authorized representative's rights under the Code to "hear and see what is occurring" control. If an officer of election wishes to make a private phone call, he or she may exit the place of election.

In sum, the representative's statutory rights are to hear and see the electoral process as well as challenge the vote of a person he suspects is not qualified. These rights, however, are subject to the officers' duties to enforce the provisions that the representatives do not hinder, delay or otherwise disturb authorized voters as well as those that govern persons in the polling place. The officers are given discretion in the performance of these duties to preserve order during the election and upon majority vote, may even order the arrest of any person, including a representative, who is engaged in prohibited conduct at the polling place.[16] This discretion, however, does not override the plain language of the Code granting the representatives the ability to observe provided they do not run afoul of the plain language governing their conduct.

CONCLUSION

Accordingly, it is my opinion that (1) local electoral boards have supervisory authority to govern authorized representatives, subject to the oversight of the State Board of Elections, but must honor the representatives' rights to observe the electoral process as provided for by law; (2) officers of election as well as local electoral boards may prevent authorized representatives from causing a disturbance or otherwise interfering with an election as set forth in the Code; and (3) authorized representatives may move about a polling place to hear and see what is occurring provided they do not run afoul of the prohibitions set forth in §§ 24.2-604(D) and 24.2-607.

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[1] VA. STATE BOARD OF ELECTIONS, HANDBOOK FOR OFFICERS OF ELECTION, § E.1 (1994).

[2] VA. STATE BOARD OF ELECTIONS, DOS AND DON'TS ON ELECTION DAY FOR CAMPAIGNERS AND AUTHORIZED REPRESENTATIVES at 3 (2010) (emphasis in original).

[3] *See* VA. CODE ANN. § 24.2-109 (2011).

[4] Section 24.2-103(A) (2011).

[5] Section 24.2-115 (2011).

[6] *Id.*

[7] Violation of this subsection constitutes a Class 1 misdemeanor. Section 24.2-604(E) (2011).

[8] Section 24.2-604(E).

[9] *See* VA. CODE ANN. § 1-230 (2011), which defines a person to include, among others, any individual, which would include an authorized representative.

[10] *See supra*, note 1.

[11] Section 24.2-604 (2011).

[12] I note that it is well settled that statutes should be construed according to their plain language. Signal Corp. v. Keane Federal Sys., 265 Va. 38, 46-47, 574 S.E.2d 253, 257 (2003). Furthermore, I must presume that the "legislature chose, with care, the words it used when it enacted the relevant statute, and we are bound by those words as we interpret the statute." City of Va. Beach v. ESG Enters, Inc., 243 Va. 149, 153,413 S.E.2d 642, 644 (1992) (quoting Barr v. Town & Country Props., 240 Va. 292, 295, 396 S.E.2d 672, 674 (1990).

[13] Section 24.2-604.

[14] *Id.*

[15] With regard the Charlottesville rule of absolute prohibition of cell phones, it is expressly at odds with the terms of § 24.2-604 ("Authorized representatives shall be allowed . . . to use a handheld wireless communications device, except that authorized representatives shall not be allowed to use such devices when they contain a camera . . . to film or photograph inside a polling place or central absentee voter precinct.").

[16] Section 24.2-607 (2011).

OP. NO. 11-052

FIRE PROTECTION: FIRE/EMS DEPARTMENTS AND FIRE/EMS COMPANIES – PROVISIONS APPLICABLE TO COUNTIES, CITIES AND TOWNS

A volunteer fire or rescue squad lacks the statutory authority or the contractual right to bill the beneficiary's home or automobile insurance policy for responding to a call about a fire emergency.

THE HONORABLE CLARENCE E. "BUD" PHILLIPS
MEMBER, VIRGINIA HOUSE OF DELEGATES
MAY 13, 2011

ISSUE PRESENTED

You inquire whether volunteer fire departments may assess and charge a fee to an individual's homeowners' insurance policy or automobile insurance policy for responding to a fire emergency.

RESPONSE

It is my opinion that a volunteer fire or rescue squad lacks the statutory authority or the contractual right to bill the beneficiary's home or automobile insurance policy for responding to a call about a fire emergency.

APPLICABLE LAW AND DISCUSSION

Virginia localities are allowed to "contract with or provide for any volunteer fire-fighting or emergency medical services companies or associations in the county, city or town for the fighting of fire or provision of emergency medical services."[1] The Code provides several avenues for volunteer fire and rescue squads to seek reimbursement for expenses incurred in responding to calls for help.

Under § 32.1-111.14(B), localities are authorized to "make reasonable charges for use of emergency medical services vehicles," including charging insurers for ambulance services. To the extent a volunteer fire or rescue squad is providing *medical* or *ambulance* services, as opposed to responding to a call concerning a fire, the volunteer company may bill an insurance company for such services.

In addition, § 15.2-1716 allows localities to enact ordinances allowing for volunteer fire and rescue companies to a recover expenses incurred in responding to certain calls when a conviction for specified crimes has occurred. Recovery may be through restitution following a conviction or through a separate civil lawsuit.[2] To the extent the individual can be reimbursed through his insurance company for these expenses, he may seek to do so. In this situation, the fire or rescue squad would not bill the insurance company. Rather, it would recover from the individual based on the court's order of restitution or from a separate civil lawsuit.

Finally, the Commissioner of Health is authorized to issue permits for emergency medical services agencies and vehicles to ensure compliance with federal regulations relating to reimbursement of ambulance services pursuant to Medicare and Medicaid.[3]

Aside from the few exceptions noted above, nothing in the *Code of Virginia* expressly authorizes volunteer fire and rescue squads to bill home or automobile owners, or

insurance companies, for responding to routine calls for service.[4] When the General Assembly has found it wise to authorize fire and rescue squads to recover for their services, it expressly has done so. In the absence of express authorization from the General Assembly, fire or rescue squads would have no statutory basis upon which to bill an individual's homeowners' or automobile insurance policy for responding to a fire emergency.[5]

Virginia law recognizes a cause of action for an implied contract, known as quantum meruit.[6] Under this theory,

> [w]here service is performed by one, at the instance and request of another, and nothing is said between the parties as to compensation for such service, the law implies a contract, that the party who performs the service shall be paid a reasonable compensation therefor. The remedy available to the plaintiff is an award of damages amounting to the reasonable value of the work performed, less compensation actually received for that work.[7]

This doctrine of quantum meruit is qualified, however, in its application. The law will recognize an implied contract for services when the services were performed under circumstances that would give the beneficiary "reason to believe they were performed with the expectation of compensation."[8] Persons who call on the assistance of volunteer fire or rescue services do not have the expectation that they are impliedly contracting for a service. Fire and rescue squads are charitable organizations, who provide their services out of a benevolent rather than a commercial motivation. "It is well established that no recovery can be had, on a quantum [m]eruit basis, for services rendered by reason of religious or charitable motives."[9] Therefore, quantum meruit affords no basis for a fire or rescue squad billing an individual or that individual's insurance company for responding to a call.

CONCLUSION

Accordingly, it is my opinion that a volunteer fire or rescue squad lacks the statutory authority or the contractual right to bill the beneficiary's home or automobile insurance policy for responding to a call about a fire emergency.

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[1] VA. CODE ANN. § 27-23.6 (2009).

[2] VA. CODE ANN. § 15.2-1716 (2010).

[3] VA. CODE ANN. § 32.1-111.6:1 (2009).

[4] Some states expressly allow for such bills. *See* Lawson Rural Fire Ass'n v. Avery, 764 S.W.2d 113 (Mo. Ct. App. 1988) (discussing statute that specifically allows volunteer fire companies to charge persons who are not members for services rendered).

[5] The Code generally contemplates that volunteer fire and rescue squads will be financed from localities, either through payments made by the locality based on each response to a call for assistance, VA. CODE ANN. § 15.2-953(D) (2010), or through property taxes, VA. CODE ANN. § 27-47 (2009).

[6] Mongold v. Woods, 278 Va. 196, 203, 677 S.E.2d 288, 292 (2009).

[7] *Id*. (internal quotation marks, alterations and citations omitted).

[8] Korzendorfer Realty v. Hawkes, 211 Va. 534, 537-38, 178 S.E.2d 524, 526 (1971).

[9] Lewis v. Holy Spirit Ass'n for the Unification of World Christianity, 589 F. Supp. 10, 13 (D. Mass. 1983) (citing cases).

OP. NO. 11-082

FIRE PROTECTION: FIRE/EMS DEPARTMENTS AND FIRE/EMS COMPANIES – PROVISIONS APPLICABLE TO COUNTIES, CITIES AND TOWNS

Section 27-14 does not permit a locality to adopt an ordinance authorizing a volunteer fire department to assess and charge a fee to an individual's homeowners' or automobile insurance policy for responding to a fire emergency.

THE HONORABLE CLARENCE E. "BUD" PHILLIPS
MEMBER, HOUSE OF DELEGATES
JULY 22, 2011

ISSUE PRESENTED

You ask whether § 27-14 of the *Code of Virginia* permits a locality to adopt an ordinance authorizing a volunteer fire department to assess and charge a fee to an individual's homeowners' or automobile insurance policy for responding to a fire emergency.

RESPONSE

It is my opinion that § 27-14 does not permit a locality to adopt an ordinance authorizing a volunteer fire department to assess and charge a fee to an individual's homeowners' or automobile insurance policy for responding to a fire emergency.

APPLICABLE LAW AND DISCUSSION

A previous opinion of this office addresses the question whether volunteer fire departments may assess and charge a fee to an individual's homeowners' or automobile insurance policy for responding to a fire emergency.[1] That opinion concludes that there is "no statutory basis upon which to bill an individual's homeowners' or automobile policy for responding to a fire emergency."

Although the prior opinion does not specifically mention § 27-14, the analysis and conclusion remain the same. Section 27-14 provides, in pertinent part, that a "governing body may make such ordinances in relation to the powers and duties of fire/EMS departments, companies, chiefs or directors and other officers as it may deem proper." By its plain terms, the statute does not specifically accord localities the authority to permit fire departments to charge insurance policies for services rendered.

Under the Dillon Rule, localities have "only those powers which are expressly granted by the state legislature, those powers fairly or necessarily implied from expressly granted powers, and those powers which are essential and indispensable."[2]

As the previous opinion and the plain language of § 27-14 demonstrate, there is no legislation expressly enabling localities to adopt such measures. The question thus becomes whether such power can be inferred from § 27-14. To find 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."[3]

Because the Virginia Code constitutes one body of law,[4] statutes are not to be read in isolation.[5] As noted in the previous opinion, § 32.1-111.14(B) authorizes localities "to make reasonable charges for use of emergency medical services vehicles, including charging insurers for ambulance services" and § 15.2-1716 permits localities to provide for recovery of expenses incurred in responding to certain calls when a conviction for specified crimes has occurred. Moreover, § 27-47 expressly provides that a locality can levy a property tax to fund the fire/EMS departments serving designated fire/EMS zones or districts, and §§ 15.2-953 (B) and (D) authorize localities to make certain payments to volunteer fire companies. Reading § 27-14 so broadly as to permit a locality to authorize a volunteer fire department to assess the fee would render these statutes superfluous.

As evidenced in these other statutes, the legislature knows how to express its intention[6] with regard to permitting charges assessed against insurers and the financing of volunteer fire departments, and chose not to include such language in § 27-14. Further, where one power is expressed, another will not be inferred,[7] and any doubt as to the existence of a power must be resolved against the locality.[8] I therefore cannot conclude that the grant of power provided in § 27-14 includes the ability to adopt an ordinance authorizing a volunteer fire department to assess and charge a fee to an individual's homeowners' or automobile insurance policy for responding to a fire emergency.[9]

CONCLUSION

Accordingly, it is my opinion that § 27-14 does not permit a locality to adopt an ordinance authorizing a volunteer fire department to assess and charge a fee to an individual's homeowners' or automobile insurance policy for responding to a fire emergency.

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[1] 2011 Op. Va. Att'y Gen. No. 11-052, *available at*

http://www.vaag.com/Opinions%20and%20Legal%20Resources/Opinions/2011opns/11-052-Phillips.pdf.

[2] City of Va. Beach v. Hay, 258 Va. 217, 221, 518 S.E.2d 314, 316 (1999) (citing Commonwealth v. County Bd. of Arlington Cnty., 217 Va. 558, 574, 232 S.E.2d 30, 40 (1977)).

[3] *Arlington Cnty*., 217 Va. at 577, 232 S.E.2d at 42.

[4] 2001 Op. Va. Att'y Gen. 192, 193 (citing Branch v. Commonwealth, 14 Va. App. 836, 419 S.E.2d 422 (1992)).

[5] 2010 Op. Va. Att'y Gen 173, 176 n.6 and citations therein. *See* Prillaman v. Commonwealth, 199 Va. 401, 405, 100 S.E.2d 4, 7 (1957) ("statutes are not to be considered as isolated fragments of law, but as a whole, or as parts of . . . a single and complete statutory arrangement").

[6] *See e.g*., 2010 Op. Va. Att'y Gen. 5, 6 and citation therein; *id*. at 7, 9; *id*. at 178, 170 and citation therein.

[7] *See* Harris v. USAA Casualty Ins. Co., 37 Va. Cir. 553, 572 (Norfolk 1994).

[8] Marble Techs., Inc. v. City of Hampton, 279 Va. 409, 417, 690 S.E.2d 84 (2010) (quoting Bd. of Sprvrs. v. Reed's Landing Corp., 250 Va. 397, 400, 463 S.E.2d 668, 670 (1995)).

[9] Section 27-14 generally authorizes ordinances governing the organizational and operational needs of a department, such as training requirements, equipment, and personnel issues. *See* 1987-88 Op. Va. Att'y Gen. 361 (concluding that a governing body has authority to establish training requirements).

OP. NO. 11-005

GAME, INLAND FISHERIES, AND BOATING: BOATING LAWS

Section 29.1-738 prohibits the reckless use of paddleboards.

THE HONORABLE BARRY D. KNIGHT
MEMBER, HOUSE OF DELEGATES
JANUARY 24, 2011

ISSUE PRESENTED

You ask whether "paddleboards" are included in the prohibition of § 29.1-738, which makes unlawful the reckless use of any skis, surfboard, or similar device to the endangerment of another person.

RESPONSE

It is my opinion that § 29.1-738 prohibits the reckless use of paddleboards.

APPLICABLE LAW AND DISCUSSION

Section 29.1-738(A) provides: "No person shall . . . manipulate any skis, surfboard, or similar device . . . in a reckless manner so as to endanger the life, limb, or property of any person." Section 29.1-738 does not expressly include "paddleboards," nor does the Code define "surfboard."

"The primary objective of statutory construction is to ascertain and give effect to legislative intent."[1] Intent is to be determined by the words used.[2] Absent a statutory definition, words will be accorded their ordinary meaning.[3] According to *Merriam-Webster's Collegiate Dictionary*, a "surfboard" means "a long narrow buoyant board . . . used in the sport of surfing[,]"[4] while a "paddleboard" is "a long narrow buoyant board used for riding the surf or in rescuing swimmers"[5] Based on these definitions, these two water instruments clearly constitute "similar device[s.]" In fact, other sources define "paddleboard" as "a type of surfboard."[6] I therefore conclude that § 29.1-739 applies to the use of a paddleboard.[7]

CONCLUSION

Accordingly, it my opinion that § 29.1-738 prohibits the reckless use of paddleboards.

[1] Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983) (citing Tiller v. Commonwealth, 193 Va. 418, 69 S.E.2d 441 (1952)).

[2] Hubbard v. Henrico Ltd. P'ship, 255 Va. 335, 339, 497 S.E.2d 335, 337 (1998) (citations omitted).

[3] *Id*., at 340, 497 S.E.2d at 388 (citations omitted).

[4] MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1182 (10th ed. 2001).

[5] *Id*. at 832.

[6] *See Paddleboat Definition*, Dictionary.com, http://dictionary.reference.com/browse/paddleboard?qsrc=2446 (citing Random House Dictionary and Collins English Dictionary) (last visited Jan. 20, 2011).

[7] Whether a violation of § 29.1-738 has occurred, however, remains an issue properly reserved to Commonwealth's Attorney, grand jury and trier of fact. *See* 1996 Op. Va. Att'y Gen. 99, 100 and citations therein.

OP. NO. 10-043

HEALTH: ENVIRONMENTAL HEALTH SERVICES – PRIVATE WELL CONSTRUCTION

Virginia Department of Health does not exceeded its authority in requiring a private well construction permit for the installation of a closed-loop direct geothermal heat pump system.

Department of Health may draft regulations defining "well" and "water well."

Local health departments are within their authority to require a Water Well Classification license for the construction of wells for use in a closed loop geothermal heat pump system.

THE HONORABLE J. CHAPMAN PETERSEN
MEMBER, SENATE OF VIRGINIA
JANUARY 13, 2011

ISSUES PRESENTED

You ask whether the Virginia Department of Health has exceeded the authority granted to it pursuant to the Virginia Private Well Construction Act[1] by requiring a private well construction permit for the installation of a direct exchange geothermal heat pump system or by providing its own definition of "water well" or "well." You also ask whether local health departments are authorized to require that contractors installing wells for geothermal heat pump systems be licensed by the Virginia Board of Contractors with a Water Well Classification license pursuant to § 54.1-1100, *et seq*., in order to be issued a permit to install a direct geothermal heat pump.

RESPONSE

It is my opinion that the Virginia Department of Health has not exceeded the authority granted it by the Virginia Private Well Construction Act either in requiring a private well construction permit pursuant to § 32.1-176.4 and 12 VA. ADMIN. CODE § 5-630-

220 for the installation of a closed-loop direct geothermal heat pump system or in drafting regulations defining "well" and "water well." Additionally, the local health departments are within their authority to require a Water Well Classification license, pursuant to §§ 32.1-176.4(C) and 54.1-1100 *et seq*., for the construction of wells for use in a closed loop geothermal heat pump system.

BACKGROUND

A direct exchange geothermal heat pump system is a model in which a refrigerant is circulated through pipes buried in the ground or submerged in water so that it exchanges heat with the ground, rather than using a secondary heat transfer fluid, such as water or antifreeze solution, in a separate closed loop.[2] There are four basic types of geothermal heat pump ground loop systems. Three of these—horizontal, vertical, and pond/lake—are closed-loop systems. The fourth type of system is the open-loop option.[3] Open-loop systems use well or surface body water as the heat exchange fluid that circulates directly through the geothermal heat pump system. Once it has circulated through the system, the water returns to the ground through the well or a recharge well, or as surface discharge.[4] Whether the geothermal heat pump system is a closed-loop system appears to be dependent upon the operation of the particular system and will need to be answered on an individual basis.

APPLICABLE LAW AND DISCUSSION

First, the authority of the Board of Health to develop regulations governing the construction of geothermal wells stems from an express mandate of the General Assembly. The General Assembly has charged the Board of Health with developing regulations that "provide for the issuance of an express geothermal permit allowing, upon proper registration and payment of application fees, the construction of wells used solely for a closed loop geothermal heating system."[5] The Board of Health has defined a "closed-loop ground-source heat pump well" system as "a well consisting of a sealed loop of plastic pipe buried beneath the earth's surface to allow heat transfer between the fluid in the pipe and the earth."[6] The permit is subject to specific statutory requirements, including that the "construction of the geothermal heating system [] comply with the private well regulations[.]"[7] It is therefore clear that the Virginia Private Well Construction Act authorizes the Board of Health to oversee the construction of closed-loop geothermal heating systems.

Second, the General Assembly has declared the policy of the Commonwealth to "require that the construction and location of private wells conform to reasonable requirements" as the "improper construction of private wells can adversely affect aquifers as ground water resources in the Commonwealth."[8] These requirements are consistent with the Commonwealth's duty to "protect these ground water resources and to safeguard the public welfare, safety and health" of its citizens.[9] Further, "[a]ny person intending to construct a private well shall apply to the [Health] Department for and receive a permit before proceeding with [well] construction."[10] A private well is defined in § 32.1-176.3 as "any water well constructed for a person on land which is owned or leased by that person and is usually intended for household, ground water source heat pump, agricultural use, industrial use or other nonpublic water well."[11]

The State Board of Health has enacted regulations, in accordance with § 32.1-176.4, to "[e]nsure that all private wells are located, constructed and maintained in a manner that does not adversely affect groundwater resources, or the public welfare, safety and health."[12] Pursuant to these authorities and the concern for the contamination of groundwater as expressed in §§ 32.1-176.4 and 32.1-176.2, the Board of Health defined a "water well" or "well" as, "any artificial opening or artificially altered natural opening, however made, by which ground water is sought or through which ground water flows under natural pressure or is intended to be artificially drawn . . . ."[13] Whenever a person seeks to construct a well, a construction permit must first be obtained from the Commissioner of the Virginia Department of Health.[14]

You note that other types of drilling, such as drilling for quarries, reach groundwater levels yet are not regulated by the Virginia Department of Health. It is true that certain drilling activities are exempted from permit requirements pursuant to 12 VA. ADMIN. CODE § 5-630-10, but the geothermal wells at issue here pose particular environmental concerns not posed by other drilling activities. Geothermal wells are placed in close proximity to homes and, therefore, near drinking water supplies and sewage drainfields. The Virginia Department of Health considers issues such as proximity to drinking water wells and sewage drainfields when issuing a geothermal permit, as is its duty pursuant to § 32.1-176.4.[15] If a heat pump well is drilled through or too close to an onsite sewage system drainfield, for example, pathogens could be introduced directly into aquifers that supply drinking water. Moreover, there is a real potential for refrigerant leaking from the closed loop of a direct exchange geothermal heat pump system into the surrounding soil, which could contaminate groundwater.[16]

The definition of a "well" in 12 VA. ADMIN. CODE § 5-630-10 as "any artificial opening or artificially altered natural opening, however made, by which ground water is sought or through which ground water flows under natural pressure or is intended to be artificially drawn" falls within the discretion given to the Board in § 32.1-176.2 to "protect … ground water resources and to safeguard the public welfare, safety and health." Defining a "well" is a necessary prerequisite to the Board of Health's adoption of regulations pertaining to the location and construction of private wells in the Commonwealth under § 32.1-176.4.[17]

The General Assembly has directed the Board of Health to adopt regulations pertaining to the location and construction of private wells and has charged the Virginia Department of Health with the interpretation and enforcement of those regulations.[18] Virginia courts will accord great weight to the interpretation of a statute by the state agency charged with its enforcement.[19] Moreover, the General Assembly is presumed to be aware of the agency's construction of a particular statute and, when such a construction continues without legislative alteration, the legislature will be presumed to have acquiesced in it.[20] In this instance, the General Assembly affirmed the Board of Health's regulation of geothermal heat pump systems through its Private Well Regulations by adding subsection C to § 32.1-176.4 in 2009, directing the Board of Health to include in its regulations provisions for the issuance of an express geothermal permit.[21]

It is therefore my opinion that the statutes enacted by the General Assembly authorize the Virginia Department of Health to regulate the construction of wells used for closed loop geothermal heating systems and that it is within the Board of Health's authority to define what a "well" is for purposes of the Virginia Private Well Construction Act.

Finally, you also ask whether local health departments are authorized to require a water well classification license from the Virginia Board of Contractors as a prerequisite to obtaining a permit to install a direct geothermal heat pump. Section 32.1-176.4(C)(1) mandates that the express geothermal permit issued by the Virginia Department of Health for closed-loop geothermal heat pump systems include the "requirement that all well construction be performed by a person holding a valid, appropriate contractor license with water well classification pursuant to Chapter 11 (§ 54.1-1100 *et seq.*) of Title 54.1." Given this statutory command, local health departments have not exceeded their authority in requiring the Water Well Classification license for installers of closed-loop geothermal wells. As with the initial determination of whether a permit is required for the installation of a direct exchange geothermal heating system, the type of geothermal system being employed will establish whether the requirements of § 32.1-176.4(C) apply.[22]

CONCLUSION

Accordingly, it is my opinion that the Virginia Department of Health has not exceeded the authority granted it by the Virginia Private Well Construction Act either in requiring a private well construction permit pursuant to § 32.1-176.4 and 12 VA. ADMIN. CODE § 5-630-220 for the installation of a closed-loop direct geothermal heat pump system or in drafting regulations defining "well" and "water well." Additionally, the local health departments are within their authority to require a Water Well Classification license, pursuant to §§ 32.1-176.4(C) and 54.1-1100 *et seq*., for the construction of wells for use in a closed loop geothermal heat pump system.

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[1] VA. CODE ANN. §§ 32.1-176.1 through 32.1-176.7 (2009).

[2] *See* the definitions provided by the U.S. Department of Energy and the U.S. Environmental Protection Agency: Energy Star Program, "Geothermal Heat Pumps Key Product Criteria," *available at* http://www.energystar.gov/index.cfm?c=geo_heat.pr_crit_geo_heat_pumps. The Virginia Private Well Regulations do not include a definition of a geothermal heat pump system.

[3] *See* United States Department of Energy, Energy Savers, Space Heating and Cooling, *available at* http://www.energysavers.gov/your_home/space_heating_cooling/index.cfm/mytopic=12650.

[4] *Id*.

[5] Section 32.1-176.4(C) (2009).

[6] 12 VA. ADMIN CODE. § 5-630-10.

[7] VA. CODE ANN. § 32.1-176.4(C)(2). Section 32.1-176.4(C) also requires that "all well construction be performed by a person holding a valid, appropriate contractor license with water well classification . . . ;" that "the registration statement accurately identify the property location, the owner's name, address, and contact information, and the contractor's name, address, and contact information;" and that "the registration statement include a detailed site plan, drawn to scale, showing the location of the geothermal heating system and any potential sources of contamination"). The State Board of Health has proposed amendments to its Private Well Regulations to comply with this statutory mandate, and these proposed amendments are

under review. *See* 12 VA. ADMIN CODE §§ 5-630-271; 5-630-272, *available at* http://www.townhall.virginia.gov/L/ViewXML.cfm?textid=3752.

[8] VA. CODE ANN. § 32.1-176.2 (2009).

[9] *Id.*

[10] Section 32.1-176.5(A) (2009).

[11] Section 32.1-176.3 (2009).

[12] 12 VA. ADMIN. CODE § 5-630-30.

[13] *See id*. § 5-630-10 for several exemptions to this definition, including wells drilled for the following purposes: (i) exploration or production of oil or gas, (ii) building foundation investigation and construction, (iii) elevator shafts, (iv) grounding of electrical apparatus, or (v) the modification or development of springs.

[14] *See id*. § 5-630-220(A) ("no person shall construct, alter, rehabilitate, abandon or extend a private well, or allow the construction, alteration, rehabilitation, abandonment or extension of a private well, without a written construction permit from the commissioner").

[15] *See, e.g., id*. §§ 5-630-380 & 5-630-400.

[16] *See* Virginia Tech Geo4Va website for a discussion of advantages and disadvantages of geothermal heat pump technology and the need for greater care and higher skill for the installation of a direct exchange system, *available at* http://www.geo4va.vt.edu/A2/A2.htm.

[17] Also, the specific inclusion of groundwater in this definition is consistent with the purposes of a private well, defined in § 32.1-176.3 as, "any water well constructed for a person on land which is owned or leased by that person and is usually intended for household, *ground water source heat pump*, agricultural use, industrial use or other nonpublic water well." (Emphasis added.)

[18] Section 32.1-176.4(A). *See, e.g.,* 2008 Op. Va. Att'y Gen. 112, 114 (Department of Health has the authority to require submission of a survey plat with application for private well construction permit).

[19] *See* Forst v. Rockingham Poultry Mktg. Coop., Inc., 222 Va. 270, 276, 279 S.E.2d 400, 403 (1981) (long-standing Department of Taxation interpretation is entitled to great weight); Dep't of Taxation v. Progressive Cmty. Club, 215 Va. 732, 739, 213 S.E.2d 759, 763 (1975) ("the construction of a statute by a state official charged with its administration is entitled to great weight"); 1990 Op. Va. Att'y Gen. 231, 232 (concurring with Board of Health interpretation that bakeries and donut shops without seating areas are not restaurants).

[20] *See* Commonwealth v. Am. Radiator & Standard Sanitary Corp., 202 Va. 13, 19, 116 S.E.2d 44, 48 (1960) ("when [a public official's construction of a statute] has long continued without change the legislature will be presumed to have acquiesced therein"); Miller v. Commonwealth, 180 Va. 36, 42, 21 S.E.2d 721, 723 (1942) ("The Legislature is presumed to be cognizant of [the construction given to a statute by public officials], and, when long continued, in the absence of legislation evincing a dissent, the courts will adopt that construction"); 1986-87 Op. Va. Att'y Gen. 194, 194 ("Board's regulations … have been in effect since 1980 and have not been modified by legislative action of the General Assembly, thereby indicating that the General Assembly has acquiesced in them").

[21] 2009 Va. Acts ch. 710. *See* 1977-78 Op. Va. Att'y Gen. 77, 78 (When the legislature passes a new law, or amends an old one, it is presumed to act with full knowledge of the law as it stands).

[22] Finally, you note that these permitting requirements cause delay and expense for the public and for businesses installing these systems. The General Assembly evidently weighed the policy considerations at issue, namely, the risks posed by improperly installed or defective systems versus the costs associated with permitting requirements, and chose the latter.

OP. NO. 10-111

LABOR AND EMPLOYMENT: PROTECTION OF EMPLOYEES – VIRGINIA MINIMUM WAGE ACT

Proposed Worker Misclassification Act does not exclude franchises from its terms, but the application of its "ABC" test would exclude typical franchises from its scope.

THE HONORABLE JAMES M. LEMUNYON
MEMBER, HOUSE OF DELEGATES
JANUARY 25, 2011

ISSUE PRESENTED

You ask whether the proposed Worker Misclassification Act, S.B. 34, would apply to franchises, and if so, whether it should be read to categorize franchisees as "employees" rather than independent contractors.

RESPONSE

It is my opinion that S.B. 34 does not exclude franchises from its terms, but the application of its test would exclude typical franchises from its scope.

APPLICABLE LAW AND DISCUSSION

S.B. 34, titled the Worker Misclassification Act, was proposed during the 2010 General Assembly and continued to 2011.[1] It would establish a new Code section, § 40.1-28.13. S.B. 34 defines an "Employer" as "any individual, partnership, association, joint stock company, corporation, business trust or any other person or groups of persons acting directly or indirectly in the interest of an employer in relation to an employee." Furthermore, the bill defines "'Performing Services' [as] the performance of any task related to the business engaged in by an Employer."

The bill sets forth a test for employee status commonly referred to as the "ABC test":

> A. For the purposes of this title, Title 60.2, and Title 65.2, if an individual performs services for an employer for remuneration, that individual shall be considered an employee of the party which pays that remuneration unless and until it is shown to the satisfaction of the Department that:
>
> 1. The individual has been and will continue to be free from direction and control of the employer, both under his contract of service and in fact;
>
> 2. The service is outside the usual course of the business of the employer; and
>
> 3. The individual is customarily engaged in an independently established trade, occupation, profession, or business, both under his contract of service and in fact.
>
> B. The failure to withhold federal or state income taxes or to pay unemployment compensation contributions or workers' compensation premiums with respect to an individual's wages shall not be considered in making a determination under this subsection A.
>
> C. In making determinations under subdivision A 1, employee status will be found where the control exercised by the party paying remuneration is a

> general one, exercised directly or indirectly, over the physical activities of the purported employee and need not extend to all the details of the physical performance of the duties performed for the employer.

The bill imposes various civil and criminal sanctions for employers who misclassify employees.[2]

"[A] franchise is a commercial arrangement between two businesses which authorizes the franchisee to use the franchisor's intellectual property and brand identity, marketing experience, and operational methods."[3] As you note, the impact of this legislation on franchise operations is a question of no small significance, given the importance of franchising to Virginia's economy. In 2005, franchised businesses employed over 330,000 individuals in Virginia and generated $26.8 billion of economic activity.[4]

You first inquire whether this bill applies to franchises. S.B. 34 expressly provides that it applies to "this title," meaning Title 40.1, covering labor and employment, "Title 60.2," covering unemployment compensation, and "Title 65.2," which covers workers' compensation. By its plain text, the bill does not exclude franchises from its scope. Statutes should be construed according to their plain language.[5] Furthermore, "[t]he duty of the courts is 'to construe the law as written."[6] Moreover, "[c]ourts cannot add language to the statute the General Assembly has not seen fit to include. Nor are they permitted to accomplish the same result by judicial interpretation. Where the General Assembly has expressed its intent in clear and unequivocal terms, it is not the province of the judiciary to add words to the statute or alter its plain meaning."[7] Therefore, whether a franchisee would be treated as an employee must be determined by application of the three-part test on a case-by-case basis.

Application of the three-part test, in general, would exclude franchisees from the scope of S.B. 34. To begin with, the franchisee is not performing services "for an employer." Rather, the franchisee, upon reaching agreement with the franchisor, is performing services for the profit and account *of the franchisee*. In addition, unlike the ordinary contract of employment, the franchisee is not being remunerated by the franchisor. Instead, it is the franchisee who pays the franchisor for the privilege of using a trademark and business system. I also note that the typical franchisee is not an "individual" but a corporation. Consequently, application of this test to typical franchise agreements would result in the exclusion of franchisees and franchisors from the scope of this statute.[8]

I also note that the Retail Franchising Act[9] specifically defines the terms "franchise" and "franchisee" in the Retail Franchise Act.[10] This separate treatment of franchises indicates that the General Assembly understands that franchises are a distinct form of business enterprise and bolsters the conclusion that Virginia law does not view typical franchise relationships as an ordinary employer/employee relationship.

CONCLUSION

Accordingly, it is my opinion that S.B. 34 does not exclude franchises from its terms, but the application of its test would exclude typical franchises from its scope.

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[1] *See* http://leg1.state.va.us/cgi-bin/legp504.exe?ses=101&typ=bil&val=sb34.

[2] S.B. 34, 2010 Reg. Sess. (Va. 2010).

[3] Kerl v. Rasmussen, 682 N.W.2d 328, 338 (Wis. 2004).

[4] PRICEWATERHOUSECOOPERS, *The Economic Impact of Franchised Businesses* 22, 26 (2008).

[5] Signal Corp. v. Keane Fed. Sys., 265 Va. 38, 46-47, 574 S.E.2d 253, 257 (2003).

[6] Hampton Roads Sanitation Dist. Comm'n v. City of Chesapeake, 218 Va. 696, 702, 240 S.E.2d 819, 823 (1978).

[7] Jackson v. Fid. & Deposit Co. of Md., 269 Va. 303, 313, 608 S.E.2d 901, 906 (2005) (internal quotation marks and citation omitted).

[8] Precisely because franchisors and franchisees are excluded from the scope of the ABC test, some employers may seek to mask an employer/employee relationship by using the franchisor/franchisee labels to evade it. In that situation, a court applying the ABC test could find that, notwithstanding the franchisor/franchisee label, the relationship is in reality one of employer/employee.

[9] VA. CODE ANN. §§ 13.1-557 through 13.1-574 (2006 & Supp. 2010).

[10] VA. CODE ANN. § 13.1-559 (Supp. 2010).

OP. NO. 11-034

MOTOR VEHICLES: POWERS OF LOCAL GOVERNMENTS

CONSTITUTION OF VIRGINIA: EDUCATION – LITERARY FUND

COUNTIES, CITIES, AND TOWNS: GENERAL POWERS OF LOCAL GOVERNMENTS

The General Assembly constitutionally may permit localities to retain the funds collected by them in enforcing their traffic light laws.

THE HONORABLE JOSEPH D. MORRISSEY
MEMBER, HOUSE OF DELEGATES
APRIL 15, 2011

ISSUE PRESENTED

You inquire whether localities can collect and keep monetary penalties for violations of traffic light ordinances pursuant to § 46.2-1308 in light of the provision of the Virginia Constitution that requires fines to be paid to the Literary Fund.

RESPONSE

It is my opinion that, because the funds collected by localities in enforcing their traffic light laws do not constitute "fines for offenses against the Commonwealth," the General Assembly constitutionally may permit localities to retain such funds.

APPLICABLE LAW AND DISCUSSION

Article VIII, Section 8 of the Virginia Constitution provides that all "fines for offenses against the Commonwealth" are to be paid to the Literary Fund. Under the Code, a "traffic infraction" is "a violation of the law punishable as provided in § 46.2-113, which is neither a felony nor a misdemeanor."[1] In turn, § 46.2-113 provides that

> It shall be unlawful for any person to violate any of the provisions of this title, or any regulation adopted pursuant to this title, or local ordinances adopted pursuant to the authority granted in § 46.2-1300. Unless otherwise stated, these violations shall constitute traffic infractions punishable by a fine of not more than that provided for a Class 4 misdemeanor under § 18.2-11.

Section 46.2-1300 authorizes local jurisdictions to adopt traffic ordinances not conflicting with state statutes, and § 46.2-1308 directs that any fines generated through enforcement of those ordinances are to be paid into the local treasury.

Section 15.2-968.1 imposes a "monetary penalty" on drivers who fail to comply with traffic light signals and further allows local communities to set up photo-monitoring systems to enforce this provision. The system is able to record violations of the traffic light provisions of §§ 46.2-833 (governing stops at traffic lights), 46.2-835 (right turn on red) and 46.2-836 (left turn on red on a one-way highway).[2] Unless prevented by the Constitution, a locality expressly is authorized to use photo-monitoring to enforce ordinances adopted based on these Code provisions and retain funds paid for violations.

Article VIII, § 8 imposes no bar to this arrangement because of the distinction the Supreme Court of Virginia has drawn between criminal fines and civil penalties. The Court addressed this issue in *Southern Express Co. v. Commonwealth, ex rel. Walker*.[3]

> What "fines" are here intended or comprehended? The answer is found in the language of the Constitution itself. They are "fines collected for offences against the State," that is fines imposed by law as punishment for a crime. Fines constitute in whole or in part the punishment for many of the smaller offences at common law, and also for many offences created by statute, and those are the "fines" which the constitutional provision was designed to cover. *It comprehends only those fines which are affixed as penalties for crime and are recoverable upon conviction of the offender*, and does not embrace those pecuniary penalties or forfeitures provided by statute, that a popular or *qui tam* action (which is a civil action) may be brought to recover.[4]

Section 15.2-968.1 does not mention fines but imposes only a monetary penalty for a traffic infraction. "Imposition of a penalty pursuant to this section shall not be deemed a conviction as an operator and shall not be made part of the operating record of the person upon whom such liability is imposed, nor shall it be used for insurance purposes in the provision of motor vehicle insurance coverage."[5] Therefore, it does not impose a punishment for a crime.

In light of this distinction, § 46.2-1308 raises no constitutional concerns. It merely permits the localities to enact a certain kind of traffic control ordinance and to receive the fines "imposed for violations of such ordinances." Because no offenses against the Commonwealth or violations of state laws are involved, Article VIII, § 8 simply does not apply.

Moreover, given that under *Southern Express* the monetary penalties authorized by § 15.2-968.1 are not criminal fines, "the General Assembly has the authority to appropriate [such] penalties elsewhere than to the Literary Fund."[6] Thus, authorizing payment of the civil penalties to the local communities would not violate the Constitution of Virginia even where the infraction is based on the failure to comply with a state statute.

CONCLUSION

Accordingly, it is my opinion that, because the funds collected by localities in enforcing their traffic light laws do not constitute "fines for offenses against the Commonwealth," the General Assembly constitutionally may permit localities to retain such funds.

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[1] VA. CODE ANN. § 46.2-100 (2010).

[2] VA. CODE ANN. § 15.2-968.1(E) (Supp. 2010).

[3] 92 Va. 59, 22 S.E. 809 (1895), *aff'd* 168 U.S. 705 (1897).

[4] *Id.* at 62, 22 S.E. at 809 (emphasis added).

[5] Section 15.2-968.1(F).

[6] 1977-78 Op. Va. Att'y Gen. 162, 165. *See also* 1986-87 Op. Va. Att'y Gen. 66 (fines required to be paid into the Literary Fund do not include "monetary penalties" assessed by different state boards that regulate professional occupations).

OP. NO. 11-036

MOTOR VEHICLES: POWERS OF LOCAL GOVERNMENTS

Section 46.2-1308 does not prohibit a prosecutor from amending a misdemeanor charge alleging a violation of state law to the equivalent municipal ordinance in the situation where the arrest or summons was issued by an officer of the Department of State Police for offenses found in titles other than Title 46.2.

THE HONORABLE NEIL S. VENER
COMMONWEALTH ATTORNEY, CAMPBELL COUNTY
MAY 13, 2011

ISSUE PRESENTED

You ask whether § 46.2-1308 prohibits a prosecutor from amending a misdemeanor charge to the equivalent municipal ordinance when the arrest or summons was made

by an officer of the Department of State Police for offenses found in titles other than Title 46.2 of the *Code of Virginia*.

RESPONSE

It is my opinion that § 46.2-1308 does not prohibit a prosecutor from amending a misdemeanor charge alleging a violation of state law to the equivalent municipal ordinance in the situation where the arrest or summons was issued by an officer of the Department of State Police for offenses found in titles other than Title 46.2.

APPLICABLE LAW AND DISCUSSION

Title 46.2 of the *Code of Virginia* addresses laws pertaining to motor vehicles. Section 46.2-1308 provides:

> In counties, cities, and towns whose governing bodies adopt the ordinances authorized by §§ 46.2-1300 and 46.2-1304, all fines imposed for violations of such ordinances shall be paid into the county, city or town treasury. Fees shall be disposed of according to law.
>
> In all cases, however, in which the arrest is made or the summons is issued by an officer of the Department of State Police or of any other division of the state government, for violation of the motor vehicle laws of the Commonwealth, the person arrested or summoned shall be charged with and tried for a violation of some provision of this title and all fines and forfeitures collected upon convictions or upon forfeitures of bail of any person so arrested or summoned shall be credited to the Literary Fund.
>
> Willful failure, refusal or neglect to comply with this provision shall constitute a Class 4 misdemeanor and may be grounds for removal of the guilty person from office. Charges for dereliction of the duties here imposed shall be tried by the circuit court of the jurisdiction served by the officer charged with the violation.

The second paragraph of § 46.2-1308 indicates that when officers of the Department of State Police arrest a person or issue a summons for violating the "motor vehicle laws of the Commonwealth," the offender "shall be charged with and tried for a violation under *this title… and all fines and forfeitures collected upon convictions or upon forfeitures of bail of any person so arrested or summoned shall be credited to the Literary Fund.*" (Emphasis added.) "[T]his title" refers to Title 46.2 of the *Code of Virginia*. Section 46.2-1308 thus quite expressly creates a limited exception to the discretion prosecutors otherwise would have to amend a charge and bring it under the provisions of a local ordinance. That exception exists in the situation where the arrest or summons (1) was brought under Title 46.2, and (2) the arrest or summons was "issued by an officer of the Department of State Police or any other division of the state government."

Under generally accepted principles of statutory construction, the mention of one thing in a statute implies the exclusion of another.[1] "The plain, obvious, and rational meaning of a statute is always to be preferred to any curious, narrow, or strained

construction."[2] The second paragraph of § 46.2-1308 does not refer to violations contained in other titles of the *Code*, rather it specifies only that violations of the motor vehicle laws, as enforced by an officer with the Virginia Department of State police, cannot be amended to a code section outside of Title 46.2. Therefore, the exclusion of all other titles is presumed to be intentional.[3] As such, I find no prohibition against amending violations contained in other titles of the Code, such as driving under the influence in violation of § 18.2-266, to a violation under local ordinances.

CONCLUSION

Accordingly, it is my opinion that § 46.2-1308 does not prohibit a prosecutor from amending a misdemeanor charge alleging a violation of state law to the equivalent municipal ordinance in the situation where the arrest or summons was issued by an officer of the Department of State Police for offenses found in titles other than Title 46.2.

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[1] *See* Smith Mountain Lake Yacht Club, Inc. v. Ramaker, 261 Va. 240, 246, 542 S.E.2d 392, 395 (2001). *See also* NORMAN J. SINGER AND J.D. SHAMBLE SINGER, 2A SUTHERLAND STATUTORY CONSTRUCTION § 47.23 (7th ed. 2007); 17 MICHIE'S JURISPRUDENCE, Statutes § 45 (2006).

[2] Turner v. Commonwealth, 226 Va. 456, 459, 309 S.E.2d 337, 338 (1983) (citing Tiller v. Commonwealth, 193 Va. 418, 420, 69 S.E.2d 441, 445 (1952)).

[3] The maxim of statutory construction *expressio unius est exclusio alterius* is applicable here. Where a statute speaks in specific terms, an implication arises that omitted terms were not intended to be included within the scope of the statute. *See, e.g.,* Turner v. Wexler, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992).

OP. NO. 11-023

PENSIONS, BENEFITS, RETIREMENT: VIRGINIA RETIREMENT SYSTEM – PARTICIPATION OF POLITICAL SUBDIVISIONS IN RETIREMENT SYSTEM

COUNTIES, CITIES, AND TOWNS: JOINT ACTION BY LOCALITIES – REGIONAL COMPETIVENESS ACT

Employees of the Hampton Roads Partnership are not eligible for VRS coverage because the Partnership is not a political subdivision.

THE HONORABLE JEFFREY L. MCWATERS
MEMBER, SENATE OF VIRGINIA
MARCH 18, 2011

ISSUE PRESENTED

You ask whether the Hampton Roads Partnership ("Partnership") constitutes a "political subdivision" under § 51.1-124.3, so that the Partnership's employees are entitled to coverage by the Virginia Retirement System ("VRS").

RESPONSE

It is my opinion that employees of the Hampton Roads Partnership are not eligible for VRS coverage because the Partnership is not a "political subdivision" under § 51.1-124.3.

APPLICABLE LAW AND DISCUSSION

Eligible employees of "political subdivisions" may participate in the Virginia Retirement System.[1] Section 51.1-124.3 includes in its definition of "political subdivision" "any commission, public authority, or body corporate created by or under an act of the General Assembly specifying the powers, privileges or authority capable of exercise by the commission, public authority, or body corporate."

The Regional Competitiveness Act[2] ("the Act") provides for the establishment of regional partnerships by localities "to work together for their mutual benefit and the benefit of the Commonwealth."[3] Section 15.2-1307 defines "regional partnership" as "an organization composed of government, business, education and civic leaders approved by the local governing bodies of the region to carry out the provisions of" the Act.[4]

The Act provides for the creation and disbursement of an incentive fund to "encourage regional strategic planning and cooperation," including "regional strategic economic development planning and joint activities."[5] The fund is administered by the Department of Housing and Community Development ("Department").[6] Existence of a regional partnership is a prerequisite for a region to receive incentive payments.[7] To be eligible to receive these funds, the regional partnership must develop a regional strategic economic development plan as well as issue an annual progress report.[8] The partnership also must identify any existing and proposed joint activities within the region.[9] Furthermore, to be eligible to receive incentive funds, a partnership "shall include as broad a representation as is practical of local government, elementary and secondary education, higher education, the business community, and civic groups."[10]

Whether employees of the Partnership are entitled to VRS participation hinges on whether the Partnership is a "political subdivision." Generally speaking,

> A political subdivision is created by the legislature to exercise some portion of the state's sovereignty in regard to one or more specific governmental functions. It is independent from other governmental bodies, in that it may act to exercise those powers conferred upon it by law without seeking the approval of a superior authority. It employs its own consultants, attorneys, accountants and other employees whose salaries are fixed by the political subdivision, and it often incurs debts which are not debts of the Commonwealth but are debts of the political subdivision.[11]

The Regional Competiveness Act does not explicitly designate regional partnerships as political subdivisions. In a different context, whether the Short Pump Community Development Authority could file a bond validation action, the Supreme Court of Virginia concluded that the Development Authority was not a political subdivision

because it was not designated as such by the General Assembly.[12] The fact that the General Assembly did not designate regional partnerships as political subdivisions provides a strong indication that they do not qualify as political subdivisions, particularly when the General Assembly ordinarily provides for such a designation.[13]

Strengthening this conclusion is the fact that regional partnerships are not given any authority to exercise a sovereign "power[], privilege[], or authority."[14] The role of regional partnerships is to bring together stakeholders from local government, civic and educational groups and from the business community to foster prosperity and wise governance. In determining whether an entity is a political subdivision, past opinions from this office have examined whether the entity has been authorized to exercise a sovereign power. Examples include issuing its own debt,[15] or enacting regulations having the force of law.[16] These factors are not present here. Regional partnerships are not authorized to exercise any such sovereign "power[], privilege[], or authority."[17]

CONCLUSION

Accordingly, it is my opinion that employees of the Hampton Roads Partnership are not eligible for VRS coverage because the Partnership is not a "political subdivision" under § 51.1-124.3.

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[1] *See* VA. CODE ANN. §§ 51.1-130; 51.1-132 (2009).

[2] VA. CODE ANN. §§ 15.2-1306 through 1310 (2008).

[3] Section 15.2-1306.

[4] For purposes of this opinion, I assume that the Hampton Roads Partnership is such an organization.

[5] Section 15.2-1308.

[6] *Id*.

[7] Section 15.1-1309(1).

[8] Section 15.1-1309(2)&(3).

[9] Section 15.1-1309(4).

[10] Section 15.1-1309(1).

[11] 2002 Op. Va. Att'y Gen. 281, 283.

[12] *See* Short Pump Town Center Cmty. Dev. Auth. v. Hahn, 262 Va. 733, 742-46, 554 S.E.2d 441, 445-47 (2001) (citing instances where General Assembly expressly has designated various authorities and commissions as "political subdivisions"). The Supreme Court of Virginia found that, because the organic statute of a particular authority did not explicitly name the body as a "political subdivision," it was not one for purposes of the Public Finance Act. *Id.* at 475-76, 554 S.E.2d at 447. *Short Pump* is not dispositive here because the Code provisions governing the Virginia Retirement System provide their own definition of "political subdivision," which does not require such designation by the General Assembly.

[13] *Id.* at 743 n. 10, 554 S.E.2d at 446 n. 10 (listing authorities expressly designated as political subdivisions by the General Assembly).

[14] Section 51.1-124.3.

[15] 2002 Op. Va. Att'y Gen. at 283 (Medical College a political subdivision because, among other attributes, it could issue its own debt).

[16] 1985-86 Op. Va. Att'y Gen. 150, 151 (concluding that soil and water conservation districts were political subdivisions because, among other things, they could issue regulations having "the force and effect of law").

[17] Section 51.1-124.3.

OP. NO. 11-109

PRISONS AND OTHER METHODS OF CORRECTION: LOCAL CORRECTIONAL FACILITIES – PRISONER PROGRAMS AND TREATMENT

Inmate crews may work on property outside the jurisdiction of the sheriff when authorized by court order or, if the workforce is established by the local governing body, only when the property is owned by a tax-exempt nonprofit organization that is organized and operated exclusively for charitable or social welfare purposes.

THE HONORABLE KENNETH W. STOLLE
SHERIFF/HIGH CONSTABLE FOR VIRGINIA BEACH
DECEMBER 16, 2011

ISSUES PRESENTED

You inquire regarding the permissibility of employing inmate labor in three scenarios. First, you ask whether inmate crews may work on property located outside the jurisdiction of the sheriff. Second, you inquire whether it is permissible to use inmates on private property, leased to a non-profit organization, for the purpose of cultivating a garden where all the vegetables harvested will benefit inmates housed in the Virginia Beach Correctional Center. Finally, you ask whether inmates may maintain trails on private property leased to a non-profit charitable foundation that uses the land to allow disabled children and veterans to hunt for deer and then donates the deer meat to another non-profit for distribution.

RESPONSE

It is my opinion that inmate crews may work on property outside the jurisdiction of the sheriff when authorized by court order or, if the workforce is established by the local governing body, only when the property is owned by a tax-exempt nonprofit organization that is organized and operated exclusively for charitable or social welfare purposes. It is further my opinion that, assuming all other statutory provisions are met, upon a proper court order, inmate crews may cultivate a garden on private property leased to a nonprofit organization so long as the nonprofit organization qualifies as exempt from taxation under 26 U.S.C. § 501(c)(3). Finally, it is my opinion that, assuming all other statutory provisions are met, inmate crews, pursuant to a court order, may maintain trails on private property leased to a nonprofit organization provided the nonprofit organization qualifies as exempt from taxation under 26 U.S.C. § 501(c)(3).

APPLICABLE LAW AND DISCUSSION

Pursuant to § 53.1-128 of the *Code of Virginia*,

> The local governing body of any county, city or town may establish workforces in the county, city or town under such conditions as it may prescribe. Such workforces are authorized to work on
>
> (i) public property or works owned, leased or operated by the Commonwealth or the county, city or town; . . .
>
> (iii) any property owned by a nonprofit organization that is exempt from taxation under 26 U.S.C. § 501(c)(3) or (c)(4) and that is organized and operated exclusively for charitable or social welfare purposes whether the same is located within such county, city or town, or elsewhere . . .

Section 53.1-129 further authorizes, in relevant part, district and circuit courts to allow prisoners to work on 1) state, county, city or town property; 2) private property that is part of a community improvement project sponsored by a locality; and 3) any private property utilized by a nonprofit organization that is exempt from taxation under 26 U.S.C. § 501(c)(3).

As an initial matter, I note the following legal principles that apply to each of your scenarios. First, absent an ambiguity, statutes are to be interpreted according to their plain meaning;[1] however, they are not to be read in isolation.[2] Rather, statutes concerning the same subject matter are to be construed *in pari materia*.[3] Additionally, the Dillon Rule of strict construction limits the powers of local governing bodies and constitutional officers to those conferred expressly by state statute or by necessary implication from such expressed powers.[4]

Turning specifically to your first question, I note that sheriffs serve the city or county that elected them and their jurisdiction is limited to that particular locality.[5] Your inquiry, as applied to you, therefore asks whether inmate works crews you supervise can perform tasks on municipal property outside the City of Virginia Beach.

A previous Opinion of this Office[6] addresses this question as it relates to court orders entered pursuant to § 53.1-129. It concluded that, because there is no jurisdictional limitation included in the statute, "pursuant to § 53.1-129, prisoner-workers from the [] city jail may work on state, local and city property located outside the city."[7] Because the General Assembly has made no subsequent amendments to this section that are relevant to your inquiry,[8] I affirm the prior Opinion here.[9]

Nevertheless, § 53.1-128, which authorizes local governing bodies to establish workforces to work on "public property or works owned, leased or operated by . . . the county, city or town[,]" is worded differently. Although there similarly is no express limitation restricting the authorized work zones to the jurisdictional limits of the locality, in one instance, the Code provides that the workforce may work on "(iii) any property owned by a nonprofit organization . . . whether the same is located within such county, city or town, or *elsewhere*[.]"[10] This is the only instance in which

the General Assembly expressly has authorized inmate work crews on property outside a locality's jurisdiction.[11] Reading § 53.1-128 to allow localities to authorize workforces on other properties located outside the locality would render this language superfluous.[12] Because the General Assembly clearly knows how to express its intention when it desires to permit workforces beyond the territorial limits of the locality,[13] I conclude that localities may permit inmate work crews to perform tasks on any property outside the jurisdiction only when the property is "owned by a nonprofit organization that is exempt from taxation under [federal law] and that is organized and operated exclusively for charitable or social welfare purposes[.]"[14]

You next ask whether inmates can cultivate a garden on property leased to a nonprofit organization when all the food harvested will be consumed by the inmates. Section 53.1-129 explicitly provides that the judges of circuit and district courts may enter an order allowing inmates to work on "any private property utilized by a nonprofit organization that is exempt from taxation under 26 U.S.C. § 501(c)(3)[.]" Based on the facts provided, I am unable to determine the extent to which the organization uses the property, other than holding the lease and permitting the inmates to cultivate it for their own usage. As such I am unable to respond definitively to this inquiry.[15] I can conclude, however, that the local governing body does not have the authority to create a workforce to work on such property in this instance. Under § 53.1-128 and in accordance with the Dillon Rule, a locality's authority, as opposed to that of a court, is limited to permitting work crews to work on property *owned* by a qualifying nonprofit organization. Moreover, as stated above, I reiterate that the property must be located within the territorial limits of the locality.

In response to your third question, I conclude that § 53.1-129 authorizes courts to permit inmates to maintain trails on private property leased to a nonprofit that uses the land to allow disabled persons to hunt deer whose meat is then donated to another nonprofit organization. In this scenario, the organization is clearly "utilizing" the property.[16] Thus, the use of inmate labor is permissible here, provided the organization qualifies for the tax exemption under the federal law and any other statutory conditions are satisfied. Maintaining the trails also may fall under § 53.1-129 if they are part of a community improvement project sponsored by the City of Virginia Beach, but I lack sufficient facts to make such a determination. Again, I note that the local governing body has no authority to authorize work crews for this purpose because the land is not owned by the nonprofit.[17]

CONCLUSION

Accordingly, it is my opinion that inmate crews may work on property outside the jurisdiction of the sheriff when authorized by court order or, if the workforce is established by the local governing body, only when the property is owned by a tax-exempt nonprofit organization that is organized and operated exclusively for charitable or social welfare purposes. It is further my opinion that, assuming all other statutory provisions are met, upon a proper court order, inmate crews may cultivate a garden on private property leased to a nonprofit organization so long as the nonprofit organization qualifies as exempt from taxation under 26 U.S.C. § 501(c)(3). Finally,

it is my opinion that, assuming all other statutory provisions are met, inmate crews, pursuant to a court order, may maintain trails on private property leased to a nonprofit organization provided the nonprofit organization qualifies as exempt from taxation under 26 U.S.C. § 501(c)(3).

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[1] Signal Corp., v. Keane Fed. Sys., 265 Va. 38, 46-47, 574 S.E.2d 253, 257 (2003).

[2] 2010 Op. Va. Att'y Gen. 173, 175 n. 6 and citations therein.

[3] *See* Prillaman v. Commonwealth, 199 Va. 401, 405, 100 S.E.2d 4, 7 (1957).

[4] *See, e.g.,* Advanced Towing Co. v. Fairfax Cnty. Bd. of Sprvrs., 280 Va. 187, 193, 694 S.E.2d 621, 624 (2010).

[5] *See* VA. CODE ANN. § 15.2-1609 (2008). In certain specified circumstances, the Code extends the jurisdiction of the sheriff beyond the territorial boundaries of his locality. *See, e.g.,* VA. CODE ANN. § 19.2-250 (2008) (providing limited extension of jurisdiction into a neighboring locality in criminal cases involving the Commonwealth); VA. CODE ANN. § 8.01-295 (2007) (authorizing sheriff to serve process in any contiguous jurisdiction).

[6] 2003 Op. Va. Att'y Gen. 143.

[7] *Id*. at 144. I further note that the jurisdiction of the Commonwealth's district and circuit courts is limited to the territory of the city or counties that they serve. *See* VA. CODE ANN. §§ 16.1-77; 16.1-123.1 (2010) (establishing jurisdiction of district courts) and VA. CODE ANN. §§ 17.1-500; 17.1-515; 17.1-516 (2010) (establishing circuit courts).

[8] "The General Assembly is presumed to have knowledge of the Attorney General's published interpretations of a statute, and its failure to make corrective amendments evinces legislative acquiescence in the interpretation." 1999 Op. Va. Att'y Gen. 90, 92 (citing Lee Gardens v. Arlington Cnty. Bd., 250 Va. 534, 540, 463 S.E.2d 646, 649 (1995)).

[9] Nonetheless, while there may be no statutory restriction to entering an order permitting inmates to work on property outside the jurisdiction of the sheriff, I note that there are practical concerns with implementing such an order. As the previous opinion found, sheriffs have no general authority to supervise the prisoners while the work crew is outside their jurisdiction, nor may they enter into an agreement with another jurisdiction to acquire such authority. 2003 Op. Va. Att'y Gen. at 144, 145.

[10] VA. CODE ANN. § 53.1-128 (Supp. 2011) (emphasis added).

[11] It is an accepted principle of statutory construction that the mention of one thing in a statute implies the exclusion of another. Turner v. Wexler, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992). A statute limiting things to be done in a particular manner implies that they shall not be done otherwise. *See, e.g.,* Jackson v. Fid. & Deposit Co., 269 Va. 303, 313, 608 S.E.2d 901, 906 (2005).

[12] *See* Cook v. Commonwealth, 268 Va. 111, 114, 597 S.E.2d 84, 86 (2004) ("Words in a statute should be interpreted, if possible, to avoid rendering words superfluous.").

[13] *See, e.g.,* 2010 Op. Va. Att'y Gen. 5, 6; 2008 Op. Va. Att'y Gen. 126, 128; 2004 Op. Va. Att'y Gen. 68, 71. *See also* Virginia Beach v. ESG Enters., 243 Va. 149, 153, 413 S.E.2d 642, 644 (1992) (stating that it is assumed that "'the legislature chose, with care, the words it used'") (quoting Barr v. Town & Country Props., Inc., 240 Va. 292, 295; 396 S.E.2d 672, 674 (1990)).

[14] Here, the authority of the sheriff to supervise such crews is implied from the express grant to the locality.

[15] Nevertheless, I note that sheriffs are responsible for the "feeding and care of all prisoners confined" within their jurisdiction. Section 15.2-1609. Section 53.1-126 further directs sheriffs to "purchase at prices as low as reasonably possible all foodstuffs and other provisions used in the feeding of jail prisoners[.]" Because the sheriff generally has discretion in organizing and managing his operations, the sheriff likely has the authority to use such a garden in fulfilling his duty. *See, e.g.,* 1984-85 Op. Va. Att'y Gen. 284.

[16] "Utilize" is defined as "to make use of: turn to practical use or account[.]" MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 1298 (10th ed. 2001).

[17] *See* § 53.1-128.

OP. NO. 11-055

PROPERTY AND CONVEYANCES: CONDOMINIUM ACT –MANAGEMENT OF CONDOMINIUM

Absent an agreement to the contrary, the responsibility for the maintenance, repair and renovation of the common elements rest with the owners' association, while the maintenance, repair and renovation of a particular unit is the responsibility of the unit owner, unless the damage originated in or through the common elements or an apparatus located within the common elements.

THE HONORABLE JEFFREY L. MCWATERS
MEMBER, SENATE OF VIRGINIA
MAY 27, 2011

ISSUE PRESENTED

You inquire who is responsible under § 55-79.79 of the Condominium Act for damage caused by a failure in the common elements, and whether the default rules in this section can be modified by agreement.

RESPONSE

It is my opinion that § 55-79.79 provides a default general rule that governs repairs and renovations in two circumstances: first, it allocates the responsibility for the maintenance, repair and renovation of the common elements to the owners' association, and, second, it provides that the maintenance, repair and renovation of a particular unit is the responsibility of the unit owner, unless the damage originated in or through the common elements or an apparatus located within the common elements. In that specific situation, when the damage originated in or through the common elements or an apparatus located within the common elements, the unit owners' association is responsible for repairs to the unit. It is further my opinion that both of these default rules can be modified by agreement.

APPLICABLE LAW AND DISCUSSION

Section 55-79.79 of the Condominium Act addresses the upkeep of condominiums. It provides in part (A) that,

> Except to the extent otherwise provided by the condominium instruments, all powers and responsibilities, including financial responsibility, with regard to maintenance, repair, renovation, restoration, and replacement of the condominium shall belong (i) to the unit owners' association in the case of the common elements, and (ii) to the individual unit owner in the case of any unit or any part thereof, except to the extent that the need for repairs, renovation, restoration or replacement arises from a condition originating in

> or through the common elements or any apparatus located within the common elements, in which case the unit owners' association shall have such powers and responsibilities.

Under subpart (i), unless "condominium instruments" provide otherwise, the unit owners' association is responsible for the maintenance, repair, renovation and replacement of the common elements. The "common elements" mean "all portions of the condominium other than the units."[1] Common elements include things like the roof or siding. In sum, subpart (i) of § 55-79.79(A) establishes a default rule that the unit owners' association is responsible for repairs to the roof, siding, and other common elements, but the owners can agree to a different arrangement.

Subpart (ii) of § 55-79.79(A) establishes a default rule for damage to a unit, as opposed to damage to the common elements. Generally, when a particular unit is damaged or needs repair or renovation, the responsibility falls to the owner of that unit. If, however, the damage or repair "arises from a condition originating in or through the common elements or any apparatus located within the common elements,"[2] then the responsibility for the damage or repair to the unit falls to the unit owners' association. For example, if leaks in the roof have damaged the ceiling of a unit, the owners' association is responsible for the repair to the unit, unless the owners have agreed to a different arrangement. Similarly, if pipes that are not part of a specific unit, but are located underneath the roof, leak and damage the ceiling of a unit owner, the damage caused by such leaks to a particular unit would be the responsibility of the owners' association because the pipes would constitute an "apparatus located within the common elements."[3] As with the rules governing common elements, this default provision can be modified by agreement. The introductory clause to subsection (A), allowing the condominium instruments to modify the default rules, applies to both subsection (i) and (ii).

CONCLUSION

Accordingly, it is my opinion that § 55-79.79 provides a default general rule that governs repairs and renovations in two circumstances: first, it allocates the responsibility for the maintenance, repair and renovation of the common elements to the owners' association, and, second, it provides that the maintenance, repair and renovation of a particular unit is the responsibility of the unit owner, unless the damage originated in or through the common elements or an apparatus located within the common elements. In that specific situation, when the damage originated in or through the common elements or an apparatus located within the common elements, the unit owners' association is responsible for repairs to the unit. It is further my opinion that both of these default rules can be modified by agreement.

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[1] VA. CODE ANN. § 55-79.41 (Supp. 2010).

[2] Section 55-79.79 (Supp 2010).

[3] I further note that § 55-79.79(B) requires a declarant to "warrant or guarantee, against structural defects, each of the units for two years from the date each is conveyed, and all of the common elements for two years." Therefore, for the first two years, regardless of any agreement to modify the default rule in subsection (A), the guarantee covers the unit buyer against structural defects to the unit or the common elements for the first two years.

OP. NO. 10-078

PROPERTY AND CONVEYANCES: PROPERTY OWNERS' ASSOCIATION ACT

A homeowners' association may covenant to limit the number of housing units within the association that may be offered for rent.

THE HONORABLE KATHY J. BYRON
MEMBER, HOUSE OF DELEGATES
JANUARY 24, 2011

ISSUE PRESENTED

You ask whether a homeowners' association, by duly recorded covenant, may limit the number of housing units within the association that may be offered for rent by the owner to tenants.

RESPONSE

It is my opinion that if properly written, adopted and enforced, and authorized as to purpose and not in conflict with an association's declarations, bylaws or rules and regulations, a homeowners' association may covenant to limit the number of housing units within the association that may be offered for rent by the owner to tenants.

APPLICABLE LAW AND DISCUSSION

The relationship between a homeowners' association and a homeowner covered by its restrictions is contractual in nature.[1] In addition to principles of contract, the Virginia Property Owners' Association Act ("the Act") provides further restrictions on homeowners' associations in Virginia.[2] The Act does not contain any provisions relating to rental property. In general, the Act allows broad latitude for contracting parties and homeowners' associations to devise rules and restrictions governing the use of property.

Although the precise issue you raise has not been the subject of any published decisions in Virginia, in analyzing an analogous statute, the Condominium Act,[3] the Virginia Supreme Court has held that "[a] condominium restriction or limitation, reasonably related to a legitimate purpose, does not inherently violate a fundamental right and may be enforced if it serves a legitimate purpose and is reasonably applied."[4] The Court further held

> that amendments to condominium restrictions, rules, and regulations should be measured by a standard of reasonableness, and that courts should refuse to enforce regulations that are found to be unreasonable. In doing so, inquiry must be made whether an association has acted within the scope of

> its authority as defined under the Condominium Act and by its own master deed and bylaws, and whether it has abused its discretion by promulgating arbitrary and capricious rules and regulations bearing no relation to the purposes of the condominium.[5]

The Court likely would apply similar principles in adjudicating amendments, restrictions, rules and regulations in cases involving homeowners' associations.

Restricting the rental of homes serves a number of legitimate interests, including preserving a sense of community and protecting property values. Virginia courts likely would uphold reasonable restrictions on the rental of homes by a homeowners' association, provided that such restrictions serve a legitimate purpose, comply with the association's own declarations, bylaws and rules and regulations, and comply with applicable laws in the way they are enforced. Whether a restriction is reasonable would be highly context specific, and may depend upon whether it was contained in the original restrictions or was the subject of an amendment to existing restrictions, and how draconian the rental restrictions are.[6]

CONCLUSION

Accordingly, it is my opinion that if properly written, adopted and enforced, and authorized as to purpose and not in conflict with an association's declarations, bylaws or rules and regulations, a homeowners' association may covenant to limit the number of housing units within the association that may be offered for rent by the owner to tenants.

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[1] Sully Station II Cmty. Ass'n v. Dye, 259 Va. 282, 284, 525 S.E.2d 555, 556 (2000). "Property owners associations and their members must abide by the corporation's governing documents. The governing documents constitute a contract collectively entered into by all the owners in the association." Farran v. Olde Belhaven Towne Owners Ass'n, 2010 Va. Cir. LEXIS 92, *7 (Fairfax Cir. Ct. 2010) (citations omitted).

[2] VA. CODE ANN. §§ 55-508 through 55-516.2 (2007 & Supp. 2010).

[3] VA. CODE ANN. §§ 55-79.39 through 55-79.103 (2007 & Supp. 2010).

[4] United Owners Ass'n of Buildamerica-1, A Condo. v. Gillman, 223 Va. 752, 768, 292 S.E.2d 378, 386 (1982).

[5] *Id.* at 223 Va. at 768–69, 292 S.E.2d at 386–87.

[6] *See* Harrison v. Sierra Dawn Estates Homeowners' Ass'n, 2010 Cal. App. Unpub. LEXIS 4736 (Cal. Ct. App. 2010) (upholding as reasonable an amendment to a homeowners' association's recorded covenant that imposed restriction on homeowners' right to rent their units); *but see* Kiekel v. Four Colonies Homes Ass'n, 162 P.3d 57 (Kan. Ct. App. 2007) (rejecting a bylaws restriction on rental of homes in a subdivision as void because the association's recorded declaration required an amendment to the declaration to impose property use restrictions).

OP. NO. 11-019

TAXATION: GENERAL PROVISIONS (LOCAL TAXES)

The limited authority found in § 58.1-3003 does not authorize a Commonwealth's Attorney to appeal to the Supreme Court of Virginia an order from a circuit court with respect to the imposition of taxes by a local governing body.

THE HONORABLE A. LEE ERVIN, ESQUIRE
COMMONWEALTH'S ATTORNEY OF AUGUSTA COUNTY
MARCH 18, 2011

ISSUE PRESENTED

You ask whether the Commonwealth's Attorney has the authority to appeal a ruling of the County Circuit Court to the Supreme Court of Virginia, when that ruling dismissed an appeal challenging the imposition of taxes by the Augusta County Board of Supervisors.

RESPONSE

It is my opinion that the limited authority found in § 58.1-3003 does not authorize a Commonwealth's Attorney to appeal to the Supreme Court of Virginia an order from a circuit court with respect to the imposition of taxes by a local governing body.

BACKGROUND

You relate that you are the Commonwealth's Attorney for Augusta County, which has a population in excess of 35,000. You report that, in 2010, you received a petition filed with your office pursuant to § 58.1-3003 of the *Code of Virginia*, which demanded that you appeal an order for the imposition of taxes that had been imposed by the Augusta County Board of Supervisors. You state that, in conformity with § 58.1-3003, you appealed this tax levy to the Augusta County Circuit Court. The attorney for Augusta County filed a demurrer requesting the dismissal of the appeal, and the Augusta County Circuit Court granted the demurrer and dismissed your appeal. You indicate that a request has been made that you appeal this ruling to the Supreme Court of Virginia.

APPLICABLE LAW AND DISCUSSION

The office of Commonwealth's Attorney is a constitutional office created pursuant to Article VII, § 4 of the Constitution of Virginia. The duties and compensation of such constitutional officers are prescribed by general law or special act.[1] Although the duties of the Commonwealth's Attorney principally involve the prosecution of crime,[2] the Code also imposes duties that are civil in nature.[3]

Section 58.1-3003 establishes such a duty. It requires a Commonwealth's Attorney to appeal a tax levied by a county to the circuit court "[i]f the attorney for the Commonwealth of any county is of the opinion that an order for imposition of taxes made by his governing body is illegal or if he receives a petition of one per centum of the registered voters of the county, but no fewer than fifty such voters, demanding that he appeal such order[.]"[4] No provision is made with regard to subsequent appeals to the Supreme Court of Virginia.

In this instance, the statutory command is limited to a filing in the circuit court. Certainly, the Commonwealth's Attorney is not *required* under the plain language of § 58.1-3003 to appeal an adverse decision from a circuit court. Whether the Commonwealth's Attorney *may* appeal is a closer question. A previous opinion from this office concluded that the General Assembly had not granted the Commonwealth's Attorney the authority to appeal from a decision to grant a concealed weapon permit application.[5] The court observed that the Commonwealth's Attorney's role was specifically delineated in the statute, and this did not include the authority to appeal. This Office concluded that "[h]ad the General Assembly intended to permit a Commonwealth's attorney to appeal the circuit court decision to grant a concealed weapon permit application, it could have done so in plain language."[6] I conclude in this specific context that the same reasoning applies. This conclusion accords with the modern conception of the role of the Commonwealth's Attorney, whose duties principally consist of representation of the Commonwealth in criminal cases and in certain civil matters that are closely related to criminal cases.

Finally, I note that § 8.01-670(1)(f) allows "any person" to "petition for an appeal to the Supreme Court if he believes himself aggrieved . . . [b]y any judgment in a controversy concerning . . . [t]he right of the Commonwealth, or a county, or municipal corporation to levy tolls or taxes . . . ." The Commonwealth's Attorney is not an aggrieved party in this situation. Rather, the taxpayers who are aggrieved may appeal to the Supreme Court of Virginia at their own initiative and expense.

CONCLUSION

Accordingly, it is my opinion that the limited authority found in § 58.1-3003 does not authorize a Commonwealth's Attorney to appeal an order from a circuit court with respect to the imposition of taxes by a governing body to the Supreme Court of Virginia.

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[1] *See* VA. CONST. art. VII, § 4. *See also* VA. CODE ANN. § 15.2-1600 (2008).

[2] *See* § 15.2-1627 (2008).

[3] *See* Kozmina v. Commonwealth, No. 092395, 2011 Va. LEXIS 53, at *5-6, n. 2 (March 4, 2011) (upholding authority of Commonwealth's Attorney to prosecute civil refusals and listing civil responsibilities of Commonwealth's Attorneys).

[4] VA. CODE ANN. § 58.1-3003 (2009).

[5] 1995 Op. Va. Att'y Gen. 123, 126.

[6] *Id*.

OP. NO. 10-110

TAXATION: LICENSE TAXES

Persons engaged in the production and operation of severing gas from the earth not in connection with coal mining may take certain deductions when the sale occurs at a

point outside the county or city where the gas was extracted and the producer has incurred additional expenses for the gas to reach its destination.

TAXATION: LOCAL OFFICERS – COMMISSIONERS OF THE REVENUE

Commissioners of the Revenue are authorized to perform audits in connection with their duty to assess license taxes.

THE HONORABLE EMMA N. HAGY
COMMISSIONER OF THE REVENUE, TAZEWELL COUNTY
AUGUST 5, 2011

ISSUES PRESENTED

You ask whether § 58.1-3712, which authorizes localities to impose a license tax on gas producers,[1] permits a taxpayer to deduct expenses and production costs from the gross receipts upon which the tax is imposed, when the receipts are for gas produced by means not in connection with coal mining. You also inquire regarding the scope of the Commissioner's ability to conduct audits relating to the collection of severance taxes authorized under § 58.1-3712.

RESPONSE

It is my opinion that § 58.1-3712 allows persons engaged in the production and operation of severing gas from the earth not in connection with coal mining to take certain deductions when the sale occurs at a point outside the county or city where the gas was extracted and the producer has incurred additional expenses for the gas to reach its destination. Those deductions might include, but are not limited to, depreciation, compression, maintenance, transportation fees, and personal property taxes; however, persons who are engaged in the production and operation of severing gas from the earth in connection with coal mining may not take such deductions. It further is my opinion that Commissioners of the Revenue are authorized to perform audits in connection with their duty to assess license taxes.

APPLICABLE LAW AND DISCUSSION

Section 58.1-3712 provides in relevant part that

> [t]he governing body of any county or city may levy a license tax on every person engaging in the business of severing coal or gases from the earth. Such tax shall be at a rate not to exceed one percent of the gross receipts from the sale of coal or gases severed within such county. Such gross receipts shall be the fair market value measured at the time such coal or gases are utilized or sold for utilization in such county or city or at the time they are placed in transit for shipment therefrom . . . . In calculating the fair market value, no person engaging in the production and operation of severing gases from the earth in connection with coal mining shall be allowed to take deductions, including but not limited to, depreciation, compression, marketing fees, overhead, maintenance, transportation fees, and personal property taxes.

One difficulty in analyzing this statute is that while it calls for a tax upon "gross receipts," the statute further provides that "gross receipts shall be the fair market value measured at the time such coal or gases are utilized or sold for utilization in such county or city or at the time they are placed in transit for shipment therefrom." The statute calls for the gross receipts to be valued "at the time" the gases are used or sold locally, or placed in transit.

This Office has opined that under this section, gross receipts may be measured at "two distinct times." These are either

> (1) when the coal [or gas] is used or sold for use within the taxing locality; or (2) when the coal [or gas] is placed in transit for shipment from the taxing locality. The use of the disjunctive indicates that two separate alternatives were intended . . . . Section 58.1-3712 thus contemplates that coal [or gas] will be either used or sold for use in the taxing locality or exported for sale in another jurisdiction. In the latter event, the fair market value for purposes of determining gross receipts is measured at the time the coal [or gas] is placed in shipment . . . . and should not include value added by the processing of the coal [or gas] in [another jurisdiction].[2]

Relying on this opinion, the Tax Commissioner has opined that although the term "gross receipts" generally does not contemplate deductions, that is not the case with respect to § 58.1-3712.[3] According to the Tax Commissioner, when the gases "severed by the taxpayer are [not] used or sold for use within the County, they must be valued when they are placed in transit for shipment."[4] Examining gases that were placed in transit for shipment at the wellhead, the Tax Commissioner concluded that the gases should be valued at the wellhead.[5] Clearly, no deductions may be taken for expenses incurred up to that point. As such,

> Gross receipts from sale may be used as a starting point when determining the value of the gases at the time they are placed in transit for shipment. Expenditures, however, which represent value added to the gases at, and subsequent to, the time they are placed in transit for shipment must be deducted. Such expenses may include processing, transportation and marketing expenses.[6]

Accordingly, if a sale takes place outside the County, the "gross receipts" received by the gas producer will be attributable in part to certain costs sustained after the point in time designated by the statute for valuation. To illustrate, suppose that gas originating in Virginia is sold in Tennessee. If the gas extractor incurs additional expenses after the gases are placed in transit, those expenses can be deducted.[7]

In 2002, after the opinions of this Office and of the Tax Commissioner had been issued, the General Assembly, in an act "declaratory of existing law[,]" added to § 58.1-3712 language providing that "no person engaging in the production and operation of severing gases from the earth *in connection with coal mining* shall be allowed to take deductions, including but not limited to, depreciation, compression, marketing fees, overhead, maintenance, transportation fees, and personal property taxes."[8] This enactment suggests that the General Assembly accepted the opinions

from the Tax Commissioner and the Attorney General,[9] but further provided that permissible deductions would be limited to those persons who are engaged in the production and operation of severing gases from the earth and who are doing so in a manner not in connection with coal mining.

In sum, persons who are engaged in the production and operation of severing gases from the earth and who do so not in connection with coal mining may take deductions, where appropriate, for among other things, "depreciation, compression, marketing fees, overhead, maintenance, transportation fees, and personal property taxes." Such deductions, however, are available only for expenses incurred *after* the gas was used or sold for use within the taxing locality or *after* it is placed in transit for shipment from the taxing locality. The point is to determine what the fair market value of the gas was before it was shipped outside of the locality.[10]

Turning to your inquiry regarding the ability of the Commissioner to conduct audits relating to the collection of severance taxes authorized under § 58.1-3712, I note that, while subsection (C) provides that "[a]ny county or city enacting a license tax under this section may require producers of coal or gas and common carriers to maintain records and file reports showing the quantities of and receipts from coal or gases which they have produced or transported[,]" it does not directly address audits. Neither its plain text nor any implication limits the ability of a Commissioner to perform an audit. Rather, this subsection makes express that a when a locality chooses to levy the license tax on the extraction of coal or gas, the locality may also require companies to maintain records regarding quantities and receipts relating to the production or transportation of the gas or coal.

Nevertheless, the Commissioner, who is charged with assessing license taxes,[11] is free to audit taxpayers who pay the license tax and to seek any necessary documentation in connection with deductions.[12] Indeed, the Commissioner is directed to require taxpayers "to furnish access to books of account or other papers and records for the purpose of verifying the tax returns of such taxpayers and procuring the information necessary to make complete assessment of any taxpayer's . . . license taxes[.]"[13]

CONCLUSION

Accordingly, it is my opinion that that § 58.1-3712 allows persons engaged in the production and operation of severing gas from the earth not in connection with coal mining to take certain deductions when the sale occurs at a point outside the county or city where the gas was extracted and the producer has incurred additional expenses for the gas to reach its destination. Those deductions might include, but are not limited to, depreciation, compression, maintenance, transportation fees, and personal property taxes; however, persons who are engaged in the production and operation of severing gas from the earth in connection with coal mining may not take such deductions. It further is my opinion that Commissioners of the Revenue are authorized to perform audits in connection with their duty to assess license taxes.

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[1] The license tax contemplated in § 58.1-3712(A) is for coal or gases. Your question concerns gases only.

[2] 1990 Op. Va. Att'y Gen. 223, 224.

[3] Ruling of the Tax Comm'r, No. 99-306 (November 29, 1999). *See* VA. CODE ANN. § 58.1-3700.1 (Supp. 2011) (providing definition of "gross receipts"). I note that "the Commissioner's construction of a tax statute, while not binding upon [a] Court, is entitled to great weight." *See, e.g.,* Dep't of Taxation v. Wellmore Coal Corp., 228 Va. 149, 154, 320 S.E.2d 509, 511 (1984).

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] As a general proposition, I further note that a locality is entitled to impose license taxes only on those receipts based on business activity conducted within its jurisdiction. *See* § 58.1-3708(B) (2009). *See also* §§58.1-3732(A); 58.1-3732(B)(2) (2009).

[8] 2002 Va. Acts ch. 433 (emphasis added).

[9] *See* 2010 Op. Va. Att'y Gen. 7, 10 n. 13 and citations therein.

[10] I agree that the plain language of the statute contemplates that gross receipts tax is to be based on the fair market value of the gas, and not necessarily whatever amount the company received for the gas. I assume that, ordinarily, the price the company received for the gas is, in fact, its fair market value. Should a gas producer sell below market to a subsidiary in an effort to reduce its tax bill, the price would not represent the fair market value of the gas. Likewise, the price paid by an out-of-state buyer who must pay for the value added by subsequent transportation or processing costs, for example, would not reflect the fair market value of the gas at the time required by the statute.

[11] Sections 58.1-3101 (2009); 58.1-3109(1), (2) (2009).

[12] For example, in Clinchfield Coal Co. v. Robbins, 261 Va. 12, 541 S.E.2d 298 (2001), the Supreme Court of Virginia concluded that a Commissioner of the Revenue lacked the authority to hire an accounting firm as an outside contractor to audit coal severance taxes, but all parties and the Court took as a given that the Commissioner himself could perform the audit of taxes assessed under § 58.1-3712(A).

[13] Section 58.1-3109(6).

OP. NO. 11-017

TAXATION: REAL PROPERTY TAX

Legislation exempting from taxation the real property of certain veterans would not apply to payments due for the tax year that began on July 1, 2010, including payments due for the second half of the tax year.

THE HONORABLE ROSS A. MUGLER
COMMISSIONER OF THE REVENUE, CITY OF HAMPTON
MARCH 2, 2011

ISSUES PRESENTED

You inquire whether two bills exempting property for disabled veterans "for tax years beginning on or after January 1, 2011," each containing an emergency enactment clause, would apply to the tax bill due in your locality on June 5, 2011, and which tax bill is assessed for the second half of the tax year that began on July 1, 2010.

RESPONSE

It is my opinion that, were it to become law, the exemption at issue would not apply to payments due for the tax year that began on July 1, 2010, including payments due for the second half of the tax year.

BACKGROUND

House Bill 1645 and Senate Bill 987 would amend the *Code of Virginia* to exempt from taxation the real property of a veteran who has "a 100 percent service-connected, permanent, and total disability, and who occupies the real property as his principal place of residence." The bills provide that the exemption would apply "for tax years beginning on or after January 1, 2011." The proposed legislation contains an emergency enactment clause, meaning that the proposal would become law from the time of its passage.

APPLICABLE LAW AND DISCUSSION

Although the proposed legislation would go into effect immediately upon approval by the General Assembly and the Governor due to its emergency enactment clause, by its plain language the law would apply only to "tax years beginning on or after January 1, 2011." The proposed legislation would not apply to a tax year that began before January 1, 2011. You relate that the tax year for the City of Hampton begins on July 1. Therefore, the current tax year began on July 1, 2010, and the proposals by their plain terms would not apply until the following tax year, *i.e.* a tax year that began "on or after January 1, 2011." The fact that there are two payments made during the course of the tax year does not alter the fact that the tax year began before January 1, 2011. Therefore, I conclude that the second half of the bill for real property of disabled veterans that will come due on June 5, 2011 would not be subject to the exemption until the following tax year.

CONCLUSION

Accordingly, it is my opinion that, were it to become law, the exemption at issue would not apply to payments due for the tax year that began on July 1, 2010, including payments due for the second half of the tax year.

OP. NO. 11-061

TAXATION: REAL PROPERTY TAX

CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE

Several questions in connection with Article X, § 6-A of the Virginia Constitution and the legislation implementing that provision, providing exemption for certain veterans.

THE HONORABLE LINDA T. PULLER
THE HONORABLE STEPHEN D. NEWMAN
MEMBERS, SENATE OF VIRGINIA

THE HONORABLE JOHN M. O'BANNON, III, M.D.
THE HONORABLE L. SCOTT LINGAMFELTER
MEMBERS, HOUSE OF DELEGATES
JULY 15, 2011

ISSUES PRESENTED

You ask several questions in connection with Article X, § 6-A of the Virginia Constitution and the legislation implementing that provision.

1. You ask what are the effective dates of Article X, § 6-A, as approved by the voters on November 2, 2010, and §§ 58.1-3219.5 and 58.1-3219.6, and whether the legal effect of these provisions may be applied retroactively;

2. You ask whether a surviving spouse who was married to an eligible veteran qualifies for the tax exemption when the veteran died before the effective date of the tax exemption;

3. You ask whether the provisions of §§ 58.1-3219.5 and 58.1-3219.6 apply to otherwise qualifying veterans who die before the effective date of these provisions, and their spouses who have not remarried and continue to occupy the real property as their principal place of residence;

4. You ask whether the provisions of Article X, § 6-A, approved by the voters on November 2, 2010, and §§ 58.1-3219.5 and 58.1-3219.6 apply to veterans rated by the U.S. Department of Veterans Affairs ("VA") with a total disability rating on the basis of individual unemployability due to service-connected disability;

5. You inquire regarding the identity of the correct official in the Commonwealth who has responsibility for interpreting and implementing §§ 58.1-3219.5 and 58.1-3219.6;

6. You ask whether the General Assembly may enact legislation authorizing the Commissioner of the Virginia Department of Veterans Services ("VDVS") to promulgate rules and regulations governing the administration and/or implementation of this tax exemption;

7. You ask whether the General Assembly has the authority to enact the provision in § 58.1-3219.5 that restricts the tax exemption to land not exceeding one acre in size;

8. You ask for a definition of the term "real property" and whether such term includes just the dwelling on the land occupied by the veteran or includes both the dwelling and the land;

9. You ask whether the tax exemption is a "program" within the meaning of § 2.2-2001(A) and (C);

10. You ask whether a legal means exists to extend the tax exemption to the surviving spouse of a veteran who was rated to have a 100 percent service-connected, permanent, and total disability but died before the exemption's effective date;

11. You ask whether the tax exemption applies to real property that the veteran occupies as his or her principal residence but that the veteran has chosen to place title in i) a revocable inter vivos trust with the spouse; ii) a revocable inter vivos trust with other(s) than the spouse; or iii) an irrevocable trust; and

12. You ask whether the tax exemption applies exclusively to the real property owned at the time of death by the veteran who qualified for the tax exemption or whether it follows the spouse if he or she decides to relocate.

RESPONSE

It is my opinion that:

1. The effective date of Article X, § 6-A as approved by the voters on November 2, 2010, is January 1, 2011. The effective date of §§ 58.1-3219.5 and 58.1-3219.6 is April 6, 2011, and the legal effect of the statutory provisions must be applied retroactively to January 1, 2011;

2. The surviving spouse of a veteran who dies before the January 1, 2011 effective date of the tax exemption does not qualify for this exemption;

3. The provisions of §§ 58.1-3219.5 and 58.1-3219.6 do not apply to either veterans who die before the effective date of these provisions or their spouses who have not remarried and continue to occupy the real property as their principal place of residence;

4. The tax exemption applies to veterans rated by the VA with a total disability rating on the basis of individual unemployability due to a service-connected disability which rating revolves around the inability to engage in substantially gainful employment;

5. The commissioner of the revenue has the responsibility for interpreting and implementing §§ 58.1-3219.5 and 58.1-3219.6;

6. The General Assembly may enact legislation authorizing the Commissioner of VDVS to promulgate rules and regulations governing the administration and/or implementation of this tax exemption;

7. The General Assembly has the authority to limit the tax break to land that does not exceed one acre;

8. Within the context of Article X, § 6-A and §§ 58.1-3219.5 and 58.1-3219.6, the definition of "real property" includes both the dwelling and the land;

9. The tax exemption is not a "program" within the meaning of § 2.2-2001(A) and (C);

10. There is no legal authority to provide the real property tax exemption to the surviving spouse of a veteran who was rated to have a 100 percent service-connected, permanent, and total disability but died before January 1, 2011;

11. The tax relief under Article X, § 6-A, as implemented by §§ 58.1-3219.5 and 58.1-3219.6, is not available when the veteran has chosen to place title to the real estate in i) a revocable inter vivos trust with the spouse; ii) a revocable inter vivos trust with other(s) apart from the spouse; or iii) an irrevocable trust; and

12. The exemption is exclusive to the property for which the veteran qualified and occupied as his or her principal place of residence at the time of death, and does not follow the spouse if he or she relocates.

BACKGROUND

At the general election held on November 2, 2010, the voters of the Commonwealth were presented the following referendum question related to amending the Constitution of Virginia:

> Shall the Constitution be amended to require the General Assembly to provide a real property tax exemption for the principal residence of a veteran, or his or her surviving spouse, if the veteran has a 100 percent service-connected, permanent, and total disability?[1]

With 82.4 percent of the voters answering the question in the affirmative,[2] Article X is now amended to include a new § 6-A, which provides that:

> Notwithstanding the provisions of Section 6, the General Assembly by general law, and within the restrictions and conditions prescribed therein, shall exempt from taxation the real property, including the joint real property of husband and wife, of any veteran who has been determined by the United States Department of Veterans Affairs or its successor agency pursuant to federal law to have a one hundred percent service-connected, permanent, and total disability, and who occupies the real property as his or her principal place of residence. The General Assembly shall also provide this exemption from taxation for real property owned by the surviving spouse of a veteran who was eligible for the exemption provided in this section, so long as the surviving spouse does not remarry and continues the real property as his or her principal place of residence.[3]

As a result of the passage of this referendum question, the 2011 Session of the General Assembly enacted legislation to implement this real property tax exemption, adding in Chapter 32 of Title 58.1, a new Article 2.3, consisting of §§ 58.1-3219.5 and 58.1-3219.6.[4]

As detailed in the United States Department of Veterans Affairs ("VA") booklet "Federal Benefits for Veterans, Dependants and Survivors,"[5] the VA pays monthly compensation benefits for disabilities incurred or aggravated during active military service. When the VA grants a veteran's claim, it awards a service-connected disability rating that determines the dollar amount of monthly compensation payments. When rating a service-connected disability, a VA adjudicator reviews the medical evidence, finds the appropriate diagnostic code, compares the clinical evidence of the severity of the veteran's current symptoms with the list of symptoms for that diagnostic code, and assigns the rating percentage that corresponds to the selected severity of symptoms. The VA pays the same dollar amount for each percentage level regardless of the nature of the veteran's disability. For example, the monthly payment for a ten percent rating will be the same for a psychiatric disorder, diabetes, heart condition, etc. The same applies to 20 to 100 percent ratings.

The VA uses a schedule of rating disabilities when it determines the level of a veteran's service-connected disability. The rating schedule is essentially a listing of diseases and disorders, categorized by body systems, that includes symptoms for each disease or disorder in an increasing order of severity. Percentages of disability are assigned to each level of symptoms from zero (non-compensable disabling) to one-hundred percent (totally disabling) in ten percent increments. The criteria for many VA 100 percent disability ratings includes a requirement that the veteran not be able to get or keep a job because of that disability.

In instances where the service-connected disability rating is not 100 percent, VA benefits nonetheless may be available to compensate the veteran at the 100 percent level if the veteran is unable to work because of his or her service-connected disability/disabilities. This benefit is called a total ("100 percent") rating on the basis of individual unemployability due to service-connected disability and is also referred to as total disability based upon individual unemployability ("TDIU" or "IU"). It revolves around to the inability to engage in "substantially gainful employment," which means the ability to earn at least an amount equal to the annual poverty level set by the federal government.

TDIU or IU is a part of the VA's disability compensation program that allows the VA to pay certain veterans compensation at the 100 percent rate, even though the VA has not rated their service-connected disabilities at the 100 percent level. To qualify, a veteran must be "unable to secure or follow substantially gainful employment as a result of service-connected disabilities."[6] A veteran also must have either 1) one service-connected disability ratable at sixty percent or more, or 2) two or more service-connected disabilities, at least one disability ratable at forty percent or more with a combined rating of seventy percent or more.[7]

Notwithstanding these criteria, a veteran, upon special consideration of extra-schedular factors, still may qualify as totally disabled when the veteran is considered unemployable due to a service-connected disability(ies), but fails to meet the minimum percentage standards.[8]

APPLICABLE LAW AND DISCUSSION

I. Effective Date and Retroactivity

You first inquire regarding the effective date of Article X, § 6-A as approved by the voters on November 2, 2010, and of chapters 769 and 840 of the 2011 Acts of Assembly that added §§ 58.1-3219.5 and 58.1-3219.6. You ask when each of these provisions became the law of the Commonwealth and whether the legal effect of these provisions applies retroactively.

Article XII, § 1 specifies the procedure for amending the Constitution of Virginia. When a proposed amendment to the Constitution is approved by a majority of those voting at the election designated by the General Assembly for approval of a proposed amendment, that amendment to the Constitution becomes effective on the date prescribed by the General Assembly.[9]

In its 2010 session, the General Assembly, through the passage of House Bill 149 and Senate Bill 31, directed that the proposed amendment adding § 6-A to Article X be submitted to the voters at the November 2, 2010, election.[10] The General Assembly further directed that "[i]f a majority of those voting vote in favor of the amendment, it shall become effective on January 1, 2011."[11] Because a majority of those voting on November 2, 2010 voted in favor of adding § 6-A to Article X of the Constitution, the provisions relating to a property tax exemption for certain veterans was a part of the Constitution on January 1, 2011.

Section 6-A required the General Assembly to exempt from taxation, by general law, "the real property, including the joint real property of husband and wife, of any veteran who has been determined by the United States Department of Veterans Affairs or its successor agency pursuant to federal law to have a one hundred percent service-connected, permanent, and total disability, and who occupies the real property as his or her principal place of residence." The addition of § 6-A to Article X was not self-executing because the amendment required further legislation from the General Assembly to make its provisions operative.[12] Adding § 6-A to Article X required the General Assembly to enact a general law exempting such veterans from real property taxation.

The general law enacted by the 2011 Session of the General Assembly to implement the provisions of § 6-A to Article X providing for the property tax exemption for certain veterans is contained in Chapters 769 and 840 of the 2011 Acts of Assembly.[13] Chapters 769 and 840 were signed into law by the Governor on April 6, 2011, and became effective immediately because both contained an emergency enactment clause.[14]

The Supreme Court of Virginia recognizes that "'[r]etrospective laws are not favored, and a statute is always to be construed as operating prospectively, unless a contrary intent is manifest.'"[15] The intent of the General Assembly is set forth in § 58.1-3219.5(A), which expressly provides that the exemption applies to tax years beginning on or after January 1, 2011. Furthermore, §§ 58.1-3219.5(B) and 58.1-

3219.6 specify that a surviving spouse of such a veteran qualifies for this real property tax exemption "so long as the death of the veteran occurs on or after January 1, 2011," and the surviving spouse provides documentation that the veteran's death occurred on or after January 1, 2011.

I, therefore, conclude that January 1, 2011, is the effective date of Article X, § 6-A of the Constitution of Virginia as approved by the voters on November 2, 2010. Chapters 769 and 840 of the 2011 Acts of Assembly (enacting §§ 58.1-3219.5 and 58.1-3219.6) became the law of the Commonwealth on April 6, 2011. The provisions of §§ 58.1-3219.5 and 58.1-3219.6 clearly and plainly apply to tax years beginning on or after January 1, 2011, and require that the veteran's death occur on or after January 1, 2011, for a spouse to claim the exemption.[16] Finally, the legal effect of these provisions applies retroactively to January 1, 2011.

II. Legal Effect on Surviving Spouse when Veteran Dies Prior to Effective Date

Your next question asks whether the surviving spouse of a veteran, who otherwise qualifies for the real property tax exemption, would qualify for the exemption when the eligible veteran died before the effective date of the exemption and the surviving spouse has not remarried and continues to occupy the real property as his or her principal place of residence.

Section 58.1-3219.5(B) expressly provides that "[t]he surviving spouse of a veteran eligible for the exemption . . . shall also qualify for the exemption, *so long as the death of the veteran occurs on or after January 1, 2011*" (emphasis added). Because statutes are to be interpreted according to their plain language,[17] I conclude that the exemption extends only to those spouses surviving a qualifying veteran who died on or after January 1, 2011, the effective date of the provision. Therefore, the surviving spouse of an otherwise qualifying veteran who dies before January 1, 2011 does not qualify for such an exemption, even when the surviving spouse has not remarried and continues to occupy the real property as his or her principal place of residence.

III. Whether §§ 58.1-3219.5 and 58.1-3219.6 Apply Retroactively

You next ask whether the provisions of §§ 58.1-3219.5 and 58.1-3219.6 apply to all qualifying veterans who die before the effective date of these provisions and their spouses who have not remarried and continue to occupy the real property as their principal place of residence.

Sections 58.1-3219.5 and 58.1-3219.6 went into effect on April 6, 2011. As I have previously stated, "'[r]etrospective laws are not favored, and a statute is always to be construed as operating prospectively, unless a contrary intent is manifest.'"[18] Sections 58.1-3219.5(A), (C), and 58.1-3219.6 expressly provide for retroactive application of these statutory provisions to January 1, 2011, so I must conclude that these provisions do not apply to veterans who died before January 1, 2011, or to their spouses. It is, therefore, necessary for a veteran to qualify for the exemption in the first instance in order for his or her spouse *also* to qualify for the exemption. For the

veteran to qualify for the exemption in the first instance, he or she must be rated by the VA pursuant to federal law to have a 100 percent service-connected, permanent, and total disability, *and* occupy the real property as his or her principal place of residence. Obviously, a veteran cannot occupy real property as his or her principal place of residence if he or she dies before the effective date of the real property tax exemption.

IV. Meaning of "100 Percent Service-connected, Permanent, and Total Disability"

You next ask whether Article X, § 6-A and §§ 58.1-3219.5 and 58.1-3219.6 apply to veterans rated by the VA with a total ("100 percent") disability rating on the basis of individual unemployability due to service-connected disability ("TDIU" or "IU"). This rating relates to the inability to engage in "substantially gainful employment," meaning a job that pays at least an amount equal to the annual poverty level set by the federal government.

The exemption is dependent on a rating by the VA, or its successor agency, indicating that, under federal law, a veteran has a 100 percent service-connected, permanent, and total disability. The constitutional amendment requires the General Assembly to grant the exemption from taxation on the real property "of any veteran who has been rated by the U.S. Department of Veterans Affairs or its successor agency pursuant to federal law to have a 100 percent service-connected, permanent, and total disability." Section 58.1-3219.5 contains the same language. The tax exemption is tethered to the VA's rating system.

The VA Schedule for Rating Disabilities[19] comprises ten grades of disability that are based on the average impairment of a veteran's occupational earning capacity.[20] Under the rating schedule, the highest grade of disability is 100 percent, which means that a veteran is totally disabled. Under the provisions of 38 C.F.R. § 4.16, however, a total disability rating may also be assigned by the VA where a person who fails to meet the schedular rating percentage is, nevertheless, unable to secure a substantially gainful occupation.[21] TDIU ratings consider the effect that service-connected disabilities have on a particular veteran's ability to work. Therefore, a total rating based on TDIU is more individualized than a schedular rating, which is based on the average impairment of earnings. In the case of *Norris v. West*,[22] the U.S. Court of Appeals for Veterans Claims found that a "'claim for TDIU is based on an acknowledgement that even though a rating less than 100% under the rating schedule may be correct, objectively, there are subjective factors that may permit *assigning a 100% rating* to a particular veteran under particular facts."[23] Therefore, a determination of the veteran's entitlement to TDIU is considered in the context of the individual veteran's capabilities regardless of whether an average person would be rendered unemployable under the same circumstances.

Given the VA policy providing that "all veterans who are unable to secure and follow a substantially gainful occupation by reason of service-connected disabilities shall be rated totally disabled[,]"[24] receiving a TDIU rating is simply "*an alternative way to*

obtain a total disability rating without being rated 100% disabled under the Rating Schedule."[25] Furthermore, the VA regulations provide that "[a]ll veterans who are basically eligible and who are unable to secure and follow a substantially gainful occupation by reasons of disabilities which are likely to be permanent shall be rated as permanently and totally disabled."[26] Accordingly, I conclude that the tax exemption extends to veterans rated by the VA with a total ("100 percent") disability rating on the basis of individual unemployability due to service-connected disability ("TDIU" or "IU").

It could be argued that the provisions of 38 C.F.R. § 4.16 apply only to total disability determinations based on the rating schedule. Article X, § 6-A to the Constitution and §§ 58.1-3219.5 and 58.1-3219.6, however, do not indicate for what reasons the 100 percent disability rating must be incurred other than that it must be service connected. Therefore, if a veteran receives a 100 percent service-connected, permanent, and total disability rating from the VA for any reason, the tax exemption will apply.[27]

V. Responsibility for Interpretation and Implementation

You next ask which official in the Commonwealth is responsible for interpreting and implementing the provisions of §§ 58.1-3219.5 and 58.1-3219.6 that execute the provisions of Article X, § 6-A.

The duties of commissioners of the revenue are set out specifically in Article 1, Chapter 31 of Title 58.1, §§ 58.1-3100 through 58.1-3122.2. Section 58.1-3107 provides that the local commissioner of the revenue "shall obtain . . . tax returns from every taxpayer within his jurisdiction who is liable . . . to file such return with him for all taxes assessed by his office." It is generally the duty of the commissioner of the revenue to assess property taxes.[28]

I am, therefore, of the opinion that the commissioner of the revenue, or local official performing the duties of a commissioner of the revenue, is the correct official in the Commonwealth with responsibility for interpreting and implementing the provisions of §§ 58.1-3219.5 and 58.1-3219.6 that execute the provisions of Article X, § 6-A.

VI. Ability of General Assembly to Pass Legislation Regarding Administration of Tax Exemption

You next ask whether the General Assembly may enact legislation that authorizes the Commissioner of VDVS to promulgate rules and regulations governing the administration and/or implementation of this tax exemption to include, but not be limited to, providing written guidance to the veterans residing in the Commonwealth, responding to requests for information regarding eligibility from veterans residing in the Commonwealth, and interpreting for the Commonwealth's veterans the provisions of Article X, § 6-A of the Constitution and §§ 58.1-3219.5 and 58.1-3219.6.

The Constitution does not grant power to the General Assembly; it only restricts power "otherwise practically unlimited."[29] Accordingly, "the General Assembly may enact any law not prohibited by the Constitution."[30] Because no constitutional

provision precludes such legislation, I conclude that the General Assembly authorize the Commissioner of VDVS to promulgate rules and regulations governing the administration and/or implementation of this tax exemption to include, but not be limited to, providing written guidance to the veterans residing in the Commonwealth, responding to requests for information regarding eligibility from veterans residing in the Commonwealth, and interpreting the provisions of Article X, § 6-A of the Constitution and §§ 58.1-3219.5 and 58.1-3219.6 for the veterans of the Commonwealth.[31]

VII. The General Assembly's Authority to Restrict Tax Exemption to Land Not Exceeding One Acre in Size

You note that § 58.1-3219.5(C) provides, in part, that "[a] county, city, or town shall provide for the exemption from real property taxes the qualifying dwelling pursuant to this section, and shall provide for the exemption from real property taxes the land, not exceeding one acre, upon which it is situated." You inquire regarding the authority of the General Assembly to impose the one-acre restriction.

The General Assembly of Virginia has plenary powers and may enact any law not prohibited by the United States Constitution or the Virginia Constitution.[32]

Article X, § 6-A requires the General Assembly to enact a general law exempting the real property used by a qualifying veteran and spouse "as his or her principal place of residence." The General Assembly did so by enacting § 58.1-3219.5(C) that requires a county, city or town to provide the real estate tax exemption for "the land, not exceeding one acre, upon which [the qualifying dwelling] is situated." The General Assembly further provided that, if a county, city, or town "provides for an exemption from or deferral of real property taxes of more than one acre of land [with regard to exemptions for the elderly or handicapped as authorized by Article 2 of Chapter 32], then the county, city, or town shall also provide an exemption for the same number of acres" pursuant to § 58.1-3219.5.[33] The General Assembly is clearly empowered to enact § 58.1-3219.5(C), and no provision of the Constitution prohibits enactment of an acreage limitation. In fact, Article X, § 6-A expressly grants to the General Assembly the authority to prescribe in general law the "restrictions and conditions" for the disabled veteran real property tax exemption. As noted above, Article X, § 6-A was not self-executing; the amendment required further action by the General Assembly to implement the exemption and to establish the restrictions and conditions for the same by general law.[34] Accordingly, it is my opinion that the General Assembly is authorized to limit the tax exemption for the land to one acre.

VIII. Meaning of "Real Property"

Within the context of Article X, § 6-A and §§ 58.1-3219.5 and 58.1-3219.6, you ask for a definition of the term "real property" and whether such term includes just the dwelling on the land occupied by the veteran, or includes both the dwelling and the land.

The General Assembly did not define the term "real property" in §§ 58.1-3219.5 and 58.1-3219.6. Therefore, unless a contrary legislative intent is manifest, words used in a statute must be given their common, ordinary, and accepted meanings in use at the time of the statute.[35] The term "real property" is generally defined to mean: "Land and anything growing on, attached to, or erected on it, excluding anything that may be severed without injury to the land. Real property can be either corporeal (soil and buildings) or incorporeal (easements)."[36] It includes land and things permanently attached to the land, such as trees, buildings, and stationary mobile homes.[37]

Therefore, I am of the opinion that the term "real property" in Article X, § 6-A and §§ 58.1-3219.5 and 58.1-3219.6 includes both the land and dwelling occupied by the veteran.

IX. Whether Tax Exemption is a "Program"

You next ask whether the tax exemption created by Article X, § 6-A, implemented by §§ 58.1-3219.5 and 58.1-3219.6, is a "program" within the meaning of § 2.2-2001(A) and (C).

Chapter 20 of Title 2.2, §§ 2.2-2000 through 2.2-2004.1, details the statutory authority of the VDVS. Section 2.2-2001 contains all of the administrative authority of VDVS to act. Specifically, § 2.2-2001(A) provides that

> The Department shall be responsible for the establishment, operation, administration, and maintenance of offices and programs related to services for Virginia-domiciled veterans of the armed forces of the United States and their eligible spouses, orphans, and dependents. Such services shall include, but not be limited to, benefits claims processing and all medical care centers and cemeteries for veterans owned and operated by the Commonwealth.

Additionally, § 2.2-2001(C) provides:

> The Department shall establish guidelines for the determination of eligibility for Virginia-domiciled veterans and their spouses, orphans, and dependents for participation in programs and benefits administered by the Department.

The General Assembly does not define the term "programs" as it is used in § 2.2-2001(A). Therefore, the word must be accorded its ordinary meaning.[38] The word "program" is generally defined as "a plan of procedure: a schedule or system under which action may be taken toward a desired goal."[39]

Neither the voter approval of Article X, § 6-A on November 2, 2010, nor the enactment of the legislation providing for the real property tax exemption constitutes a "program" as that word is used in § 2.2-2001(A). In addition, the amendment and subsequent legislation are clearly not programs or benefits under § 2.2-2001(C).

After the ballot question passed, the General Assembly enacted §§ 58.1-3219.5 and 58.1-3219.6, which do not direct or authorize the VDVS to interpret the provisions. Rather, § 58.1-3219.5(C) requires a county, city or town to provide for the exemption. Furthermore, § 58.1-3219.6 requires that one claiming the exemption file with the commissioner of the revenue of the county, city or town, forms supplied by the locality containing certain required information and documentation from the U.S. Department of Veterans Affairs reflecting that the veteran has a 100 percent service-connected, permanent, and total disability.

I am, therefore, of the opinion that the tax exemption created by Article X, § 6-A, implemented by §§ 58.1-3219.5 and 58.1-3219.6, is not a "program" within the meaning of § 2.2-2001(A) and (C).

X. Whether a Legal Means Exists to Extend Tax Exemption to Surviving Spouse of Veteran who Died Prior to January 1, 2011

Another question you ask is whether a legal means exists by which to extend this tax exemption to the surviving spouse of a veteran who was rated to have a 100 percent service-connected, permanent, and total disability but died before the January 1, 2011, effective date of Article X, § 6-A and §§ 58.1-3219.5 and 58.1-3219.6.

The Constitution of Virginia requires the taxation of all property, except as specifically excluded therein.[40] Therefore, although the General Assembly generally "possesses all legislative power not prohibited to it,"[41] the legislature may not adopt a measure providing for tax exemptions unless expressly authorized to do so by the Constitution. In the absence of the amendment adding Article X, § 6-A, therefore, the General Assembly would have been precluded from providing the real estate tax exemption contained in § 58.1-3219.5. As such, Article X, § 6-A provides an exception to the requirement that all property be taxed.

This exception, however, is confined to the express provisions of the amendment. Article X, § 6-A confers authority upon the General Assembly to extend the real estate tax provision to surviving spouses of eligible veterans. To be eligible, the veteran must "occup[y] the real property as his or her principal place of residence." Veterans who predecease the effective date of the statute are ineligible for the tax relief because they cannot "occupy" the property, so in turn, their surviving spouses also are ineligible.

Article X, § 6-A does not permit the legislature to enact any additional legislation to further exempt surviving spouses of veterans who passed away prior to the effective date. Therefore, it is my opinion that there is no way, short of another constitutional amendment, to provide to the surviving spouse of such deceased veterans the real property tax exemption.

XI. Whether Tax Exemption Applies to Real Property Titled in a Trust

Another question relating to the tax exemption is whether these provisions apply to real property that is i) titled in a revocable inter vivos trust with the spouse; ii) titled

in a revocable inter vivos trust with other(s) than the spouse; or iii) titled in an irrevocable trust.

Under Virginia law, a person (the settlor) may create a trust by transferring property to another person as trustee.[42] When real property is involved, the transfer typically takes the form of a recorded deed of conveyance to the trustee. In the context of local property taxes, the Code provides that "[i]f the property is held in trust for the benefit of another, it shall be listed by and taxed to the trustee, if there is any in this Commonwealth, and if there is no trustee in this Commonwealth, it shall be listed by and taxed to the beneficiary."[43]

Prior opinions of the Attorney General have strictly construed eligibility for the property tax exemption allowed under Article X, § 6(b) and § 58.1-3210 for certain persons who are at least sixty-five years of age or permanently and totally disabled when ownership of the property is not directly or solely held by the person who otherwise might qualify for the tax benefit.[44] It is worth noting that the tax exemption of Article X, § 6-A uses broader language than that found in Article X, § 6(b). The former applies the exemption to "the real property, including the joint real property of husband and wife, of any veteran" whereas the latter applies its exemption to "real estate and personal property . . . *owned by*, and occupied as the sole dwelling of, persons not less than sixty-five years of age." [Emphasis added.] This distinction in language, however, at most leaves some ambiguity as to the question whether a property held in trust might qualify for the Article X, § 6-A exemption.

As the Supreme Court of Virginia has articulated, however:

> The Constitution of Virginia, as revised in 1971, provides that "[e]xemptions of property from taxation . . . shall be strictly construed." This rule of strict construction stems from the Commonwealth's announced policy "to distribute the tax burden uniformly and upon all property." Therefore, statutes granting tax exemptions are construed strictly against the taxpayer, and "[w]hen a tax statute is susceptible of two constructions, one granting an exemption and the other not granting it, courts adopt the construction which denies the exemption." Indeed, "where there is any doubt, the doubt is resolved against the one claiming exemption," and "to doubt an exemption is to deny it."[45]

In light of this rule of strict construction, such an ambiguity will be resolved against eligibility, and the outcome is the same.

In pertinent part § 58.1-3219.5(A) provides:

> [T]he General Assembly hereby exempts from taxation the real property, including the joint real property of husband and wife, of any veteran who has been rated . . . pursuant to federal law to have a 100 percent service-connected, permanent, and total disability, and who occupies the real property as his principal place of residence.

Section 58.1-1 defines a "taxpayer" as "every person, corporation, partnership, organization, *trust* or estate subject to taxation under the laws of this Commonwealth, or under the ordinances, resolutions or orders of any county, city, town or other political subdivision of this Commonwealth." (Emphasis added.) Section 58.1-3281 makes it clear that the "taxpayer" assessed with real property taxes is the person or entity that owned the property on January 1 of the tax year.

Consequently, the specific exemption created by Article X, § 6-A and implemented by §§ 58.1-3219.5 and 58.1-3219.6 extends to the "taxpayer" assessed with real property taxes who is also the person or entity that owned the property on January 1 of the tax year. Article X, § 6-A includes in this exemption "joint real property of husband and wife." If this exemption had been intended to apply to situations where real property is owned by a revocable inter vivos trust with a spouse, a revocable inter vivos trust with other(s) than the spouse, or an irrevocable trust, the General Assembly would have so provided in the question submitted to the voters on November 2, 2010, just as it did for joint ownership by husbands and wives. The statutory maxim of *expressio unius est exclusio alterius* "provides that mention of a specific item in a statute implies that omitted terms were not intended to be included within the scope of the statute."[46]

Therefore, I am of the opinion that the relief afforded pursuant to Article X, § 6-A, as implemented by §§ 58.1-3219.5 and 58.1-3219.6, is not available when the real estate is i) titled in a revocable inter vivos trust with the spouse; ii) titled in a revocable inter vivos trust with other(s) than the spouse; or iii) titled in an irrevocable trust. As with extending the exemption to spouses who survive veterans who died before the effective date, another constitutional amendment would be needed to provide taw relief for properties held in trust.

XII. Whether Tax Exemption is Exclusive to the Property Owned by the Qualifying Veteran or Whether Exemption Follows the Spouse if He or She Relocates

You relate a concern regarding a spouse's eligibility for the property tax exemption subsequent to the death of the veteran who qualified for the exemption. You specifically inquire whether the real property tax exemption created by Article X, § 6-A, as implemented by §§ 58.1-3219.5 and 58.1-3219.6, is exclusive to the property the veteran occupied at the time of death or whether the exemption follows the spouse if he or she relocates.

You seek explanation of whether the word "property" in this context refers to the *specific* property which was initially granted the property tax exemption or is it defined as a general term used to describe any principal place of residence owned by the spouse. Section 58.1-3219.5(B) provides that a veteran's spouse remains eligible provided that "the death of the veteran occurs on or after January 1, 2011, the surviving spouse does not remarry, and the surviving spouse continues to occupy the real property as his principal place of residence."

The words "continues to occupy the real property" must be strictly construed.[47] When the surviving spouse of a veteran who qualified for the tax exemption moves to a new property, she does not "continue[] to occupy the real property" that was exempt.

Therefore, I must also conclude that the real property tax exemption created by Article X, § 6-A, as implemented by §§ 58.1-3219.5 and 58.1-3219.6, is exclusive to the property the veteran qualified for and occupied as his or her principal place of residence at the time of death, and does not follow the spouse if he or she decides to relocate.

CONCLUSION

Accordingly, it is my opinion that:

1. The effective date of Article X, § 6-A as approved by the voters on November 2, 2010, is January 1, 2011. The effective date of §§ 58.1-3219.5 and 58.1-3219.6 is April 6, 2011, and the legal effect of the statutory provisions must be applied retroactively to January 1, 2011;

2. The surviving spouse of a veteran who dies before the January 1, 2011, effective date of the tax exemption does not qualify for this exemption;

3. The provisions of §§ 58.1-3219.5 and 58.1-3219.6 do not apply to either veterans who die before the effective date of these provisions or their spouses who have not remarried and continue to occupy the real property as their principal place of residence;

4. The tax exemption applies to veterans rated by the VA with a total disability rating on the basis of individual unemployability due to a service-connected disability which rating revolves around the inability to engage in substantially gainful employment;

5. The commissioner of the revenue has the responsibility for interpreting and implementing §§ 58.1-3219.5 and 58.1-3219.6;

6. The General Assembly may enact legislation authorizing the Commissioner of VDVS to promulgate rules and regulations governing the administration and/or implementation of this tax exemption;

7. The General Assembly has the authority to limit the tax break to land that does not exceed one acre;

8. Within the context of Article X, § 6-A and §§ 58.1-3219.5 and 58.1-3219.6, the definition of "real property" includes both the dwelling and the land;

9. The tax exemption is not a "program" within the meaning of § 2.2-2001(A) and (C);

10. There is no legal authority to provide the real property tax exemption to the surviving spouse of a veteran who was rated to have a 100 percent service connected, permanent, and total disability but died before January 1, 2011;

11. The tax relief under Article X, § 6-A, as implemented by §§ 58.1-3219.5 and 58.1-3219.6, is not available when the veteran has chosen to place title to the real estate in i) a revocable inter vivos trust with the spouse; ii) a revocable inter vivos trust with other(s) apart from the spouse; or iii) an irrevocable trust; and

12. The exemption is exclusive to the property for which the veteran qualified and occupied as his or her principal place of residence at the time of death, and does not follow the spouse if he or she relocates.

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[1] *See* 2010 Va. Acts chs. 358, 588.

[2] *See* VIRGINIA STATE BOARD OF ELECTIONS, NOVEMBER 2, 2010 GENERAL AND SPECIAL ELECTIONS OFFICIAL RESULTS, *available at* https://www.voterinfo.sbe.virginia.gov/election/DATA/2010/EB24720D-F5C6-4880-8DC5-12AE4D0C3772/official/9_s.shtml.

[3] *See* 2010 Va. Acts chs. 358, 588.

[4] *See* 2011 Va. Acts chs. 769, 840.

[5] *See* U.S DEP'T OF VETERANS AFFAIRS, FEDERAL BENEFITS FOR VETERANS, DEPENDANTS AND SURVIVORS (2011), *available at* www.va.gov/opa/publications/benefits_book.asp. The details of the administration of VA disability benefits can be found in the *Code of Federal Regulations*. *See* 38 C.F.R. Part 4.

[6] 38 C.F.R. 4.16(a) (2010).

[7] *Id*.

[8] *Id.* at § 4.16(b).

[9] VA. CONST. art. XII, § 1. Note that strict compliance with the prerequisites of Article XII, § 1 is required in order to amend effectively the Constitution. *See* Coleman v. Pross, 219 Va. 143, 246 S.E.2d 613 (1978) (holding that where proposed amendments approved at 1978 Session of the General Assembly were not the same as the proposed amendments approved at 1977 session, there was not strict compliance with Article XII, § 1).

[10] *See* 2010 Va. Acts chs. 358, 588.

[11] *Id.*

[12] *See* Gray v. Virginia Sec'y of Transp., 276 Va. 93, 103, 662 S.E.2d 66, 71 (2008) ("If a constitutional provision is self-executing, no further legislation is required to make it operative"). *See also* Robb v. Shockoe Slip Found., 228 Va. 678, 681-82, 324 S.E.2d 674, 676 (1985) (explaining how to determine whether a constitutional provision is self-executing).

[13] 2011 Va. Acts chs. 769, 840 (adding §§ 58.1-3219.5 and 58.1-3219.6 to Chapter 32 of Title 58.1, relating to real property tax).

[14] "All laws enacted at a regular session . . . shall take effect on the first day of July following the adjournment of the session of the General Assembly at which it has been enacted . . . unless in the case of an emergency (which emergency shall be expressed in the body of the bill) the General Assembly shall specify an earlier date." VA. CONST. art. IV, § 13.

[15] Adams v. Alliant Techsystems, Inc., 261 Va. 594, 599, 544 S.E.2d 354, 356 (2001) (quoting Duffy v. Hartsock, 187 Va. 406, 419, 46 S.E.2d 570, 576 (1948)) (other citation omitted).

[16] "When the language in a statute is clear and unambiguous, [courts] apply the statute according to its plain language." Va. Polytechnic Inst. & State Univ. v. Interactive Return Serv., 271 Va. 304, 309, 262 S.E.2d 436, 438 (2008) (citing HCA Health Servs. v. Levin, 260 Va. 215, 220, 530 S.E. 2d 417, 419-20 (2000)).

[17] *See, e.g.,* Signal Corp. v. Keane Fed. Sys., Inc., 265 Va. 38, 46-47; 574 S.E.2d 253, 257 (2003) (also noting that "[courts] are not are not free to add language, nor to ignore language, contained in statutes.")

[18] *Duffy*, 187 Va. at 419, 46 S.E.2d at 576 (citing Whitlock v. Hawkins, 105 Va. 242, 249, 53 S.E. 401, 403 (1906)).

[19] *See* 38 C.F.R. pt. 4 (2010).

[20] *See* 38 C.F.R. §§ 4.15, 4.25 (2010).

[21] *See* 38 C.F.R. § 4.16(a) (2010).

[22] 12 Vet. App. 413 (1999).

[23] *Id.* at 421 (quoting Parker v. Brown, 7 Vet. App. 116, 118 (1994)) (emphasis added).

[24] 38 C.F.R. § 4.16(b).

[25] 12 Vet App. at 420-21 (emphasis added).

[26] *See* 38 C.F.R. § 4.17 (2010).

[27] I note that other states' Attorneys General have come to the same conclusion with respect to similar statutes. *See* 1976 Op. Md. Att'y Gen. 836; 2009 Op. Ark. Att'y Gen. No. 2009-054.

[28]A prior Opinion of this Office concludes that it is the duty of the commissioner of the revenue to assess property taxes. 1982-83 Op. Va. Att'y Gen. 518.

[29] Lewis Trucking Corp. v. Commonwealth, 207 Va. 23, 29, 147 S.E.2d 747, 751 (1966); *see also* Terry v. Mazur, 234 Va. 442, 449, 362 S.E.2d 904, 908 (1987).

[30] *Id*. (citations omitted).

[31] I note, however, that the General Assembly may not authorize the VDVS to expand the scope of the exemption beyond the limits established by the constitutional amendment.

[32] City of Portsmouth v. City of Chesapeake, 205 Va. 259, 264, 136 S.E.2d 817, 822 (1964); Ry. Express Agency, Inc. v. Commonwealth, 199 Va. 589, 593, 100 S.E.2d 785, 788 (1957), *aff'd,* 358 U.S. 434 (1959); Sprvrs. of Cumberland Cnty. v. Randolph, 89 Va. 614, 619, 16 S.E. 722, 723 (1893).

[33]As stated in the case of Pettus v. Hendricks, 113 Va. 326, 330, 74 S.E. 191, 193 (1912), while the word "shall" is primarily mandatory in effect, and "may" is primarily permissive in effect, "courts, in endeavoring to arrive at the meaning of written language, whether used in a will, a contract, or a statute, will construe "may" and "shall" as permissive or mandatory in accordance with the subject matter and context."

[34] *See supra* note 12 and accompanying text.

[35]*See* Commonwealth v. Orange-Madison Coop. Farm Serv., 220 Va. 655, 658, 261 S.E.2d 532, 533-34 (1980) ("In the absence of a statutory definition . . . , a statutory term is given its ordinary meaning, given the context in which it is used"); Op. Va. Att'y Gen.: 1995 at 289, 290; 1991 at 296, 298; 1990 at 233, 234.

[36] BLACK'S LAW DICTIONARY 1337 (9th ed. 2009).

[37] I, however, wish to note that prior opinions of the Attorney General conclude that manufactured homes should be classified and taxed as real or personal property, depending on how the common law doctrine of fixtures applies to the facts and circumstances of each case. *See* Op. Va. Att'y Gen.: 2001 at 197, 198; 1987-88 at 576, 577; 1985-86 at 300, 301; 1981-82 at 368, 369; 1977-78 at 427, 428. The three tests applied by the Supreme Court of Virginia in determining whether an item of personal property placed upon realty becomes a fixture are: "(1) annexation of the property to the realty, (2) adaptation to the use or purpose to which that part of the realty with which the property is connected is appropriated, and (3) the intention of

the parties." Transcon. Gas Pipe Line Corp. v. Prince William Cnty., 210 Va. 550, 555, 172 S.E.2d 757, 761-62 (1970).

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

[39] *See* Winborne v. Virginia Lottery, 278 Va. 142, 148, 677 S.E.2d 304, 306 (2009) (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGAUGE UNABRIDGED 1812 (1993)).

[40] VA. CONST. art. X, § 1.

[41] Sprvrs. of Cumberland Cnty. v. Randolph, 89 Va. 614, 619, 16 S.E. 722, 723 (1893).

[42] *See* VA. CODE ANN. § 55-544.01 (Supp. 2011).

[43] VA. CODE ANN. § 58.1-3015 (2009).

[44] *See* 2007 Op. Va. Att'y Gen. 129, 132 (exemption not available when children, siblings or friends of a qualifying individual jointly own the real estate with the same but do not themselves qualify for the tax benefit); 1999 Op. Va. Att'y Gen. 205, 206 (exemption not available to individual proprietary lessee when a real estate cooperative association owns the real estate in question).

[45] Commonwealth v. Wellmore Coal Corp., 228 Va. 149, 153-54, 320 S.E.2d 509, 511 (1984) (alteration in original) (internal citations omitted).

[46] Turner v. Wexler, 244 Va. 124, 127, 418 S.E.2d 886, 887 (1992).

[47] VA. CONST. art. X, § 6(f).

OP. No. 11-068

TAXATION: RETAIL AND USE TAX

When the true object of a transaction is the acquisition of a good and the service provided is incidental to that purchase, there is a connection between the sale and service that allows the imposition of the sales tax on the service.

The tire disposal fee charged as part of a transaction for the sale of new automotive tires is subject to the retail sales and use tax.

THE HONORABLE LYNWOOD W. LEWIS, JR.
MEMBER, HOUSE OF DELEGATES
DECEMBER 16, 2011

ISSUES PRESENTED

You inquire whether the Commonwealth's sales tax may be imposed on a fee a tire merchant charges for used tire disposal as part of a transaction involving the purchase and installation of new tires. You also ask what constitutes a "connection" between the sale and the service that would permit such a tax to be imposed.

RESPONSE

It is my opinion that, when the true object of a transaction is the acquisition of a good and the service provided is incidental to that purchase, there is a connection between the sale and service that allows the imposition of the sales tax on the service, so that

the tire disposal fee the tire merchant charges to a customer as part of a transaction for the sale of new automotive tires is subject to the retail sales and use tax.

BACKGROUND

You describe a transaction in which a tire merchant sells new automotive tires to a customer and installs those new tires on the customer's vehicle. The merchant lists separately on the sales invoice a $2.50 fee identified as "tire disposal labor" for disposal of used tires removed from the customer's vehicle. This fee covers the expense of transporting the used tires to a landfill and the charge imposed at the landfill. The customer is not required to use this service and, if the customer does not leave the used tires with the merchant for disposal, the merchant does not charge the fee. You indicate that your inquiry arises from a 1994 Ruling of the Tax Commissioner[1] that found that the fee for disposing used tires is subject to the tax when the disposal service is provided in conjunction with the sale of new tires while the provision of a tire disposal service without the sale of tangible property remains exempt.

APPLICABLE LAW AND DISCUSSION

Section 58.1-603 of the *Code of Virginia* imposes a sales tax "upon every person engaged in the business of selling at retail or distributing tangible personal property in the Commonwealth" in an amount equal to 4% of "the gross sales price of each item or article of tangible personal property when sold at retail or distributed in this Commonwealth." Section 58.1-602 defines "sales price" as "the total amount for which tangible personal property or services are sold, including any services that are a part of the sale[.]"

In implementing these provisions, the Tax Commissioner, who is charged with "the administration of the tax laws of Commonwealth,"[2] has promulgated a regulation concerning the taxation of transactions that include services. It provides that "[c]harges for services generally are exempt from the retail sales and use tax.[3] However, services provided in connection with sales of tangible personal property are taxable." To resolve whether such a connection exists, the regulation further sets forth a "true-object test" to be used "to determine whether a particular transaction which involves both the rendering of a service and the provision of tangible personal property constitutes an exempt service or a taxable retail sale . . . ."[4]

The test establishes that

> If the object of the transaction is to secure a service and the tangible personal property which is transferred to the customer is not critical to the transaction, then the transaction may constitute an exempt service. However, if the object of the transaction is to secure the property it produces, then the entire charge, including the charge for any services provided, is taxable.[5]

The Supreme Court of Virginia has adopted and applied this "true object" test. In *WTAR Radio-TV Corp. v. Commonwealth*, the Court rejected the taxpayer's

contention that the use of broadcasting equipment by station personnel to produce broadcast advertisements purchased by customers was a non-taxable service.[6] The Court instead determined that the tax exemption was not available, because "the parties purchasing commercial advertisements from WTAR were more interested in the final product than the service that produced it[,]" so that "the true object of the buyer of the advertisement was not the service per se, but the end product produced by the service."[7] Additionally, in *LZM, Inc. v. Dep't of Taxation,* the Court ruled that a waste pumping service for portable toilets was incidental to the leasing of the toilets and, therefore, taxable.[8] The Court reached this conclusion because the service was not separate from the leasing transaction. It was billed simultaneously, and the toilets themselves would not work without the service.[9] Further, there was nothing in the record to suggest that LZM offered waste pumping services apart from its leasing transactions, suggesting that the pumping service existed incidental to the true object of the transaction.[10]

In response to your first inquiry regarding what constitutes a "connection," therefore, I conclude that a connection resulting in a taxable service exists when the service is incidental to a transaction whose dominant purpose is procuring a product.

You also ask whether the tax assessment in the scenario you present is an improper imposition of the sales tax. I first note that there is a statutory presumption that the assessment of a tax is prima facie correct[11] and that the Constitution of Virginia provides that any exemptions of property from taxation are to be strictly construed against the taxpayer and in favor of the Commonwealth.[12] Furthermore, taxation is the rule and not the exception, and when a tax statute is susceptible to two constructions, one granting an exemption and the other denying it, then the latter construction is to be adopted.[13]

As you note, the Tax Commissioner previously has addressed the issue of tire disposal fees. He determined that

> The service alone is often of little value to the customer without the provision of the tangible personal property sold, i.e. tires. . .The department has historically taken this position on similar "service" transactions that take place in connection with the sale of tangible personal property, such as alteration charges, gift wrap charges, charges for scotchguarding furniture, charges for dismantling leased equipment, and charges for the firing of greenware. For these reasons, I find the waste tire disposal fee made in conjunction with the sale of tangible personal property to be taxable, whether separately stated or not. Likewise, waste tire disposal fees without the provision of tangible personal property would be exempt.[14]

The Commissioner's analysis accords with the Virginia Supreme Court's holdings. The disposal of used tires is analogous to the waste pumping service in *LZM*. Absent facts to the contrary, the tire merchant does not appear to offer a tire disposal service independent of a sale of new tires. While the operation of the new tires is not dependent on the service, as the toilets were dependent on the pumping service, no

disposal service is needed but for the installation of the newly purchased tires. I therefore conclude that the disposal service is only incidental to the customer's true object of the purchase and installation of new tires and, thus, the cost of the entire transaction, including the tire disposal fee, is taxable.

As a final matter, I note that the Commissioner's Ruling was issued in 1994 and that *WTAR*, the case adopting the "true-object" test, was decided in 1977. Because the General Assembly is presumed to be aware of the interpretation of its enactments by state agencies and the courts, the legislature is deemed to have acquiesced in that interpretation when it fails to take legislative action to modify the enactment.[15] Given the years that have elapsed since those decisions were rendered and the absence of any action by the General Assembly evincing disagreement with the taxation of services connected with a sale whose true object is the acquisition of tangible personal property, I conclude that the General Assembly has deemed that such taxation is permissible under Virginia law.

In sum, when a transaction involves both the sale of tangible personal property and the rendering of a service, the true object of the transaction must be examined to determine whether it is subject to the retail sales and use tax as a sale of tangible personal property or is exempt from taxation as a sale of services.

CONCLUSION

Accordingly, it is my opinion that, when the true object of a transaction is the acquisition of a good and the service provided is incidental to that purchase, there is a connection between the sale and service that allows the imposition of the sales tax on the service, so that the tire disposal fee the tire merchant charges to a customer as part of a transaction for the sale of new automotive tires is subject to the retail sales and use tax.

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[1] Tax Comm'r Ruling 94-241 (1994).

[2] VA. CODE ANN. § 58.1-202 (Supp. 2011).

[3] 23 VA. ADMIN. CODE § 10-210-4040(A).

[4] 23 VA. ADMIN. CODE § 10-210-4040(D).

[5] *Id.*

[6] WTAR Radio-TV Corp. v. Commonwealth, 217 Va. 877, 884, 234 S.E.2d 245, 249 (1977).

[7] *Id.* at 883-84, 234 S.E.2d at 248-49

[8] LZM, Inc. v. Dep't of Taxation, 269 Va. 105, 606 S.E.2d 797 (2005).

[9] *Id.* at 112-13, 606 S.E.2d at 801 (noting that the manner of computing the service fee or the manner of accounting for it is not dispositive).

[10] *Id.*

[11] VA. CODE ANN. § 58.1-205 (Supp. 2011).

[12] VA. CONST. art. X, § 6(f); *see also* Dep't of Taxation v. Wellmore Coal Corp., 228 Va. 149, 153-54, 320 S.E.2d 509, 511 (1984) (exemptions are construed strictly against the taxpayer).

[13] *WTAR*, 217 Va. at, 879, 234 S.E.2d at 247; *Wellmore Coal*, 228 Va. at 153, 320 S.E.2d at 511.

[14] Tax Comm'r Ruling 94-241 (1994).

[15] *See* 2010 Op. Va. Att'y Gen. 7, 10 n.13 and citations therein.

OP. NO. 11-073

TAXATION: STATE RECORDATION TAX

When the amount secured by a deed of trust is known, the Clerk of Court should calculate the recordation tax based on the amount of indebtedness rather than the fair market value of the encumbered property.

THE HONORABLE YVONNE G. SMITH
CLERK OF THE CIRCUIT COURT OF HENRICO COUNTY
MAY 27, 2011

ISSUE PRESENTED

You inquire, in light of an apparent conflict between the *Code of Virginia* and the Virginia Administrative Code, how to calculate the recordation tax on deeds of trust when the amount secured under the deed is greater than the fair market value of the property subject to the deed.

RESPONSE

It is my opinion that, when the amount secured by a deed of trust is known, the Clerk of Court should calculate the recordation tax based on the amount of indebtedness rather than the fair market value of the encumbered property.

APPLICABLE LAW AND DISCUSSION

Section 58.1-803(A) of the *Code of Virginia* provides that

> A recordation tax on deeds of trust or mortgages is hereby imposed at the rate of 25 cents on every $100 or portion thereof of the amount of bonds or other obligations secured thereby. . . . In any case in which the amount which may be secured under a deed of trust or mortgage is not ascertainable, the tax shall be based upon the fair market value of the property conveyed, determined as of the date of the deed of trust or mortgage.

Section 58.1-203(A) provides:

> The Tax Commissioner shall have the power to issue regulations relating to the interpretation and enforcement of the laws of this Commonwealth governing taxes administered by the Department. Such regulations shall not be inconsistent with the Constitutions and applicable laws of this Commonwealth and of the United States.

Pursuant to this authority, the Commissioner has promulgated that

> The recordation tax is not a tax on property but on a civil privilege, i.e., the privilege of utilizing the registration laws of Virginia. The tax is generally measured by the consideration or actual (fair market) value of the property transferred, whichever is greater, and the amount of bonds or other obligations secured by deeds of trust or mortgages.[1]

The regulations also provide the following illustration:

> A. Examples of deeds of trust, mortgages and supplemental indentures taxable under § 58.1-803 of the Code of Virginia:
>
> 1. A deed of trust secured by real estate with a lesser value than the note. For example, if real estate valued at $30,000 secures a note of $160,000, the tax is based upon the value of the real estate.[2]

Applying these regulations, the Tax Commissioner has opined that:

> The [recordation] tax is not imposed on the total amount of the bonds or other obligations described in a deed of trust, but on the amount that is secured by the property conveyed. Therefore, the amount secured by a recorded deed of trust can never be more than the fair market value of the property described and conveyed by the deed. The tax will be limited to the fair market value of the property conveyed whenever the amount of the bonds or other obligations exceeds the value of the property conveyed.[3]

When a statute is unambiguous on its face, it will be interpreted according to its plain language.[4] The plain language of § 58.1-803(A) states in its opening sentence that the recordation tax on deeds of trust shall be imposed on "the amount of bonds or other obligations secured thereby." "Secured thereby" means "secured by the deed of trust."[5] The statute allows for levying the recordation tax based on the fair market value of the collateral property legally conveyed to the trustee in situations where the loan amount secured by the deed of trust is *not* ascertainable. The statute is silent with regard to fair market value where the loan amount *is* ascertainable.[6] By the express terms of the statute, consideration of fair market value occurs only when the amount of indebtedness is unknown. Other provisions of the statute support this reading.[7]

Moreover, previous opinions of this Office have concluded that "the measure of the recordation tax . . . is the amount of the obligation secured[,]"[8] and that "Section 58.1-803(A) provides that the tax shall be assessed on the basis of the fair market value of the property *only* where the amount of the obligation cannot be ascertained from the face of the instrument."[9] This is so even where the amount of the loan secured is considerably less than the fair market value of the property.[10] Further, where the question presented was whether the tax should be based on the maximum amount authorized under the line of credit or the fair market value of the property, this Office determined that "[t]he proper tax should be based upon the maximum amount for which the owners may be held liable under their guaranty. That maximum is the same

maximum amount which is authorized under the line of credit line and not the fair market value of the property conveyed."[11]

The underlying purpose of the statute confirms that the recordation tax is ordinarily to be based on the amount stated in the obligations that are secured, not the fair market value of the property. "The recordation tax is not a tax on property . . . but a tax on a civil privilege[,]"[12] *i.e.,* the privilege of utilizing the registration laws of Virginia. The Recording Act[13] provides that a recorded deed takes priority over any unrecorded deed and any deed subsequently recorded.[14] Recording is required for one reason only: to perfect an instrument against claims of competing title or right by those claiming an interest through an unrecorded instrument and by subsequent purchasers and creditors.[15] Therefore, the statute logically provides for the tax to be based on the amount being protected by the recordation when that amount is ascertainable, rather than on the initial (and often fluctuating) fair market value of the property that is used as collateral.

I therefore conclude that the example provided in Title 23, § 10-320-40(A)(1) of the Administrative Code is inconsistent with the plain language of Virginia Code § 58.1-803, so that when the amount secured by a deed of trust is known, the recordation tax is to be based on that amount rather than the fair market value of the collateral.[16]

CONCLUSION

Accordingly, it is my opinion that, when the amount secured by a deed of trust is known, the Clerk of Court should calculate the recordation tax based on the amount of indebtedness rather than the fair market value of the encumbered property.

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[1] 23 VA. ADMIN. CODE § 10-320-10.

[2] *Id.* at § 10-320-40.

[3] Ruling of the Tax Comm'r, No. 06-77 (August 23, 2006).

[4] *See ,e.g.*, Hubbard v. Henrico Ltd. P'ship, 225 Va. 335, 339-40; 497 S.E.2d 335, 337-38 (1998).

[5] *See* 2002 Op. Va. Att'y Gen. 132, 134.

[6] *See* Lynchburg Div. of Soc. Servs. v. Cook, 276 Va. 465, 483, 666 S.E.2d 361, 370 (2008) ("'The rules of statutory interpretation argue against reading any legislative enactment in a manner that will make a portion of it useless, repetitious, or absurd. On the contrary, it is well established that every act of the legislature should be read so as to give reasonable effect to every word . . . .'") (quoting Jones v. Conwell, 227 Va. 176, 181, 314 S.E.2d 61, 64 (1984)). *See also Hubbard*, 255 Va. at 340, 497 S.E.2d at 338 ("[E]very part of a statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary.").

[7] *See* § 58.1-803(C) (recording tax on mortgage is determined by the value of bonds issued rather than on the fair market value of the property); § 58.1-803(D) (recording tax in refinance situation is based on the amount that is in addition to the original debt secured by the deed of trust, not the fair market value of the property).

[8] 1981-82 Op. Va. Att'y Gen. 388.

[11] 1990 Op. Va. Att'y Gen. 257, 258 (Emphasis added).

[10] *See* 1981-82 Op. Va. Att'y Gen. 388 (holding that where only part of the loan amount was secured by the subject deed of trust, and the remainder of the note was secured elsewhere, the recordation tax was based on the amount specifically agreed to in the deed of trust).

[11] 1984-85 Op. Va. Att'y Gen. 386, 387.

[12] *See* Pocahontas Consol. Collieries Co., Inc., v. Commonwealth, 113 Va. 108, 112, 73 S.E. 446, 448 (1912) (describing recordation as a privilege by which purchasers and creditors may avail themselves, on the terms prescribed by the statute, of the benefits and advantages of the state's public registry) (citing Attorney General of the United States holding that tax on the recordation of a deed conveying property to the United States was a tax upon a civil right and not a tax upon property, Opinions of Attorney General of the U.S., Vol. 18, p. 491). *See also* White v. Schwartz, 196 Va. 316, 321, 83 S.E.2d 376, 379 (1954) (following *Pocahontas*, holding that the recording tax is not a tax on property but a tax on a civil privilege); 23 VA. ADMIN. CODE § 10-320-10.

[13] VA. CODE ANN. §§ 55-95 through 105 (2009).

[14] *See* § 55-96 (providing, in pertinent part, that every deed, deed of trust, or mortgage "shall be void as to all purchasers for valuable consideration without notice not parties thereto and lien creditors, until and except from the time it is duly admitted to record . . .").

[15] An unrecorded deed is effective as between the parties to the deed. Turner v. Stip, 1 Va. (1 Wash.) 319 (1794); Barton v. Brent, 87 Va. 385, 13 S.E. 29 (1891); Hunton v. Wood, 101 Va. 54, 43 S.E. 186 (1903).

[16] *See* § 58.1-203(A). *See also* Hancock Co. v. Stephens, 177 Va. 349, 356, 14 S.E.2d 332, 334 (1941) ("We must construe the law as it is written. An erroneous construction by those charged with its administration cannot be permitted to override the clear mandates of a statute.").

OP. NO. 11-022

TAXATION: TAXATION OF CORPORATIONS

Senate bill establishes a sunset date of July 1, 2016 for persons with an economic interest in coal who have received tax credits from an electricity generator to redeem these tax credits. Generators of electricity will be able continue to rely on these tax credits after July 1, 2016.

THE HONORABLE ALBERT C. POLLARD, JR.
MEMBER, HOUSE OF DELEGATES
APRIL 1, 2011

ISSUE PRESENTED

You ask about the impact of Senate Bill 1111 and whether the proposed measure would allow unredeemed tax credits earned before 2006 to be sold, and/or whether the unused tax credits can be carried forward after 2016.

RESPONSE

It is my opinion that the effect of Senate Bill 1111 is to establish a sunset date of July 1, 2016 for persons with an economic interest in coal who have received tax credits from an electricity generator to redeem these tax credits. It is further my opinion that

if Senate Bill 1111 becomes law, generators of electricity can continue to rely on these tax credits after July 1, 2016.

APPLICABLE LAW AND DISCUSSION

Section 58.1-400 imposes a tax on corporate income. Section 58.1-400.2 applies this tax to certain electric suppliers, pipeline distribution companies, gas utilities and gas suppliers. Section 58.1-433.1 establishes a "three-dollar-per-ton credit against the tax imposed by § 58.1-400 or § 58.1-400.2 for each ton of coal purchased and consumed by such electricity generator, provided such coal was mined in Virginia as certified by such seller."[1] An electricity generator may allocate this tax credit to a "person with an economic interest in coal."[2] Section 58.1-433.1(B) currently provides as follows:

> All credits earned on or after January 1, 2006, which are allocated to persons with an economic interest in coal as provided under this subsection may be used as tax credits by such persons against the tax imposed by § 58.1-400 and any other tax imposed by the Commonwealth. If the credits earned on or after January 1, 2006, and prior to July 1,-2011, exceed the state tax liability for the applicable taxable year of such person with an economic interest in coal, the excess shall be redeemable by the Tax Commissioner as set forth in subsection D of § 58.1-439.2.

The import of this provision is, first, if an electrical supplier allocates the tax credits earned on or after January 1, 2006, to "a person with an interest in coal," the person with an economic interest in coal can use them as tax credits against any Virginia tax. If the credits exceed the state tax liability for the applicable tax year for the person with an economic interest in coal, the excess is redeemable by the Tax Commissioner as set forth in subsection D of § 58.1-439.2. Subsection D of § 58.1-439.2 provides that

> If the credit exceeds the person's state tax liability for the tax year, the excess shall be redeemable by the Tax Commissioner on behalf of the Commonwealth for ninety percent of the face value within ninety days after filing the return; however, for credit earned in tax years beginning on and after January 1, 2002, such excess shall be redeemable by the Tax Commissioner on behalf of the Commonwealth for eighty-five percent of the face value within ninety days after filing the return. The remaining ten or fifteen percent of the value of the credit being redeemed, as applicable for such tax year, shall be deposited by the Commissioner in a regional economic development fund administered by the Coalfields Economic Development Authority to be used for the Coalfields Economic Development Authority and the Virginia Economic Development Partnership.

Senate Bill 1111 amends § 58.1-433.1(B) by deleting the phrase "and prior to July 1, 2011," and adding the following:

> *provided that the ability of persons with an economic interest in coal to redeem with the Tax Commissioner credits received pursuant to an*

allocation under this section shall expire for credits earned under this section on or after July 1, 2016.

As I read the changes that Senate Bill 1111 makes to the existing statute, a person with an interest in coal who has been allocated a tax credit by a generator of electricity will no longer be able to redeem those tax credits with the Tax Commissioner if the electricity generator earned these credits on or after July 1, 2016. Under the bill, the "ability to redeem" the tax credits "shall expire" for "persons with an economic interest in coal" if the credits are earned "on or after July 1, 2016." The electricity generator will still be able to claim these tax credits beyond July 1, 2016 with respect to their own tax liability and can continue to carry them over.[3]

CONCLUSION

Accordingly, it is my opinion that the effect of Senate Bill 1111 is to establish a sunset date of July 1, 2016 for persons with an economic interest in coal who have received tax credits from an electricity generator to redeem these tax credits. It is further my opinion that if Senate Bill 1111 becomes law, generators of electricity can continue to rely on these tax credits after July 1, 2016.

---

[1] VA. CODE ANN. § 58.1-433.1(A) (2009).

[2] Section 58.1-433.1(B). An economic interest "is the same as the economic ownership interest required by § 611 of the Internal Revenue Code which was in effect on December 31, 1977. A party who only receives an arm's length royalty shall not be considered as having an economic interest in coal mined in the Commonwealth." Section 58.1-439.2(C) (2009).

[3] Effectively, the electricity generator will not be able to allocate those credits after July 1, 2016, because the only entity by statute that is eligible for such an allocation under the statute is a person with an economic interest in coal. *See* § 58.1-433.1(B).

OP. NO. 11-070

TAXATION: TAX EXEMPT PROPERTY

CONSTITUTION OF VIRGINIA: TAXATION AND FINANCE

Pursuant to grandfather clause, property may qualify for exemption or remain tax exempt if the property qualified for an exemption under the law before July 1, 1971.

Whether specific real estate is exempt from local taxation depends on whether, considering all of the relevant facts and circumstances, the property was used as an institution of learning or for activities that predominantly promoted charitable or benevolent purposes.

Whether specific real estate is exempt from local taxation is a factual determination to be made by the Commissioner of Revenue.

THE HONORABLE JANET H. RORRER
COMMISSIONER OF THE REVENUE, PATRICK COUNTY
OCTOBER 7, 2011

ISSUE PRESENTED

You inquire whether real estate owned by Smith River Soil & Wild Life Conservation Club, Inc., a Virginia corporation (the "Club"), is exempt from local taxation.

RESPONSE

It is my opinion that the determination of whether the real estate owned by the Club on July 1, 1971, is exempt from local taxation is a factual determination to be made in the first instance by you as the Commissioner of Revenue. That determination will depend on whether, considering all of the relevant facts and circumstances, the Club engaged in activities as an institution of learning or engaged in activities that predominantly promoted charitable or benevolent purposes. Assuming you find that to be the case, you must further determine whether the Club's activities satisfy the requirements for non-profits.

BACKGROUND

According to the documentation you provide, the Club was recognized by the State Corporation Commission as a non-stock, not-for-profit corporation on January 20, 1956. The Charter lists the corporate purposes and powers as follows:

> (1) To acquire lands and to erect, build, con[s]truct, maintain and operate a hunting and fishing club, shooting range, including the right to purchase … lands, buildings, hunting preserves, fish ponds, and other facilities for the purpose of preserving and prop[a]gating wild life of all kinds … and to teach and carry into practice all methods of soil conservation on a non-profit basis.
>
> (2) To construct, maintain and operate all types of club houses, concessions, shooting ranges and activit[i]es not contrary to law in and on all lands … acquired … maintained, or operated by this Corporation on a non-profit basis.

Additionally, copies of recorded deeds indicate that the Club acquired a ten (10) acre +/- parcel of real estate in June, 1965 and a one-half (1/2) acre +/- parcel of real estate in April, 1966. As you note, the Club is not among the list of codified tax-exempt entities found in §§ 58.1-3650.1 through 58.1-3650.1001 of the *Code of Virginia*. Finally, you state that the Club's "property has been taxable since they purchased it [and] they have requested me to exempt it from real estate taxation."

APPLICABLE LAW AND DISCUSSION

Upon its effective date, Article X, § 6 of the Constitution of Virginia of 1971 provided, in relevant part:

> Exempt property. – (a) Except as otherwise provided in this Constitution, the following property and no other shall be exempt from taxation, State and local …

> (4) Property owned by … institutions of learning not conducted for profit, so long as such property is primarily used for … scientific, or educational purposes or purposes incidental thereto….
>
> * * *
>
> (6) Property used by its owner for … charitable, … benevolent, cultural, or public park and playground purposes, as may be provided by . . . the General Assembly and subject to such restrictions and conditions as may be prescribed.

The General Assembly has not specifically designated the Club as a benevolent, charitable, historical or patriotic organization or public park or playground as contemplated by Article X, § 6(a)(6),[1] but that fact does not end the inquiry. Article X, § 6(f) of the Constitution further provides:

> (f) Exemptions of property from taxation as established or authorized hereby shall be strictly construed; provided, however, that *all property exempt from taxation on the effective date of this section shall continue to be exempt* until otherwise provided by the General Assembly as herein set forth. [Emphasis added.]

Moreover, pursuant to Article X, § 6(a)(6), the General Assembly has enacted § 58.1-3606, which provides as follows:

> (A) Pursuant to the authority granted in Article X, Section 6(a)(6) of the Constitution of Virginia to exempt property from taxation by classification, the following classes of real and personal property shall be exempt from taxation:
>
> * * *
>
> 4. Property owned by . . . incorporated colleges or other institutions of learning not conducted for profit. This paragraph shall apply only to property primarily used for literary, scientific or educational purposes or purposes incidental thereto.[2]
>
> * * *
>
> 7. Buildings with the land they actually occupy, and the furniture and furnishings therein belonging to any benevolent or charitable organization and used by it exclusively for lodge purposes or meeting rooms, together with such additional adjacent land as may be necessary for the convenient use of the buildings for such purposes.
>
> * * *
>
> (B) Property, belonging in one of the classes listed in subsection A of this section, which was exempt from taxation on July 1, 1971, shall continue to be exempt from taxation under the rules of statutory construction applicable to exempt property prior to such date.

Your brief description of the activities of the Club suggests that it does not qualify as "an institution of learning" for purposes of § 58.1-3606(A)(4). Although learning is one part of the Club's mission, it evidently is not principally devoted to learning. Because the Constitution requires tax exemptions to be strictly construed, it appears likely that the Club would not qualify as an institution of learning under § 58.1-3606(A)(4).[3] If the Club can demonstrate that it functions as "an institution of learning," however, then it will qualify for a tax exemption under this statutory provision. Similarly, it is doubtful, under the strict construction of the statute, that the buildings used by the Club were used "exclusively" for meeting rooms under § 58.1-3606(A)(7).

Nonetheless, because the Club received its Charter and acquired the real estate for which it claims an exemption prior to 1971, I cannot exclude the possibility that it can avail itself of the grandfather provisions of Article X, § 6(f) and Code § 58.1-3606(B). The question thus becomes whether the property was eligible for tax-exempt status when the 1971 Constitution was adopted. In addressing the application of the grandfather clause,[4] the Supreme Court of Virginia held that the strict construction mandated by Article X, § 6(f) of the 1971 Constitution applied only prospectively to exemptions authorized under Article X, § 6(a)(6).[5] The Court further found that "the grandfather clause . . . retains a rule of liberal construction to apply retroactively to determine whether certain property was exempt on July 1, 1971, and therefore, should continue to be exempt."[6] Under this approach, "exemption was the rule and taxation the exception."[7] Property thus could qualify for exemption or remain tax exempt if the property qualified for an exemption under the law before July 1, 1971. To answer this question, one must turn to exceptions found in the 1902 Constitution.

Article XIII, § 183 of the 1902 Constitution of Virginia provided in relevant part, as follows:

> Except as otherwise provided in this Constitution, the following property and no other, shall be exempt from taxation, state and local . . . :
>
> * * *
>
> (d) Buildings with the land they actually occupy and the furniture, furnishings … wholly devoted to educational purposes, belonging to, and actually exclusively occupied and used by … incorporated colleges, academies, industrial schools, seminars, or other incorporated institutions of learning ….
>
> * * *
>
> (f) Buildings with the land they actually occupy, and the furniture and furnishings therein, belonging to any benevolent or charitable association and used exclusively for lodge purposes or meeting rooms by such association, together with such additional adjacent land as may be necessary for the convenient use of the buildings for such purposes . . .

The Club's 1956 incorporation date entitles any land it acquired by July 1, 1971 to the liberal standard, provided that it was exempt from taxation at that time. Therefore,

under Article XIII § 183(d), if the Club can establish under this standard that its buildings were and are "primarily used for educational purposes or purposes incidental thereto," then it can claim an exemption under that provision.[8]

Alternatively, the Club can seek to establish under Article XIII § 183(f) that it functions as a "benevolent or charitable association." Under this construction, a "charitable" entity was one that was organized and operated to provide some service of public welfare or for the public good.[9] Given its accepted meaning, a "benevolent" entity is one that is "philanthropic, humane, with a purpose or desire to do good and confer benefits on man rather than realize gain or profit."[10]

As noted, the Club's Charter indicates that the corporate purposes include "preserving wildlife of all kinds" and "teach[ing] and carry[ing] into practice all methods of soil conservation." Moreover, the Charter calls for the corporate powers to be exercised on a non-profit basis. In the abstract, any such actions would appear to be for the public service or public good. They would also appear to confer benefits on society in general.[11] No information, however, is provided explaining if, or how, the Club actually exercises those powers as they might relate to teaching and practicing soil conservation or wildlife protection.

Additionally, the Charter authorizes operating a hunting and fishing club, a shooting range, hunting preserves, and club houses with concessions. Standing alone, such activities do not implicate undertakings for the public welfare or public good. Again, I have no factual information explaining if, or how, those activities are conducted.

Nor do I have the factual information necessary to determine if, in comparison to any non-public welfare issues, any charitable or benevolent undertakings meet the dominant purpose test so that the overall use of the property promotes the exempt purpose(s) of the Club.[12] Specifically, the property use must have a direct reference to the charitable and or benevolent goals and tend to directly and immediately facilitate and promote those goals.[13]

Clearly one aspect of that determination will be the extent to which the Club's operations traditionally have been, and continue to be, conducted in a non-profit manner. Although the Club may generate revenue, or even profits, such revenues or profits alone are not necessarily determinative. If the Club's activities predominantly promote wildlife preservation and the teaching of soil conservation techniques, assuming all the other criteria have also been met, the Club could be entitled to tax exempt status.[14]

Ultimately, more facts are necessary to reach a conclusion concerning whether the Club's property is exempt from taxation.

CONCLUSION

Accordingly, it is my opinion that the determination of whether the real estate owned by the Club on July 1, 1971, is exempt from local taxation is a factual determination to be made in the first instance by you as the Commissioner of Revenue. That

determination will depend on whether, considering all of the facts and circumstances, the Club engaged in activities as an institution of learning or engaged in activities that predominantly promoted charitable or benevolent purposes. Assuming you find that to be the case, you must further determine whether the Club's activities satisfy the requirements for non-profits.

---

[1] Effective January 1, 2003, a constitutional amendment to Article X, § 6(a)(6) replaced the state legislative process for approval of exempt entities with a process for local approval. The General Assembly also enacted VA. CODE ANN. § 58.1- 3651 (2009), which specifies a procedure and criteria for local classification. *See* 2003 Op. Va. Att'y Gen. 28.

[2] I can find no other constitutional or statutory provisions under which the Club could qualify for an exemption.

[3] For examples of what constitutes a qualifying institution of learning, *see* Richmond v. Southside Day Nursery Ass'n, 207 Va. 561,151 S.E.2d 370 (1966) (nursery with pre-school education program held exempt) and Commonwealth v. Hampton Normal & Agric. Inst., 106 Va. 614, 56 S.E. 594 (1907) (college's operation of a model dairy farm held exempt).

[4] Manassas Lodge No. 1380, Loyal Order of Moose, Inc. v. County of Prince William, 218 Va. 220, 237 S.E.2d 102 (1977) (construing recently adopted Va. Const. art. X, § 6(f) (1971) and Virginia Code § 58-12, predecessor statute to § 58.1-3606). *See* 1977-78 Op. Va. Att'y Gen. 415.

[5] *Manassas Lodge*, 218 Va. at 223, 237 S.E.2d at 105.

[6] *Id.*

[7] *Id*. at 22, S.E.2d at 104 (citing Commonwealth v. Lynchburg Y.M.C.A., 115 Va. 745, 748, 80 S.E. 589, 590 (1914)).

[8] County of Hanover v. Trs. of Randolph-Macon Coll., 203 Va. 613, 614, 125 S.E.2d 812, 813 (1962).

[9] *Manassas Lodge*, 218 Va. at 224, 237 S.E.2d at 105 (quoting City of Richmond v. United Givers Fund of Richmond, Henrico & Chesterfield, Inc., 205 Va. 432, 436, 137 S.E. 2d 876, 879 (1964)).

[10] *Id.* (citing BLACK'S LAW DICTIONARY 201 (4th ed. 1951)). *See* 1977-78 Op. Va. Att'y Gen. at 417.

[11] *See Hampton Normal & Agric. Inst*., 106 Va. at 614, 56 S.E. at 594.

[12] Smyth Cnty. Cmty. Hosp. v. Town of Marion, 259 Va. 328, 334, 527 S.E.2d 401, 404 (2000).

[13] *Id.* at 334-35, 527 S.E.2d at 404 (citing *Lynchburg Y.M.C.A*., 115 Va. at 752, 80 S.E. at 591).

[14] *See Lynchburg Y.M.C.A*., 115 Va. at 745, 80 S.E. at 589; *Trs. of Randolph-Macon Coll.,* 203 Va. at 617, 125 S.E.2d at 815.

NAME INDEX

Ayers, L.J. III. 10-075 28
Barlow, William K 10-115 36
Bell, William A. Jr. 11-099 71
Britton, Mathew J. 11-071 124
Byron, Kathy J. 10-078 163
Chappell, John Barrett Jr. 11-027 88
Cole, Mark L. 11-043 104
Davis, Rex A. 11-091 87
Domenech, Douglas W. 11-089 55
Erby, Gordon F. 11-094 73
Ervin, A. Lee 11-019 164
Eubank, Marty G. 11-003 120
Garrett, T. Scott 10-122 118
Habeeb, Gregory D. 11-076 91
Hagy, Emma N. 11-096 11
Hanger, Emmett W. Jr. 11-078 99
Herring, Charniele L. 10-116 93
Hunt, J. Vaden ..... 11-011, 11-069 ..... 128, 23
Hurley, Raymond A. 11-047 84
Janis, William ..... 10-128, 11-001 ..... 32, 43
Jefferson, B. James. 11-039 3
Jones, Dennis E. 11-088 82
Kennedy, Jack ..... 11-018, 11-057, 11-063 ..... 106, 25, 80
Kilgore, Terry, G. 11-095 18
Knight, Barry D. 11-005 142
LeMunyon, James M. 10-110 166
Lewis, Lynwood W. Jr. 11-068 188
Lind, Robin R. 11-096 11
Lingamfelter, L. Scott 11-061 171
Loupassi, G. Manoli 11-086 111
Marsden, David W. 10-121 126
Marshall, Danny W. III. 11-105 47
Marshall, Robert G. 11-049 65
McWaters, Jeffrey L. ..... 11-023, 11-055 ..... 154, 161
Merricks, Donald W. 11-105 47
Morrissey, Joseph D. 11-034 150
Mugler, Ross A. 11-017 170
Mullins, Karen T. 11-075 68
Neo, Tamara C. 11-045 8
Newman, Stephen D. 11-061 171
Norment, Thomas K. Jr. 11-083 20
O'Bannon, John M. 11-002, 11-061 52,171
Oder, G. Glenn 11-003 120
Pandak, Sharon E. 11-024 130

Peace, Christopher K. 11-065 39
Petersen, J. Chapman..... 10-043, 11-032 .....104, 51
Phillips, Clarence E. “Bud” 11-015, 11-052, 11-082.....76, 37, 140
Pollard, Albert C. Jr. ..... 11-022, 11-059 .....195, 14
Puller, Linda T. 11-061 171
Rorrer, Janet H. 11-070 197
Schuler, James M. 11-010 98
Sincere, Richard E. Jr. 11-028 132
Smith, Yvonne G. 11-073 192
Stolle, Kenneth W. 11-109 157
Vener, Neil S. 11-036 152

SUBJECT INDEX

ADMINISTRATION OF GOVERNMENT

Department of Law – General Provisions (official opinions of Attorney General). Attorney General cannot issue an opinion to a local official unless the opinion is directly related to the discharge of the duties of the official requesting the opinion 106

Attorney General has no authority to render an official opinion requested by a local government officer unless the question dealt with is directly related to the discharge of the duties of the official requesting the opinion 80

Attorney General is reluctant to declare any statute unconstitutional.....3

Opinion request from county attorney shall itself be in the form of an opinion embodying a precise statement of all the facts together with such attorney's legal conclusions 130

Roll of the Office is to assess the lawfulness of policies in light of the law as it presently exists in Virginia 163

While Opinions of the Attorney General are given respectful consideration by the courts, they are not binding on the courts 111

State Agencies Related to the General Operation of Government – Department of Veterans Services. General Assembly may not authorize VDVS to expand the scope of tax exemption for disabled veterans beyond limits established by constitutional amendment 171

Tax exemption created by Article X, § 6-A is not a program within the meaning of 2.2-2001.....171

Statutes implementing real estate tax relief for certain veterans do not direct or authorize Department of Veteran Services to interpret exemption provisions....171

State and Local Conflict of Interests Act. Act provides minimum rules of ethical conduct for state and local government officers and employees 71

Although Act does not preclude simultaneous service as member of town council and county school board, the potential interaction between the two bodies requires persons so serving to remain alert to possible contractual and transactional conflicts 71

Assuming the compensation for service on either the town council or county school board exceeds $10,000 annually, a personal interest in the governmental agency arises.....71

Code authorizes a Commonwealth's Attorney or citizens to file suits for violations of the Conflicts Act.....3

Commonwealth's attorney can provide advisory opinions to local officials 3

Exception found in § 2.2-3119(E) applies to Franklin County, because it is a member of Planning District 12.....3

Members of both town councils and school boards are subject to the Act 71

Good-faith reliance on commonwealth's attorney's written advisory opinion shields requester from prosecution under the Act.....3

Government employment free of any conflict of interest does not implicate any suspect class or fundamental right 3

Persons appointed by local governing bodies or by school boards to a position of trust, as well as members of local boards and councils, need not file a disclosure statement unless the local governing body or school board specifically requires them to do so 8

Requirements of § 2.2-3119(E) are satisfied when a school board member recuses himself and certifies on the record that he had no involvement in the decision to hire his spouse or relative 3

Section 2.2-3119(E) does not require the school board to have no involvement in hiring decisions.....3

Section 2.2-3119(E) does not require the school board to forfeit its hiring authority; rather, it requires the superintendent independently to reach a determination about the qualifications of an applicant who is married to or related to a school board member and to do so without any involvement of the school board in that hiring decision. Upon receiving the superintendent's recommendation, the non-conflicted school board members then can vote on the applicant 3

Section 2.2-3119(E) is unlikely to be found unconstitutional 3

Town councilman may serve on the county school board, provided all other eligibility requirements are met 71

Unless the governing body has adopted a policy that requires a disclosure statement to be completed and filed, there is no need for persons occupying positions of trust or members of local boards or councils to file the disclosure statement.....8

When General Assembly wishes to impose automatic disclosures, it knows how to do so 8

When strictures of § 2.2-3119(E) are followed, no violation occurs 3

Virginia Freedom of Information Act. Before a meeting, a public body must give notice of the date time and location of its meetings in the manner specified by statute 11

Determination of whether particular conduct would violate Act must be made on a case-by-case basis 11

Discussion of electoral board business by two members of the Board constitutes a meeting of the Board under FOIA that must be conducted in public and properly noticed as required by the Act 11

Electronic mail lacks the simultaneous feature of telephone meetings and therefore does not constitute a meeting under the Act.....11

Exemptions from public access to meetings must be narrowly construed.....11

Interaction from one electoral board member to another via electronic mail does not offend FOIA 11

Meeting for purpose of deliberating policy or preparing to take action constitutes public business.....11

No matter how impractical the requirements of the Act, where the Act applies it must be followed 11

Officially transacting business contemplates a broad view extended not only to the taking of an official vote, but also to the peripheral discussions surrounding the vote 11

Transaction of public business includes conversations over the telephone involving rescheduling board meetings, submitting agenda items, commenting on unapproved draft minutes of prior meetings and other similar matters 11

Section 2.2-3710(B) applies only when no meeting is taking place 11

When two or more members of the electoral board transact or discuss pubic business over the phone, that constitutes a meeting of an electoral board.....11

Virginia Public Procurement Act. Act's Competitive process requirements do not apply to the purchase or lease of real estate 55

Amended Procurement Act requires use of E-Verify by certain employers who enter certain contracts with agencies of the Commonwealth.....14

Applicability of the procurement law's requirements depends on an examination of the proposed contract or lease to determine its predominant purpose 55

Competitive process requirements of the Act apply when a public body enters into a contract with a nongovernmental contractor for the purchase or lease of goods or lease of real estate 55

Contract to purchase tomatoes does not trigger E-Verify requirement.....14

E-verify requirement does not apply to state contracts that are primarily for the acquisition of goods but can apply if contract is primarily to acquire services.....14

E-verify requirement does not apply to subcontractors under a State contract.....14

Public procurement laws are not constitutional in stature 55

Requirement to register and participate in E-Verify is triggered only when the performance required by contract emphasizes services rather than goods 14

Seasonal workers, who return to contractor's work site after having left the country and lawfully re-entered, are "newly hired" for purposes of E-Verify if they did not have at all times a reasonable expectation of resuming employment.14

Section 2.2-4308.2 applies only to companies that enter into a contract with an agency of the Commonwealth 14

Section 2.2-4308.2 does not require contractors to confirm eligibility of workers employed by subcontractors 14

AGRICULTURE, ANIMAL CARE, AND FOOD

Virginia has long allowed localities to enact laws requiring animals to be kept inside a fence 39

Localities expressly are authorized to enact ordinances governing the running at large and keeping of animals.....39

Implementation of Tobacco Master Settlement Agreement (Virginia Escrow Statute). By limiting applicable definition to cigarettes intended to be sold, the General Assembly exempts cigarettes produced for personal use.....18

Cigarettes produced by roll-you-own machines fall outside the definition of tobacco product manufacturers.....18

Retailer who allows customers to use an on-premises machine to make RYO cigarettes for that customer's personal use is not a "tobacco product manufacturer" under the Virginia Escrow Statute 18

Retailer who does not directly manufacture cigarettes cannot become a manufacturer indirectly based on consumer's use of roll-your-own machines.....18

Virginia Tobacco Escrow Statute imposes certain requirements on tobacco product manufactures, including payment of funds into escrow account.....18

Right to Farm. Agricultural districts are distinct from zoning districts that have been classified as agricultural 20

Localities are free to permit agricultural uses in areas otherwise zoned or designated.....20

Property zoned to allow agricultural activity may include areas zoned under an agricultural classification, areas designated and agricultural districts, and areas zoned as other classifications that may allow agriculture.....20

Proposed amendments to the Right to Farm Act would apply to areas currently zoned as agricultural districts or classifications, as well any other areas in which the zoning provisions allow for agricultural activity 20

Right to Farm Act restricts the ability of localities to regulate certain activities within particular areas 20

ALCOHOL BEVERAGE CONTROL ACT

Definitions and General Provisions. ABC Act constitutes a comprehensive legislative scheme 23

ABC Act provides that locality may permit sale of mixed beverages when a majority of voters in that jurisdiction approves such sales by referendum.....23

Commonwealth has preempted control of alcoholic beverages.....23

Had General Assembly intended to permit Board of Supervisors or its members to file petition to approve sale of mixed beverages, it knew how to do so 23

Neither member of Board of Supervisors nor Board in its entirety is authorized to petition circuit court for a referendum on mixed beverage sales 23

Only qualified voters may file a petition to seek a referendum on the sale of mixed beverages 23

Political subdivisions retain only the limited and specific authority over alcohol set out in statute 23

CIVIL REMEDIES AND PROCEDURE

Absent statutory authority allowing a minor to bring a legal action, a mature minor must file the required petition by a next friend 93

In civil matters, minors who have not been legally emancipated are considered to be under a disability 93

Minor may initiate suit if he or she is emancipated.....93

There is no provision authorizing “mature minors” to initiate legal action.....93

Dockets. Although ‘proceeding’ is broad in scope, it is not all-inclusive.....25

Letter between counsel does not become a proceeding simply because an attorney files it with the court.....25

Purpose underlying § 8.01-335(A) is to enable trial courts to identify cases which litigants or their counsel are not interested in pursuing to a conclusion 25

Requests for information are not proceedings 25

Term ‘proceeding’ does not simply refer to formal action that provides a complete remedy, but also to procedural steps that are part of that larger action.....25

When an attorney files a copy of a letter to opposing counsel with the Clerk of Court, such a filing does not constitute a "proceeding," but the filed letter may indicate there are other ongoing proceedings, thereby foreclosing discontinuance of the action 25

Whether a particular filing qualifies as a "proceeding" requires a review of its specific contents 25

Executions and Other Means of Recovery. After obtaining a judgment for the payment of money, a judgment creditor may institute collection proceedings upon issuance of a writ of fieri facias 28

Although the sheriff or other executing officer may be required to levy on the tangible personal property of a judgment debtor when executing a writ of fieri facias, no such requirement is imposed when serving a Summons for Interrogatories or Garnishment Summons 28

Because intangible property is incapable of levy and sale, it is subject to judgment lien upon delivery of writ of fieri facias to authorized officer 28

Execution of the writ of fieri facias and service of summons in garnishment need not occur simultaneously 28

Garnishment proceedings are available to judgment creditors to collect against third parties believed to hold money to which judgment debtor is or may be entitled 28

Garnishment proceeding must be regarded as a civil suit.....28

Issuance of the writ of fieri facias authorizes a lien against the personal property of the debtor.....28

Issuance of a writ of fieri facias is a prerequisite to the issuance of a summons to answer interrogatories, but no levy is required 28

Judgment creditor who seeks a levy must pay separate fees for the levy and the service of the writ of fieri facias 28

Lien attaches to debtor's tangible personal property from the time it is actually levied by the officer executing writ of fieri facias 28

No levy is necessary when pursuing garnishment proceedings 28

Twenty-one days after judgment is entered, the creditor may request the clerk of court to issue writ of fieri facias 28

Virginia law contemplates that levying is a distinct act and a levy may not always occur 28

Writs of fieri facias, debtor interrogatories, and garnishments are distinct proceedings.....28

Limitation of Actions – Personal Actions Generally. For an agreement to be deemed a written contract for statute of limitations purposes, it must show on its face a complete and concluded agreement between the parties 32

If written agreement is missing one or more essential terms it is unwritten for statute of limitation purposes and subject to three-year limitations period.....32

Section 8.01-246(2) does not require a written contract be reduced to a single writing to qualify for the five-year limitations period 32

Statute of limitations for written contracts applies to credit card agreements when the agreement consists of a series of documents, provided that at least one of the documents referencing and incorporating the others is signed by the cardholder and the written documents contain all essential terms of the agreement 32

CLERKS OF COURT (*See* CONSTITUTIONAL OFFICERS)

COMMISSIONERS OF THE REVENUE (*See* CONSTITUTIONAL OFFICERS)

COMMONWEALTH PUBLIC SAFETY

Department of Criminal Justice Services – Private Security Businesses. Fact that services provided might be used for a security system does not trigger the licensure requirement 36

If an employee of an contractor or subcontractor does not have access to information concerning the design, extent, status or location of an end user's electronic security equipment, he would not be classified as an electronic security employee.....36

Section 9.1-139 does not distinguish between contractors and subcontractors.....36

Virginia law requires persons engaged in the private security service business to be licensed through the Department of Criminal Justice Services.....36

When an employee who is installing wiring or equipment has access to confidential information concerning the design, extent, status or location of an end user's electronic security equipment, the contractor or subcontractor employing this individual must obtain a license from the Department of Criminal Justice Services.....36

COMMONWEALTH'S ATTORNEY (*See* CONSTITUTIONAL OFFICERS)

CONSERVATION

Agencies of the Commonwealth are authorized to sign leases or other contracts with respect to land conservation 55

Constitutional prohibition against appropriations to charitable institutions not owned or controlled by the Commonwealth, applies to nonprofits that are devoted to land conservation 55

General Assembly and state agencies may not make grants that are tantamount to gifts of taxpayer dollars to charitable institutions devoted to land conservation.....55

'Holder' may acquire conservation easement by gift, purchase, devise or bequest..55

Nonprofit organizations devoted to land conservation are charities for purposes of Article IV, § 16 55

Virginia Land Conservation Foundation is responsible for distributing funds to land trusts for stewardship responsibilities 55

CONSTITUTIONAL OFFICERS

Authority of the APA to perform an audit of constitutional officers is not limited to those instances provided in § 15.2-2511(B) 73

Board of Supervisors may authorize a 5% salary supplement to constitutional officers and their employees to be paid out of county funds.....82

County Board of Supervisors is required to appropriate to the office of a constitutional officer who is serving as a license agent for DMV 80 percent of the funds remitted by DMV to the county for DMV transactions processed by the office of the constitutional officer 84

County Board of Supervisors may supplement the compensation of constitutional officers 82

County Board of Supervisors once it establishes salary supplement, is free to increase, decrease or eliminate the supplement.....82

Monies so appropriated may not be used to supplant existing local funding for such office, nor to reduce the local share of the Compensation Board-approved budget for such office below the level established pursuant to general law 84

Once a salary is set by the Compensation Board, unless overturned, the Board's decision sets the minimum amount constitutional officers can be paid 82

Process for establishing the budget of a constitutional officer is provided by general law.....84

Salaries of constitutional officers are set by the Compensation Board 82

Use of DMV compensation to offset salaries of employees of constitutional offices results in an impermissible reduction of the local share of the Compensation Board-approved budget for those offices 84

While a locality is required to provide for the annual audit of its constitutional officers, an audit performed by the Auditor of Public Accounts can satisfy that requirement 73

Clerks of Court. As constitutional officer, considerable deference is given to ministerial decisions made my circuit court clerks unless such actions are contrary to law.....106

Clerk may, but is not required to, inquire with courts not of record concerning pending charges or restraining or protective orders.....106

Clerk may rely on the CCRE report and consultation with local law enforcement to discharge statutory duties 106

Clerk may seek mandamus relief to require County Board of Supervisors to adopt a budget 80

Clerk of Court can close the office when a county has failed to adopt a budget and the Clerk cannot pay his employees 80

Clerks are dependent on localities for their offices and supplies.....80

Clerks are required to keep their offices open during weekdays 80

Clerks of Court are specifically exempt from suit arising from acts or omissions relating to the issuance of concealed handgun permits unless the clerk was grossly negligent or engaged in willful misconduct.....106

Clerk, or the employees of the Clerk's office, can volunteer to continue serving until the budget impasse is resolved 80

Code authorizes circuit court to delegates to the clerk responsibility for the issuance of concealed weapons permit 106

If clerk adheres to statutory requirements regarding procedure for verifying eligibility for concealed weapons permits, a failure to detect pending criminal charges or protective orders does not constitute gross negligence 106

If Clerk is made aware of ongoing proceedings via the filing of a letter, the Clerk may not discontinue an action pursuant to § 8.01-335(A), provided those proceedings have occurred in the previous two years.....25

Failure of a clerk to detect any existing protective orders or criminal charges does not constitute gross negligence, provided the clerk has followed the statutory requirements governing the issuance of a concealed weapon permit 106

Nothing in Code addresses what Clerk's office must do in the event a locality's governing body fails to adopt a budget.....80

To the extent particular functions can continue in the absence of funding from the County and without staffing, or with volunteer staffing, the Clerk should continue to keep such systems operational.....80

When amount secured by a deed of trust is known, the Clerk of Court should calculate the recordation tax based on the amount of indebtedness rather than the fair market value of the encumbered property.....192

When issuing a concealed weapon permit, the clerk of court has no duty to verify with the general district or the juvenile and domestic relations court whether the applicant has any criminal charges or protective orders pending against him in those courts 106

Commissioner of the Revenue. Commissioner is charged with assessing license taxes 166

Commissioner is free to audit taxpayers who pay license tax and to seek any necessary documentation in connection with deductions 166

Commissioner of revenue is correct official in the Commonwealth with responsibility for interpreting and implementing provisions executing real property tax exemption for certain disabled veterans 171

Commissioners of the revenue are authorized to perform audits in connection with their duty to assess license taxes 166

Duties of commissioners of revenue are set out specifically in Article 1, Chapter 31 if Title 58.1 171

It is generally duty of commissioner of revenue to assess property taxes 171

Local commissioner of revenue shall obtain tax returns from every taxpayer within his jurisdiction who is liable to file such return with him for all taxes assessed by his office 171

Whether specific real estate is exempt from local taxation is a factual determination to be made by the Commissioner of Revenue 197

Commonwealth's Attorney. Although duties of Commonwealth's Attorney principally involve the prosecution of crime, the Code also imposes duties that are civil in nature 164

Application of various elements of a criminal offense to a specific set of facts rests with the Commonwealth's attorney, the grand jury and the trier of fact 111

Code authorizes a Commonwealth's Attorney or citizens to file suits for violations of the Conflicts Act 3

Commonwealth's attorney is constitutional officer whose duties are prescribed by general law or special act 164

Commonwealth's attorney can provide advisory opinions to local officials 3

Good-faith reliance on commonwealth's attorney's written advisory opinion shields requester from prosecution under the Act 3

Limited authority found in § 58.1-3003 does not authorize a Commonwealth's Attorney to appeal to the Supreme Court of Virginia an order from a circuit court with respect to the imposition of taxes by a local governing body 164

Limited exception to prosecutorial discretion exists where arrest or summons was brought under Title 46.2 and the arrest or summons was issued bay an officer of the Department of State Police or any other division of state government.....115

Role of Commonwealth's Attorney principally consists of representation of the Commonwealth in criminal cases and in certain civil matters that are closely related to criminal cases 164

Section 46.2-1308 expressly creates limited exception to discretion prosecutors otherwise have to amend a charge and bring it under the provisions of a local ordinance 152

Section 46.2-1308 does not prohibit prosecutor from amending a misdemeanor charge alleging a violation of state law to the equivalent municipal ordinance in situation where the arrest or summons was issued by an officer of the Department of State Police for offenses found in titles other than Title 46.2.....152

Sheriffs. Although the sheriff or other executing officer may be required to levy on the tangible personal property of a judgment debtor when executing a writ of fieri facias, no such requirement is imposed when serving a Summons for Interrogatories or Garnishment Summons.....28

Fees sheriffs may charge for services are governed by the express terms of § 17.1-272 28

If a person is convicted, but is not admitted or readmitted to jail following conviction, sheriff may not assess a processing fee.....87

Inmate crews may work on property outside the jurisdiction of the sheriff when authorized by court order or, if the workforce is established by the local governing body, only when the property is owned by a tax-exempt nonprofit organization that is organized and operated exclusively for charitable or social welfare purposes 157

Sheriff may access a processing fee only when a person is admitted, or re-admitted, to jail after conviction 87

Sheriffs are responsible for the feeding and care of all prisoners confined within their jurisdiction.....157

Sheriff's jurisdiction is limited to particular locality 157

Sheriffs serve the city or county that elected them 157

Treasurers. Although school board can decide how to spend the funds, the mechanics of disbursing funds rest with the treasurer.....120

City school board is not empowered to order the treasurer to disburse a salary advance.....120

Constitution provides that treasurer's duties shall be prescribed by general law or special act 120

Mechanics of making payroll payments to schools rests with the treasurer 120

Powers and duties of local treasure are set out generally in Article 2, Chapters 31 and 39 of Title 58.1 120

Separate account is not necessarily separate bank account 120

Treasurer is charged with responsibility for receipt, custody and disbursement of funds of the school board 120

Treasurer is not required to maintain a separate bank account for school board funds 120

CONSTITUTION OF THE UNITED STATES

Government employment free of any conflict of interest does not implicate any suspect class or fundamental right.....3

Constitution directs the federal government to conduct decennial census of the population of each state.....128

Defense/militia Powers. Appointment in the state National Guard is distinct from what is required to become commissioned in the National Guard of the United States.....43

Congress regulates the commissioning of officers in the National Guard through the process of federal recognition.....43

Constitution confers broad power to United States government with respect to military matters generally and to control over state militias more specifically.....43

Constitution of United States expressly reserves to States the power to appoint officers to state militias, which includes the modern National Guard 43

For the regulation of state militias, the Constitution reserves to the States the appointment of officers, and the authority of training the militia to the discipline prescribed by Congress.....43

Power of appointing or terminating a state National Guard officer is left to the States 43

Power to determine which state Guard officers are eligible for service in the overlapping National Guard of the United States rests with Congress.....43

Due Process/Equal Protection/Fundamental Rights. Condominium restriction or limitation, reasonably related to a legitimate purpose, does not inherently violate a fundamental right and may be enforced 163

Equal Protection does not require states to rely on total population figures from the population census when drawing district boundaries for state or local government office holders 128

Property rights are not absolute 39

Requiring landlords to pay and/or collect the debts left by tenants who have contracted with utility providers does not violate the United States Constitution, the Constitution of Virginia or the Code of Virginia 91

When authorized by the legislature, a locality can enact ordinances designed to regulate property to protect the health and safety of its citizens 39

Where policy or regulation does not infringe upon a suspect class or fundamental rights, the standard of review is highly deferential toward the locality 39

First Amendment, Establishment Clause – Legislative Prayer. Bar for a locality in permitting legislative invocations is highly a high one 47

Fourth Circuit has repeatedly reaffirmed that legislative prayers are constitutional 47

Legislative invocations constitute a tolerable acknowledgment of beliefs widely held among the people of this country 47

Locality may request ministers to use nonsectarian prayers 47

Practice of legislative invocations has been considered valid 47

Precedent requires legislative prayers to embrace a non-sectarian ideal 47

Whether any particular prayer containing the words 'Jesus Christ' would violate the United States Constitution turns on contextual facts 47

First Amendment, Freedom of Speech. Animal noises are not constitutionally protected speech 39

Noise control ordinances are invalidated when unconstitutionally vague 39

Second Amendment, Right to Keep and Bear Arms. Because the University adopted a policy rather than a regulation, it has not "otherwise prohibited by law" persons with a concealed carry permit from possessing a handgun, so that the policies may not be used to prohibit persons with such a permit from carrying a concealed firearm into the buildings covered by the policy 99

Carrying a weapon for personal protection constitutes a good and sufficient reason to carry a weapon into a place of worship while a meeting for religious purposes is being held there 104

Churches and other religious entities, like any other owner of property, can restrict or ban the carrying of weapons onto their private property 104

Government may enact laws forbidding the carrying or firearms in sensitive places 99

Law is not settled with respect to how strictly courts will evaluate restrictions on the use and possession of firearms 99

Places of worship can restrict or ban firearms from their premises 104

Right to bear arms is not unlimited..... 39, 99

Right to bear arms is protected by the Constitutions of Virginia and of the United States 39, 99, 104

Right to open carry may be limited in sensitive places like schools and government buildings 99

Right to self-defense lies at the heart of the right to keep and bear arms 104

Second Amendment acts as a restraint on government, not private parties 104

Second Amendment operates as a restriction on the States as well as the federal government 39, 99

Second Amendment protects individual right to bear arms 39, 99

Second Amendment protects right of law-abiding, responsible citizens to use arms in defense of hearth and home 39

University has authority to promulgate regulations restricting firearms within certain buildings 99

University of Virginia lawfully may promulgate policy that prohibits persons from openly carrying a firearm in the buildings subject to the policy 99

Unless conduct at issue is not protected by the Second Amendment, the Government bears burden justifying constitutional validity of the law 39

Spending Clause. Congress, through its spending power, can condition the use of federal funds on the States' acceptance of "Don't Ask, Don't Tell" policy.....43

States that fail to comply with federal regulations risk the forfeiture of federal funds allocated to organize, equip and arms state guards 43

CONSTITUTION OF VIRGINIA

Article IV imposes certain restrictions on the power of the General Assembly to impose local, special or private laws.....3

Except as far as restrained by the State Constitution and the Constitution of the United States, the legislature has plenary power.....55

Government employment free of any conflict of interest does not implicate any suspect class or fundamental right.....3

If constitutional provision is self-executing, no further legislation is required to make it operative 171

Public procurement laws are not constitutional in stature 55

Requiring landlords to pay and/or collect the debts left by tenants who have contracted with utility providers does not violate the United States Constitution, the Constitution of Virginia or the Code of Virginia 91

Virginia Constitution is not a grant of power, but only the restriction of powers otherwise practically unlimited 55

Bill of Rights (Right to Keep and Bear Arms). Because the University adopted a policy rather than a regulation, it has not "otherwise prohibited by law" persons with a concealed carry permit from possessing a handgun, so that the policies may not be used to prohibit persons with such a permit from carrying a concealed firearm into the buildings covered by the policy 39

Carrying a weapon for personal protection constitutes a good and sufficient reason to carry a weapon into a place of worship while a meeting for religious purposes is being held there.....104

Churches and other religious entities, like any other owner of property, can restrict or ban the carrying of weapons onto their private property 104

Constitution of Virginia protects the right to bear arms, but it also recognizes the importance of property rights 104

Government may enact laws forbidding the carrying or firearms in sensitive places 99

Law is not settled with respect to how strictly courts will evaluate restrictions on the use and possession of firearms.....99

Places of worship can restrict or ban firearms from their premises 104

Protections afforded by the Virginia Constitution in this area are coextensive with those of the Second Amendment 99

Right to bear arms is not unlimited.....39, 99

Right to bear arms is protected by the Constitutions of Virginia and of the United States 39, 99, 104

Right to open carry may be limited in sensitive places like schools and government buildings 99

Right to self-defense lies at the heart of the right to keep and bear arms 104

University has authority to promulgate regulations restricting firearms within certain buildings 99

University of Virginia lawfully may promulgate policy that prohibits persons from openly carrying a firearm in the buildings subject to the policy 99

Bill of Rights (Right to Acquire & Possess Property). Churches and other religious entities, like any other owner of property, can restrict or ban the carrying of weapons onto their private property.....104

Constitution of Virginia protects the right to bear arms, but it also recognizes the importance of property rights 104

Localities expressly are authorized to enact ordinances governing the running at large and keeping of animals 39

Places of worship can restrict or ban firearms from their premises.....104

Property rights are not absolute 39

Virginia has long allowed localities to enact laws requiring animals to be kept inside a fence 39

Conservation. Article IV, § 16, which prohibits appropriations to charitable institutions not owned or controlled by the Commonwealth, applies to nonprofits that are devoted to land conservation 55

Article XI, §§ 1 and 2, which address land conservation, do not remove the specific bar on charitable appropriations 55

While the General Assembly cannot make appropriations in the nature of gifts to nonprofits engaged in land conservation, it can sign contracts or leases with such entities 55

Conservation – Right to Hunt. Constitutional text expressly allows the General Assembly to restrict the right to hunt by General law 51

Prohibition on hunting on Sundays does not transgress the constitutional right to hunt and fish 51

Right to hunt is not unlimited 51

That the General Assembly did not repeal the prohibition on hunting on Sundays in the wake of a constitutional amendment is indication that no constitutional conflict exists.....51

Education. Article VIII, § 7 of the Constitution of Virginia and § 22.1-28 provide that the supervision of schools in each school division shall be vested in a school board 118, 120

Constitution charges legislature to determine the manner in which funds are to be provided for the costs of maintaining an educational program meeting prescribed standards of quality.....76

Constitution of Virginia directs General Assembly provide for system of free public elementary and secondary schools.....76, 126

Legislature is to provide for the apportionment of the costs of programs between the Commonwealth and the local units of government comprising such school divisions....76

No Code or constitutional provision prohibits a planning commission member from being elected to the school board and simultaneously serving in both capacities....124

School board cannot forfeit its independence to another entity and must retain its ability to fulfill its responsibilities....118

State funding for consolidated school divisions should not be less than that achieved for a period of five years....76

When school divisions are consolidated, the Composite Index to be applied to the consolidated school division is the lower of the Composite Indices established for the two governmental entities....76

Education – Literary Fund. Article VIII, § 8 provides that all fines for offenses against the Commonwealth are to be paid to the Literary Fund....150

Funds collected by localities in enforcing their traffic light laws do not constitute fines for offenses against the Commonwealth....150

General Assembly constitutionally may permit localities to retain the funds collected by them in enforcing their traffic light laws....150

General Assembly has authority to appropriate monetary penalties authorized by § 15.2-968.1 elsewhere than to the Literary Fund....150

Monetary penalties authorized by § 15.2-968.1 are not criminal fines....150

Supreme Court of Virginia has drawn distinction between criminal fines and civil penalties....150

Unless prevented by Constitution, locality expressly is authorized to use photo-monitoring to enforce certain ordinances and retain finds for violations....150

Future Changes – Amendments. Article XII, § 1 specifies the procedures for amending the Constitution of Virginia....171

Strict compliance with Article XII, § 1 is required to amend effectively the Constitution....171

When proposed amendment to the Constitution is approved by a majority of those voting at the election, that amendment to the Constitution becomes effective on the date prescribed by the General Assembly....171

Judiciary. Article VI establishes the judicial branch of the Commonwealth's government and creates the Supreme Court of Virginia....98

Article VI governs the Supreme Court's jurisdiction and provides for the composition of the Court and the selection of judges.....98

Article VI requires decisions based on merits to be recorded in writing.....98

Court's procedures allowing routine orders to be endorsed by the Clerk's office and permitting identities of panel members to remain undisclosed pose no constitutional problems.....98

No constitutional violation occurs when the justices of the Supreme Court of Virginia decline to sign an order or to identify themselves as members of the panel that ruled on a particular matter before the Court 98

Supreme Court is vested with broad authority to make rules governing course of appeals and procedures to be used in courts of the Commonwealth.....98

Supreme Court has promulgated no rule requiring its panel members to identify themselves or to sign all orders 98

Legislature. All laws enacted at a regular session take effect on the first day of July following adjournment of the session at which it has been enacted, unless in the case of emergency the General Assembly shall specify an earlier date.....171

Constitution does not grant power to the General Assembly; it only restricts power otherwise practically unlimited.....171

General Assembly may enact any law not prohibited by the Constitution 171

General Assembly of Virginia has plenary powers and my enact any law not prohibited by the United States Constitution or the Virginia Constitution 171

Legislature – Appropriations to religious or charitable organizations. Agencies of the Commonwealth are authorized to sign leases or other contracts with respect to land conservation 55

Article IV, § 16, which prohibits appropriations to charitable institutions not owned or controlled by the Commonwealth, applies to nonprofits that are devoted to land conservation.....55

Article XI, §§ 1 and 2, which address land conservation, do not remove the specific bar on charitable appropriations.....55

Charitable institution is not defined in the Constitution 52

Commission on Constitutional Revision left the existing ban on charitable appropriations essentially undisturbed from the prior Constitution.....52

Constitution does not prohibit categorically all payments to charities from the State 52

Constitution forbids gifts to charities, irrespective of whether those gifts cover all or only part of the cost of a particular charitable endeavor 55

Contracts with nonprofits that provide for land conservation and stewardship do not offend Article IV, § 16 55

Grant in the nature of a gift does not satisfy constitutional requirements.....55

General Assembly and state agencies may not make grants that are tantamount to gifts of taxpayer dollars to charitable institutions devoted to land conservation...55

General Assembly can make appropriations to nonsectarian institutions for the reform youthful criminals 52

General Assembly may authorize counties, cities, or towns to make appropriations to any charitable institution or association.....52

Idea at the heart of Article IV, § 16 was to prevent the transfer of tax dollars from one private party to another private party that is charitable in nature.....55

Plain language indicates purpose of Article IV, § 16 is to prohibit the appropriation of public funds for charitable purposes 52, 55

Nonprofits are charitable institutions within the scope of Article IV, § 16.....55

Nonprofit organizations devoted to land conservation are charities for purposes of Article IV, § 16.....55

Provided Commonwealth is not liable for the debt, the General Assembly may assist non-state educational institutions or higher education with borrowing money for the construction of facilities 52

Prohibition on charitable appropriations does not extend to bona fide contracts between the state and charitable institutions.....55

Several exceptions exist to the constitutional prohibition against appropriations to charitable institutions.....52

State can buy land and lease it to nonprofit upon certain terms and conditions....55

Term 'charitable institution' was intended to have broad meaning 55

That the state is a co-holder with a nonprofit does not turn a gift of funds into a contract, if the nonprofit is not contractually obligated to perform any particular service.....55

Virginia Constitution forbids General Assembly from making any appropriation of public funds, personal property, or real estate to any charitable organization that is not owned or controlled by the Commonwealth 52, 55

While General Assembly cannot make appropriations in the nature of gifts to nonprofits engaged in land conservation, it can sign contracts or leases with such entities 55

Legislature – Form of Laws. Article IV, § 12 is not a substantive modification on the power of the General Assembly 65

Courts have allowed legislatures to enact a separate statute that neutralizes another law, so long as it does not literally amend the actual text of the previously enacted statute 65

Enactment of § 3-6.03 of House Bill 1500 is consistent with Article IV, § 12 of the Constitution of Virginia 65

If the General Assembly were required to publish at length a statute that is greatly impacted by another statute, bills would become unwieldy and voluminous.....65

Single object rule is to be liberally construed and treated so as to uphold the law if practicable.....65

To fall within the constitutional prohibition, the statute must literally amend a specific Code provision 65

To fall within the constitutional prohibition, the General Assembly would have had to modify actual text of statute without republishing it at length.....65

When it applies, Article IV, § 12 imposes a procedural requirement 65

Local Government – County, City, and Town governing bodies. Action in mandamus lies in favor of any citizen of the county to compel the performance by the Board of Supervisors its duty under Article VII, § 5 and § 24.2-304.1 68

Article VII, § 5 applies to those localities that elect members of their governing bodies on a district basis 68

Article VII, § 4 creates the officer of treasurer and provides treasurer's duties shall be prescribed by general law or special act 120

Board of Supervisors is specifically tasked with reapportioning the districts every ten years.....68

In order to satisfy the mandate of Article VII, § 5, Board of Supervisors must take an affirmative action to reapportion the County's magisterial districts in the 10th year since the last reapportionment, irrespective of whether the decennial population figures would necessitate any boundary adjustments 68

State Board of Elections has the power to compel the governing body to carry forth its constitutional and statutory duties.....68

Virginia law mandates that the Board of Supervisors take affirmative action to reapportion the magisterial districts for the county in this tenth year since the last reapportionment using the most recent decennial population figures.....68

Local Government – Multiple Offices. Article VII, § 6 of the Virginia Constitution restricts dual office holding 71

Article VII, § 6 prohibits persons from holding more than one office mentioned in the Article 120

Article VII addresses governing bodies of towns, but not school boards 71

Constitution poses no bar to councilman serving on county school board 71

No Code or constitutional provision prohibits planning commission member from being elected to school board and simultaneously serving in both capacities.....124

Town council has no appointment authority over county school board 71

Town councilman may serve on county school board, provided all other eligibility requirements are met 71

Taxation and Finance. Adding § 6-A to Article X required further legislation to make its provisions operative 171

Addition of § 6-A to Article X was not self-executing 171

Article X is now amended to include a new § 6-A 171

Article X, § 6-A does not permit the legislature to enact any additional legislation to further exempt surviving spouses of veterans who passed away prior to the effective date.....171

Article X, § 6-A expressly grants to General Assembly authority to prescribe in general law restrictions and conditions for the disabled veteran real property tax exemption 171

Article X, § 6-A provides exception to requirement that all property be taxed...171

Club's 1956 incorporation date entitles any land it acquired by to July 1, 1971 to liberal standard, provided it was exempt from taxation at the time 197

Constitution of Virginia requires taxation of all property, except as specifically excluded therein.....171

Constitution requires tax exemptions to be strictly construed 197

Exemptions of property from taxation must be strictly construed.....171

Grandfather clause retains rule of liberal construction to apply retroactively to determine whether certain property was exempt on July 1, 1971 and therefore should continue to be exempt 197

In absence of amendment adding Article X, § 6, General Assembly would have been precluded from providing the real estate tax exemption contained in § 58.1-3219.5 171

In addressing application of grandfather clause, the Supreme Court of Virginia held that the strict construction mandated by Article X 6(f) of the 1971 Constitution applied only prospectively to exemptions authorized under Article X, § 6(a)(6) 197

January 1, 2011 is the effective date of Article X, § 6-A 171

Legislature may not adopt a measure providing for tax exemptions unless expressly authorized to do so by the Constitution 171

No provisions of the Constitution prohibits enactment of an acreage limitation on property tax exemption 171

Provisions relating to a property tax exemption for certain veterans was part of the Constitution on January 1, 2011 171

Pursuant to grandfather clause, property may qualify for exemption or remain tax exempt if the property qualified for an exemption under the law before July 1, 1971 197

Relief afforded pursuant to Article X, § 6-A is not available when the real estate is i) titled in revocable inter vivos trust with spouse, ii) titled in revocable inter vivos trust with others, iii) titled in irrevocable trust.....171

Term 'real property' in Article X, § 6-A includes both the land and dwelling occupied by the veteran 171

Whether specific real estate is exempt from local taxation depends on whether, considering all of the relevant facts and circumstances, the property was used as an institution of learning or for activities that predominantly promoted charitable or benevolent purposes 197

COUNTIES, CITIES AND TOWNS

Board of supervisors of county with the board form of government is vested with all rights and powers conferred on boards of supervisors by general law.....82

Agricultural and Forestal Districts Act. Agricultural and Forestal Districts Act makes separate reference to zoning provisions and establishes its own criteria and conditions for the creation of agricultural districts under its provisions 20

Proposed amendments to the Right to Farm Act would apply to areas currently zoned as agricultural districts or classifications, as well any other areas in which the zoning provisions allow for agricultural activity 20

Budgets, Audits and Reports. Adoption of a budget is a non-discretionary duty a Board of Supervisors must fulfill 80

APA is required to perform an audit when special circumstances are present or when there is suspected fraud or inappropriate handling of funds 74

Authority of the APA to perform an audit of constitutional officers is not limited to those instances provided in § 15.2-2511(B) 74

Clerks are dependent on localities for their offices and supplies.....80

Clerks are required to keep their offices open during weekdays 80

Clerk may seek mandamus relief to require County Board of Supervisors to adopt a budget 80

Clerk of Court can close the office when a county has failed to adopt a budget and the Clerk cannot pay his employees 80

Clerk, or the employees of the Clerk's office, can volunteer to continue serving until the budget impasse is resolved 80

Code contemplates APA would be conducting audits of constitutional officers..74

County is forbidden from paying out any funds until they have been appropriated.80

Section 15.2-2511 requires localities to provide for the annual auditing of constitutional officers 74

To the extent particular functions can continue in the absence of funding from the County and without staffing, or with volunteer staffing, the Clerk should continue to keep such systems operational.....80

Variety of statutes address audits for local government agencies.....74

When APA performs an audit, the locality need not engage the services of an accountant to perform a redundant audit 74

When locality fails to have an audit performed, the APA is permitted but not required to conduct the audit 74

While locality is required to provide for the annual audit of its constitutional officers, an audit performed by the Auditor of Public Accounts can satisfy that requirement.....74

Franchises, Public Property, Utilities – General Provisions for Public Utilities. Water authority may record its liens prior to obtaining a judgment and without first seeking to collect such debt from any tenant who received services from the authority 88

General Powers of Local Government. General Assembly constitutionally may permit localities to retain the funds collected by them in enforcing their traffic light laws 150

Funds collected by localities in enforcing their traffic light laws do not constitute fines for offenses against the Commonwealth 150

Monetary penalties authorized by § 15.2-968.1 are not criminal fines.....150

Unless prevented by the Constitution, locality expressly is authorized to use photo-monitoring to enforce certain ordinances and retain finds for violations..150

When authorized by the legislature, a locality can enact ordinances designed to regulate property to protect the health and safety of its citizens.....39

Joint Actions by Localities. General Assembly has established a Composite Index of Local Ability-to-Pay that is computed for each locality 76

Localities whose composite indices demonstrate a lesser ability to contribute toward the cost of education receive a larger share of the state funding 76

State funding for consolidated school divisions should not be less than that achieved for a period of five years.....76

When school divisions are consolidated, the Composite Index to be applied to the consolidated school division is the lower of the Composite Indices established for the two governmental entities.....76

Joint Action by Localities – Regional Competiveness Act. Act provides for the establishment of regional partnerships by localities to work together for their mutual benefit 154

Employees of the Hampton Roads Partnership are not eligible for VRS coverage because the Partnership is not a political subdivision.....154

Existence of a regional partnership is a prerequisite for a region to receive incentive payments 154

Regional partnerships are not authorized to exercise a sovereign power, privilege or authority 154

Whether employees of regional partnership are entitled to VRS participation hinges on whether partnership is a political subdivision 154

Local Constitutional Officers, Courthouses and Supplies. Board of Supervisors may authorize a 5% salary supplement to constitutional officers and their employees to be paid out of county funds.....82

Clerk of Court can close the office when a county has failed to adopt a budget and the Clerk cannot pay his employees 80

Clerk, or the employees of the Clerk's office, can volunteer to continue serving until the budget impasse is resolved 80

To the extent particular functions can continue in the absence of funding from the County and without staffing, or with volunteer staffing, the Clerk should continue to keep such systems operational.....80

Local Constitutional Officers, Courthouses and Supplies – Compensation Board Generally. County Board of Supervisors is required to appropriate to the office of a constitutional officer who is serving as a license agent for DMV 80 percent of the funds remitted by DMV to the county for DMV transactions processed by the office of the constitutional officer.....84

County Board of Supervisors may supplement the compensation of constitutional officers.....82

County Board of Supervisors once it establishes salary supplement, is free to increase, decrease or eliminate the supplement 82

Monies so appropriated may not be used to supplant existing local funding for such office, nor to reduce the local share of the Compensation Board-approved budget for such office below the level established pursuant to general law 84

Once a salary is set by the Compensation Board, unless overturned, the Board's decision sets the minimum amount constitutional officers can be paid 82

Process for establishing the budget of a constitutional officer is provided by general law 84

Salaries of constitutional officers are set by the Compensation Board 82

Use of DMV compensation to offset salaries of employees of constitutional offices results in an impermissible reduction of the local share of the Compensation Board-approved budget for those offices 84

Local Constitutional Officers, Courthouses and Supplies – Sheriffs. If a person is convicted, but is not admitted or readmitted to jail following conviction, a processing fee may not be assessed 87

In situations where an individual spent some time pretrial, but is not sent back to jail following conviction, the individual is not admitted to the jail following conviction and no fee can be assessed 87

Processing fee may be assessed only when a person is admitted, or re-admitted, to jail after conviction 87

Sheriffs are responsible for the feeding and care of all prisoners confined within their jurisdiction 157

Sheriff's jurisdiction is limited to particular locality 157

Sheriffs serve the city or county that elected them 157

Planning, Subdivision of Land and Zoning. Agricultural districts are distinct from zoning districts that have been classified as agricultural 20

Localities are authorized to enact zoning ordinances to promote the health safety or general welfare of the public 20

Localities are free to permit agricultural uses in areas otherwise zoned or designated 20

Property zoned to allow agricultural activity may include areas zoned under an agricultural classification, areas designated and agricultural districts, and areas zoned as other classifications that may allow agriculture 20

Proposed amendments to the Right to Farm Act would apply to areas currently zoned as agricultural districts or classifications, as well any other areas in which the zoning provisions allow for agricultural activity 20

Police and Public Order. Locality may enact ordinances allowing for volunteer fire and rescue companies to recover expenses incurred in responding to certain calls when a conviction for specified crimes has occurred 137

Regional Cooperation Act. General Assembly expressly has authorized a locality to belong to more than one planning district 3

Planning District Commission is a political subdivision of the Commonwealth, chartered under the Regional Cooperation Act 3

Virginia Water and Waste Authorities Act. Although water authority is a service authority, the provisions of § 15.2-2119 do not apply to its enforcement powers....88

Dinwiddie County Water Authority, as a water authority, is governed by the Virginia Water and Waste Authorities Act 88

Clerk's office has no need to require proof of any such judgment or collection efforts by a water authority.....88

Requiring landlords to pay and/or collect the debts left by tenants who have contracted with utility providers does not violate the United States Constitution, the Constitution of Virginia or the Code of Virginia.....91

Supreme Court of Virginia has rejected argument that imposition of liens and collection of charges would deprive the landowner of property without due process of law 91

Virginia law plainly contemplates that a landlord will be responsible, to some limited degree, for certain water and sewer utilities obtained by a tenant.....91

Virginia Water and Waste Authorities Act constitutes the full and complete authority for doing the acts therein and is to be liberally construed 88

Water authority may record its liens prior to obtaining a judgment and without first seeking to collect such debt from any tenant who received services from the authority.....88

COURTS NOT OF RECORD

Jurisdiction of district courts is limited to the territory of the city or counties they serve 157

Juvenile and Domestic Relations District Courts. Absent statutory authority allowing a minor to bring a legal action, a mature minor must file the required petition by a next friend 93

Cases in the juvenile and domestic relations courts are initiated by the filing of a petition.....93

In civil matters, minors who have not been legally emancipated are considered to be under a disability....93

Minor may initiate suit if he or she is emancipated....93

There is no provision authorizing "mature minors" to initiate legal action....93

What constitutes emancipation is governed by §§ 16.1-331 through 16.1-334....93

Juvenile and Domestic Relations District Courts – Immediate Custody, Arrest, Detention and Shelter Care/Disposition. Emancipated minor may file petitions for protective orders....93

Law enforcements may file a petition for emergency protective order on behalf of minors....93

Law enforcement officers may file petitions for emergency protective orders on behalf of minors who are victims of family abuse or stalking, sexual assault or other acts of criminal violence....93

Minors may seek an emergency protective order in certain situations....93

Minor who has not been emancipated can seek a protective order only through a next friend....93

Non-emergency protective orders contemplate filing a pleading in court....93

Persons, including juveniles, subjected to family abuse may obtain an emergency protective order from a magistrate....93

Protective order proceedings are civil in nature....93

Whether an individual is entitled to obtain a protective order is distinct from whether the person may request the issuance of such an order....93

COURTS OF RECORD

General Assembly has provided that orders of the circuit courts be signed by the presiding judge....98

Jurisdiction of circuit courts is limited to the territory of the city or counties they serve....157

Supreme Court. Court's procedures allowing routine orders to be endorsed by the Clerk's office and permitting identities of panel members to remain undisclosed pose no constitutional problems....98

No constitutional violation occurs when the justices of the Supreme Court of Virginia decline to sign an order or to identify themselves as members of the panel that ruled on a particular matter before the Court....98

Supreme Court is vested with broad authority to make rules governing course of appeals and procedures to be used in courts of the Commonwealth.....98

Supreme Court has promulgated no rule requiring its panel members to identify themselves or to sign all orders 98

CRIMES AND OFFENSES GENERALLY

Application of various elements of a criminal offense to a specific set of facts rests with the Commonwealth's attorney, the grand jury and the trier of fact 111

Crimes Involving Health and Safety. Because the University adopted a policy rather than a regulation, it has not "otherwise prohibited by law" persons with a concealed carry permit from possessing a handgun, so that the policies may not be used to prohibit persons with such a permit from carrying a concealed firearm into the buildings covered by the policy.....99

Government may enact laws forbidding the carrying or firearms in sensitive places 99

Law is not settled with respect to how strictly courts will evaluate restrictions on the use and possession of firearms.....99

University has authority to promulgate regulations restricting firearms within certain buildings 99

University of Virginia lawfully may promulgate policy that prohibits persons from openly carrying a firearm in buildings subject to the policy.....99

Where the possession of a handgun is prohibited by law, persons with concealed carry permit may not bring their weapons to such locations 99

Crimes Involving Health and Safety – Dangerous Use of Firearms or Other Weapons. Carrying a weapon for personal protection constitutes a good and sufficient reason to carry a weapon into a place of worship while a meeting for religious purposes is being held there 104

Places of worship can restrict or ban firearms from their premises.....104

Crimes Involving Health and Safety – Other Illegal Weapons. Applicant for concealed carry permit must state whether he has any pending criminal charges or is the subject of a protective order 106

Conceal carry permitting statute is designed with significant safeguards to ensure only qualified persons receive and hold permits.....106

Clear intent of the General Assembly is to allow concealed handgun permit holders to carry handguns only in areas where it has not specifically prohibited the carrying of handguns 99

Clerk may, but is not required to, inquire with courts not of record concerning pending charges or restraining or protective orders.....106

Clerks of Court are specifically exempt from suit arising from acts or omissions relating to the issuance of concealed handgun permits unless the clerk was grossly negligent or engaged in willful misconduct.....106

Code authorizes circuit court to delegates to the clerk responsibility for the issuance of concealed weapons permit 106

Code requires conceal carry review process to be completed in 45 days 106

Failure of a clerk to detect any existing protective orders or criminal charges does not constitute gross negligence, provided the clerk has followed the statutory requirements governing the issuance of a concealed weapon permit 106

If clerk adheres to statutory requirements regarding procedure for verifying eligibility for concealed weapons permits, a failure to detect pending criminal charges or protective orders does not constitute gross negligence 106

If individual incurs a criminal charge or is the subject of a protective order after the permit is issued, the permit will be revoked or forfeited 106

Individuals may obtain concealed weapon permit pursuant to § 18.2-308(D)....106

Policies do not fall under the exception contemplated in § 18.2-308(O).....99

Right to open carry may be limited in sensitive places like schools and government buildings 99

Unlike open carry, there is additional statutory overlay that addresses persons who have received a concealed carry permit 99

Under § 18.2-308(O), persons with valid concealed weapons permits may not, through a policy, as opposed to a regulation be prohibited from exercising their right to carry a concealed handgun 99

Virginia Code prohibits the carrying of a concealed weapon other than by certain classes of individuals and those to whom a permit has been issued 106

When issuing a concealed weapon permit, the clerk of court has no duty to verify with the general district or the juvenile and domestic relations court whether the applicant has any criminal charges or protective orders pending against him in those courts.....106

Crimes Involving Morals and Decency – Gambling. Activity constitutes illegal gambling when elements of prize, chance and consideration are present together.111

Certain sweepstakes are legal 111

Element of consideration is missing in situations where a purchase is unnecessary to win 111

Gambling devices are illegal 111

If a person is engaged in illegal gambling, he is not exempt from civil or criminal prohibitions on gambling simply because he ostensibly raises funds for charities or political organizations 111

If the business model effectively consists of persuading individuals to purchases chances to win prizes, with a product or service an afterthought to the chance to win prizes, the element of consideration is present regardless of whether some individuals are offered free entries 111

There is a difference between laws purporting to directly regulate charities and charitable solicitation and the gambling and gambling device laws that do not purport to regulate speech 111

Ultimate question is whether sweepstakes is product or whether scenario employs sweepstakes legitimately to promote giving or merchandise and services 111

Whether a particular factual scenario constitutes illegal gambling turns on actual rather than hypothetical facts 111

With a few limited exceptions, gambling is illegal in Virginia 111

CRIMINAL PROCEDURE

Central Criminal Records Exchange. Clerk may rely on the CCRE report and consultation with local law enforcement to discharge statutory duties 106

Criminal records maintained by the Exchange are available to criminal justice entities 7 days a week, 24 hours a day 106

Protective Orders for Stalking. Emancipated minor may file petitions for protective orders 93

Law enforcement officers may file petitions for emergency protective orders on behalf of minors who are victims of family abuse or stalking, sexual assault or other acts of criminal violence 93

Minors may seek an emergency protective order in certain situations 93

Minor who has not been emancipated can seek a protective order only through a next friend 93

Non-emergency protective orders contemplate filing a pleading in court 93

Persons, including juveniles, subjected to family abuse may obtain an emergency protective order from a magistrate 93

Protective order proceedings are civil in nature 93

To obtain a protective order for stalking, sexual battery or serious bodily injury, a warrant first must be issues for the arrest of the alleged offender 93

Whether an individual is entitled to obtain a protective order is distinct from whether the person may request the issuance of such an order.....93

DEFINITIONS

100% service-connected, permanent, and total disability 171

ABC test.....147

Agricultural operation 70

Appropriation 65

Aquaculture.....20

Assemblage 11

Benevolent 197

Charitable.....197

Click wrap acceptance.....111

Closed-loop ground-source heat pump well.....104

Cohabitation 93

Common elements.....161

Connection 188

Debtor interrogatory.....28

Direct exchange geothermal heat pump 104

Directly.....18

Economic interest.....195

Electronic security business 36

Electronic security employee 36

Emancipated minor 93

Employer.....147

E-verify program.....14

Family abuse 93

Family and household member 93

Franchise 147
Franchisee 147
Garnishment summons/proceeding 28
Gross negligence 106
Gross receipts 166
Holder 55
Levy 28
Manufacture 18
Mature minor 93
Meeting 11
Newly hired 14
Officer 73, 124
Official 73
Open-loop system 104
Paddleboard 142
Performing services 147
Political subdivision 154
Private security services business 36
Private well 104
Proceeding 25
Production agriculture and silviculture 20
Program 171
Property 171
Public body 55
Public business 11
Qualified voter 23
Real property 171
Reapportionment 68

Regional partnership 154

Regulation 99

Sales price 188

Shall 68, 73

Secured thereby 192

Separate account 120

Services 14

Substantially gainful employment 171

Supersede 84

Supplant 84

Taxpayer 171

Tobacco product manufacturer 18

Traffic infraction 150

Transaction of public business 11

True object test 188

University facility 99

Utilize 157

Water well 104

Well 104

Written contract 32

EDUCATION

Article VIII, § 7 of the Constitution of Virginia and § 22.1-28 provide that supervision of schools in each school division shall be vested in a school board...118

General Assembly has established a Composite Index of Local Ability-to-Pay that is computed for each locality 76

Localities whose composite indices demonstrate a lesser ability to contribute toward the cost of education receive a larger share of the state funding 76

General Powers and Duties of School Boards. Decision to consolidate health plans or back office financial services presents little danger to the school board's core responsibility of overseeing school policy 118

In general, powers and duties of school board are set forth in § 22.1-79 118

Outsourcing certain functions is permissible so long as school boards and localities comply with statutory and constitutional restrictions.....118

School boards and cities or counties can agree to exercise certain functions jointly as a cost-saving measure.....118

School board can create with the locality a joint legal entity responsible for certain aspects of personnel, finance, operations, maintenance and construction, facilities' design and engineering and management information systems.....118

School board can consolidate certain functions with a city or a county, but may not abrogate its duties or compromise its independence with respect to its core responsibilities.....118

School board can delegate responsibilities to subordinate officers 3

School board cannot forfeit its independence.....118

School board must retain authority to decide what supplies, materials and commodities it may need and their costs.....118

Sharing a chief financial officer with a locality presents a danger of restricting the school board in budgetary matters.....118

Public School Funds. Although school board can decide how to spend the funds, the mechanics of disbursing funds rest with the treasurer.....120

Authority to establish payroll dates for school division employees rests with school board, but the *Code of Virginia* contemplates regular payroll periods.....120

City school board is not empowered to order the treasurer to disburse a salary advance.....120

County school board has discretion occasionally to deviate from system of monthly, semi-monthly or biweekly payroll payments 120

Mechanics of making payroll payments to schools rests with the treasurer 120

School board can choose payroll payment date, but choice must reflect a regularized timetable 120

So long as funds of school division are separately tracked and maintained in a distinct 'funding account' the mandate of a separate account is satisfied 120

Treasurer is not required to maintain a separate bank account for school board funds.....120

Ultimate authority to determine when school division employees are paid rests with the school board.....120

School Boards; Selection, Qualification and Salaries of Members. Although the State and Local Conflict of Interests Act does not preclude simultaneous service as a member of town council and county school board, the potential interaction between the two bodies requires persons so serving to remain alert to possible contractual and transactional conflicts 71

Member of a governing body is precluded from being appointed to the school board of the county, city or town that he serves 71

No Code or constitutional provision prohibits a planning commission member from being elected to the school board and simultaneously serving in both capacities 124

Planning commissioner is an officer.....124

Planning commission member is not precluded from being elected to, and serving on, a school board.....124

Town council has no appointment authority over county school board 71

Town councilman may serve on the county school board, provided all other eligibility requirements are met 71

Section 22.1-30 applies only to appointed school boards, not to those whose members are elected 71

Section 22.1-30(A) only prohibits certain officers from being appointed to the school board, it does not prohibit officers from being elected.....124

System of Public Schools – General Provisions. Advanced Test Placement Examination fee cannot be charged to students who are taking an advanced placement course.....126

Because AP exam is the required end-of-course examination, it cannot be viewed as a service or program for which a fee may be levied.....126

No statute authorizes local school board to impose fees for taking of tests.....126

Regulations of the Board of Education prohibit fees or charges unless authorized by the Board 126

School board cannot impose a mandatory fee on students taking advanced placement courses for the required taking of the Advanced Placement Examination.....126

School board may not levy fees or charges on any pupil except as provided in Title 22.1 or by regulation of the State Board of Education 126

Section 22.1-253.13:1(D)(10) does not provide school board authority to impose fee for advanced placement course or examination, but directs board to provide information on financial assistance for those wishing to take such examination..126

Teachers, Officers and Employees. Because Franklin County is located in Planning District 12, it falls under the plain language of § 22.1-293(E).....3

Exception found in § 2.2-3119(E) applies to Franklin County, because it is a member of Planning District 12.....3

General Assembly has vested hiring authority for schools in local school boards 11-039

Requirements of § 2.2-3119(E) are satisfied when school board member recuses himself and certifies on the record that he had no involvement in the decision to hire his spouse or relative 3

Section 2.2-3119(E) does not require school board to forfeit its hiring authority; rather, it requires the superintendent independently to reach a determination about the qualifications of an applicant who is married to or related to a school board member and to do so without any involvement of the school board in that hiring decision. Upon receiving the superintendent's recommendation, the non-conflicted school board members then can vote on the applicant.....3

Section 2.2-3119(E) does not require school board to have no involvement in hiring decisions.....3

EDUCATIONAL INSTITUTIONS

Regulation has the force of law, whereas a policy does not.....99

University has authority to promulgate regulations restricting firearms within certain buildings.....99

University may impose certain regulations or prohibitions concerning firearms to ensure the safe operation of the campus.....99

University, which is vested with the authority to promulgate and enforce policies governing its buildings, may enforce its policies related to firearms 99

Unless a policy conflicts with a law or regulation, a policy may be enforced by the University.....99

University of Virginia. Because the University adopted a policy rather than a regulation, it has not "otherwise prohibited by law" persons with a concealed carry permit from possessing a handgun, so that the policies may not be used to prohibit persons with such a permit from carrying a concealed firearm into the buildings covered by the policy 99

Board of visitors in tasked with care and preservation of property belonging to the University 99

University of Virginia lawfully may promulgate policy that prohibits persons from openly carrying firearm in the buildings subject to the policy.....99

ELECTIONS

General Assembly has afforded the State Board of Elections general authority over elections in the Commonwealth 32

Local elections are subject to the State Board of Elections.....68

State Board of Elections is authorized to seek a writ of mandamus to ensure elections are conducted according to law.....68

State Board of Elections has the power to ask a court to compel the local governing body to carry forth its constitutional and statutory duties in the interest of fair and uniform elections.....68

Election Districts, Precints, and Polling Places – Reapportionment of Local Election Districts. Action in mandamus lies in favor of any citizen of the county to compel the performance by the Board of Supervisors its duty under Article VII, § 5 and § 24.2-304.1.....68

Governing bodies must reapportion local election districts every 10 years using decennial population figures provided by U.S. Bureau of the Census.....128

In order to satisfy the mandate of Article VII, § 5, Board of Supervisors must take an affirmative action to reapportion the County's magisterial districts in the 10th year since the last reapportionment, irrespective of whether the decennial population figures would necessitate any boundary adjustments 68

Local governing bodies may not exclude out-of-state prisoners housed in state adult correctional facilities from the locality's population for the purposes of the decennial reapportionment if the total population of inmates housed at the state adult correctional center does not exceed twelve percent of the locality's population.....128

Locality is required to send copies of its local redistricting changes to its local electoral board, the State Board of Elections and the Division of Legislative Services 68

Under federal law, a state can exclude inmate populations in drawing districts for state or local districts 128

Virginia law mandates that the Board of Supervisors take affirmative action to reapportion the magisterial districts for the county in this tenth year since the last reapportionment using the most recent decennial population figures.....68

The Election – General Provisions; Polling Places. Authorized representatives are subject to certain restrictions.....132

Authorized representatives may move about a polling place to hear and see what is occurring provided they do not run afoul of statutory prohibitions 132

Electoral process does not take place only at the pollbook.....132

Enforcement of restrictions on authorized representatives rests with the officers of election 132

Local electoral boards have supervisory authority to govern authorized representatives, subject to the oversight of the State Board of Elections 132

Local electoral boards must honor the representatives' rights to observe the electoral process as provided for by law.....132

Officers of election are generally tasked with maintaining order at elections, including oversight of authorized representatives 132

Officers of election are given discretion in performance of their duties to preserve order during the election.....132

Officers of election as well as local electoral boards may prevent authorized representatives from causing a disturbance or otherwise interfering with an election 132

Officers of election may order arrest of any person, including a representative, who is engaged in prohibited conduct at the polling place 132

Officers of election must give authorized representatives leeway to perform role as observers 132

Representatives cannot hinder or delay a qualified voter or officers of election...132

Representatives shall be close enough to the process to be able to hear and see what is occurring 132

Representative's statutory rights are to hear and see the electoral process as well as challenge the vote of a person he suspect is not qualified.....132

There is no authority in the Code for officers of election to confine representatives to a general area 132

Federal, Commonwealth and Local Officers–Constitutional and Local Officers. Applying § 24.2-220, one must first determine which supervisors are successors to those supervisors whose terms expired in 1995 or any fourth year thereafter.....130

Orange County Board of Supervisors, upon reversion to non-staggered terms would be elected to a four-year term beginning in 2015 130

Previously adopted ordinance calling for staggered terms for supervisors must first be repealed before reverting to non-staggered terms.....130

Section 24.2-220 allows for a county board of supervisors, which by previously adopted ordinance is elected biennially to staggered four-year terms pursuant to § 24.2-219, to revert to quadrennial election of all members 130

Local Electoral Boards. Among the local electoral board's statutory duties is the appointment of the officers of election, to include designating one such officer as the chief officer of election 132

Discussion of electoral board business by two members of the Board constitutes a meeting of the Board under FOIA that must be conducted in public and properly noticed as required by the Act 11

Interaction from one electoral board member to another via electronic mail does not offend FOIA 11

Local electoral boards, which oversee the conduct of elections, are directed to follow election laws and rules and regulations of the State Board insofar as they do not conflict with Virginia or federal law.....132

When two or more members of the electoral board transact or discuss pubic business over the phone, that constitutes a meeting of an electoral board.....11

FIRE PROTECTION

Fire/EMS Departments and Fire/EMS Companies. Aside from few noted exceptions, nothing in the Code expressly authorizes volunteer fire and rescue squads to bill home or automobile owners or insurance companies for responding to routine calls 137

Code generally contemplates that volunteer fire and rescue squads will be financed form localities, either through payments made by the locality based on each response call or through property taxes.....137

Code provides several avenues for volunteer fire and rescue squads to seek reimbursement for expenses incurred in responding to calls for help 137

Grant of power in § 27-14 does not include the ability to adopt an ordinance authorizing a volunteer fire department to assess and charge a fee to individual's homeowners' or automobile insurance policy 140

In absence of express authorization from the General Assembly, fire or rescue squads would have no statutory basis upon which to bill an individual's homeowners' or automobile insurance policy 137

Locality may enact ordinances allowing for volunteer fire and rescue companies to recover expenses incurred in responding to certain calls when a conviction for specified crimes has occurred.....137

Quantum meruit affords no basis for a fire or rescue squad billing an individual or that individual's insurance company for responding to a call.....137

Reading § 27-14 to permit locality to authorize volunteer fire department to assess fee against insurance would render other statutes superfluous 140

Section 27-14 does not permit a locality to adopt ordinance authorizing a volunteer fire department to assess and charge fee to an individual's homeowners' or automobile insurance policy for responding to a fire emergency.....140

Section 27-14 generally authorizes ordinances governing the organizational and operational needs of a department 140

Volunteer fire or rescue squad lacks the statutory authority or the contractual right to bill the beneficiary's home or automobile insurance policy for responding to a call about a fire emergency.....137

GAME, INLAND FISHERIES, AND BOATING

Boating Laws. Section 29.1-738 prohibits the reckless use of paddleboards.....142

Surfboard and paddleboard constitute similar devices 142

Wildlife and Fish Laws – Hunting and Trapping. Constitutional text expressly allows the General Assembly to restrict the right to hunt by General law 51

Prohibition on hunting on Sundays does not transgress the constitutional right to hunt and fish 51

Restriction on hunting on Sundays is a longstanding one 51

Right to hunt is not unlimited.....51

That the General Assembly did not repeal the prohibition on hunting on Sundays in the wake of a constitutional amendment is indication that no constitutional conflict exists.....51

HEALTH

Environmental Health Services – Private Well Construction. Defining 'well' is necessary prerequisite to Board of Health's adoption of regulations pertaining to location and construction of private wells.....143

Department of Health may draft regulations defining 'well and 'water well'....143

General Assembly has directed Board of Health to adopt regulations pertaining to location and construction of private wells and has charged Virginia Department of Health with the interpretation enforcement of those regulations.....143

It is within the Board of Health's authority to define 'well' for purposes of Virginia Private Well Construction Act.....143

Local health departments are within their authority to require a Water Well Classification license for the construction of wells for use in a closed loop geothermal heat pump system 143

There are four basic types of geothermal heat pump ground loop systems 143

Virginia Department of Health does not exceeded its authority in requiring a

private well construction permit for the installation of a closed-loop direct geothermal heat pump system 143

Virginia Private Well Construction Act authorizes Board of Health to oversee construction of closed-loop geothermal heating systems 143

Whenever person seeks to construct well, construction permit must first be obtained from the Commissioner of the Virginia Department of Health.....143

LABOR AND EMPLOYMENT

Federal law generally prohibits the employment of unauthorized aliens within the United States 14

Federal law requires employers to verify the eligibility status of individuals they hire 14

Section 2.2-4308.2's E-Verify requirement applies only to companies that enter into a contract with an agency of the Commonwealth 14

While participation in E-Verify is voluntary for most businesses, companies may be required by state or federal regulation to use E-Verify 14

Protection of Employees – Virginia Minimum Wage Act. Bill imposes various civil and criminal sanctions for employers who misclassify employees 147

Bill sets forth test for employee status commonly referred to as 'ABC test'.....147

Franchisee is not performing services for an employer 147

Franchisee, upon reaching agreement with franchisor, is performing services for the profit and account of the franchisee.....147

Proposed Worker Misclassification Act does not exclude franchises from its terms, but the application of its 'ABC' test would exclude typical franchises from its scope 147

Whether franchisee would be treated as an employee must be determined by application of three-part test on case-by-case basis.....147

MOTOR VEHICLES

Department of Motor Vehicles. County Board of Supervisors is required to appropriate to the office of a constitutional officer who is serving as a license agent for DMV 80 percent of the funds remitted by DMV to the county for DMV transactions processed by the office of the constitutional officer.....84

Monies so appropriated may not be used to supplant existing local funding for such office, nor to reduce the local share of the Compensation Board-approved budget for such office below the level established pursuant to general law 84

Powers of Local Governments. Any fines generated through enforcement of local traffic ordinance are to be paid into local treasury 150

General Assembly constitutionally may permit localities to retain the funds collected by them in enforcing their traffic light laws 150

Funds collected by localities in enforcing their traffic light laws do not constitute fines for offenses against the Commonwealth 150

Limited exception to prosecutorial discretion exists where arrest or summons was brought under Title 46.2 and the arrest or summons was issued bay an officer of the Department of State Police or any other division of state government.....152

Monetary penalties authorized by § 15.2-968.1 are not criminal fines.....150

Section 46.2-1300 authorizes local jurisdictions to adopt traffic violations not conflicting with state statutes.....150

Section 46.2-1308 does not prohibit a prosecutor from amending a misdemeanor charge alleging a violation of state law to the equivalent municipal ordinance in situation where the arrest or summons was issued by an officer of the Department of State Police for offenses found in titles other than Title 46.2.....152

Section 46.2-1308 expressly creates limited exception to discretion prosecutors otherwise have to amend a charge and bring it under the provisions of a local ordinance 152

Unless prevented by Constitution, locality expressly is authorized to use photo-monitoring to enforce certain ordinances and retain finds for violations 150

PENSIONS, BENEFITS, AND RETIREMENT

Virginia Retirement System – Participation of Political Subdivisions in Retirement System. Eligible employees of political subdivisions may participate in Virginia Retirement System 154

Employees of the Hampton Roads Partnership are not eligible for VRS coverage because the Partnership is not a political subdivision.....154

In determining whether entity is a political subdivision, past opinions have examined whether entity has been authorized to exercise sovereign power.....154

Political subdivision is created by legislature to exercise some portion of the state's sovereignty in regard to one or more specific governmental functions...154

Whether employees of regional partnership are entitled to VRS participation hinges on whether partnership is a political subdivision 154

PRISONS AND OTHER METHODS OF CORRECTION

Local Correctional Facilities – Prisoner Programs and Treatment. Assuming all other statutory requirements are met, upon proper court order, inmate crews may cultivate garden on private property leased to nonprofit organization that qualifies as tax exempt under federal law 157

Assuming all other statutory requirements are met, upon proper court order, inmate crews may maintain trails on private property leased to nonprofit organization that qualifies as tax exempt under federal law 157

Inmate crews may work on property outside the jurisdiction of the sheriff when authorized by court order or, if the workforce is established by the local governing body, only when the property is owned by a tax-exempt nonprofit organization that is organized and operated exclusively for charitable or social welfare purposes 157

Localities may permit inmate crews to perform tasks on property outside the jurisdiction only when the property is owned by a tax-exempt nonprofit organization that is organized and operated exclusively for charitable or social welfare purposes 157

Locality's authority, as opposed to that of a court, is limited to permitting crews to work on property owned by a qualifying nonprofit organization 157

Sheriffs are responsible for the feeding and care of all prisoners confined within their jurisdiction.....157

PROPERTY AND CONVEYANCES

Every deed, deed of trust or mortgage shall be void as to all purchasers for valuable consideration without notice not parties thereto and lien creditors until and except from the time it is duly admitted 192

Recording Act provides that recorded deed takes priority over any unrecorded deed and any deed subsequently recorded 192

Recording is required for one reason only: to perfect an instrument against claims of competing title or right by those claiming an interest through an unrecorded instrument and by subsequent purchasers and creditors.....192

Unrecorded deed is effective as between the parties to the deed 192

Condominium Act –Management of Condominium. Absent an agreement to the contrary, the responsibility for the maintenance, repair and renovation of the common elements rest with the owners' association, while the maintenance, repair and renovation of a particular unit is the responsibility of the unit owner, unless the damage originated in or through the common elements or an apparatus located within the common elements.....161

Common elements include things like the roof or ceiling 161

Condominium instruments can modify default rules relating to repairs.....161

Condominium restriction or limitation, reasonably related to a legitimate purpose, does not inherently violate a fundamental right and may be enforced.....163

Generally, when a particular unit is damaged or needs repair or renovation, the responsibility falls to the owner of that unit 161

If damage or repair arises from a condition originating in or through the common elements or any apparatus located within the common elements, the responsibility for damage or repair falls to the unit owners' association 161

Subpart (i) of § 55-79.79(A) establishes default rule that unit owners' association is responsible for repairs to the roof, siding and other common elements.....161

Subpart (ii) of § 55-79.79(A) establishes default rule for damage to a unit, as opposed to damage to the common elements 161

Property Owners' Association Act. Act allows broad latitude for contracting parties and homeowners' associations to devise rules governing use of property..163

Act does not contain any provision relating to rental property.....163

Governing documents constitute a contract collectively entered into by all the owners in the association.....163

Homeowners' association may covenant to limit the number of housing units within the association that may be offered for rent 163

In addition to principles of contract the Act provides further restrictions on homeowners' associations in Virginia.....163

Property owners' associations and their members must abide by the corporation's governing documents.....163

Relationship between homeowners' association and homeowner covered by its restrictions is contractual in nature 163

Restricting the rental of homes serves a number of legitimate interests.....163

Whether a restriction is reasonable would be highly context specific 163

SHERIFFS (*See* CONSTITUTIONAL OFFICERS)

STATUTORY CONSTRUCTION

Federal regulations governing the implementation of federal law cited in Virginia statute provide guidance in interpretation.....14

Ambiguity/clarity. Absent ambiguity, statutes are to interpreted according to their plain meaning.....157

When language in a statute is clear and unambiguous, courts apply the statute according to its plain language 171

When statute is unambiguous, it is to be interpreted according to its plain language.....73, 192

When statutory language is clear and unambiguous, the plain language used should determine the legislative intent, unless such a literal construction would lead to a manifest absurdity 20

Authority. Any doubt as to the existence of power must be resolved against the locality.....23, 120, 140

To find a particular power from power expressly granted, it must be found that legislature intended grant of the express also would confer the implied 140

Virginia follows Dillon Rule of strict construction, which provides that local governing bodies have only those powers that are expressly granted, those that are necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable 23, 120

Where one power is expressed, another power will not be inferred 140

Conflict. In the event of conflict between statutory authorization and the appropriation, the Appropriations Act, which has the effect of law and is the most recent expression of legislative intent, controls 76

When two statutes conflict, and one speaks to a subject generally and another deals with an element of that subject specifically, the more specific statute is controlling.....3

When two statutes seemingly conflict, they should be harmonized, if at all possible, to give effect to both 3

Constitutionality. All statutes and ordinances are presumed constitutional; any doubt should be resolved in favor of their constitutionality 39

Any reasonable doubt shall be resolved in favor of an act's constitutionality....152

Court must defer to legislative acts if there is reasonably conceivable set of facts that could provide a rational basis for the measure under review.....39

Where a policy or regulation does not infringe on a suspect class or a fundamental right, the standard of review is highly deferential toward the locality.....39

Definition. Absent statutory definition, words will be accorded their ordinary meaning.....142

Dillon's Rule. Any doubt as to the existence of power must be resolved against the locality.....23, 120, 140

Dillon Rule applies to school boards as well as localities 120

Dillon Rule limits powers of local governing bodies and constitutional officers to those conferred expressly by statute or by necessary implication form such expressed powers.....157

Local governing bodies have only those powers expressly granted by legislature, those powers fairly or necessarily implied from expressly granted powers, and those powers which are essential and indispensible 23, 140

To find a particular power from power expressly granted, it must be found that legislature intended grant of the express also would confer the implied 140

Virginia follows Dillon Rule of strict construction, which provides that local governing bodies have only those powers that are expressly granted, those that are necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable 23, 120

Expressio unius est exclusio alterius. Mention of one thing in statute implies the exclusion of another 106, 152, 157

Mention of specific item in statute implies that omitted items were not intended to be included within scope of statute.....171

Statue limiting a thing to be done in a particular manner implies that it shall not be done otherwise 157

Statue limiting a thing to be done in a particular manner, or by a prescribed person or tribunal, implies that it shall not be done otherwise, or by a different person or tribunal.....106

Where statute speaks in specific terms, an implication arises that omitted terms were not intended to be included within the scope of the statute.....152

Harmony. Principles of statutory construction require that statutes related to a similar subject be construed together in order to achieve a harmonious result 73

When two statutes seemingly conflict, they should be harmonized, if at all possible, to give effect to both 3

***In pari materia*/same subject.** Principles of statutory construction require that statutes related to a similar subject be construed together in order to achieve a harmonious result 73

Statutes relating to same subject matter are to be read *in pari materia*.....14,157

Statutes should not be read in isolation 73, 140, 157

Statutes are not to be considered as isolated fragments of law, but as a whole, or as parts of a single and complete statutory arrangement 73

Virginia Code constitutes one body of law.....140

Where legislation dealing with a particular subject consists of related general provisions indicative of settled policy, new enactments are to be taken as intended to fit into the existing scheme and they should be so construed as to harmonize the general tenor or purport of the system and make the scheme consistent and uniform in its operation 14

Interpretation. Absent ambiguity, statutes are to interpreted according to their plain meaning 157

Because General Assembly is presumed to be aware of the interpretation of its enactments by state agencies and the courts, legislature is deemed to have acquiesced in that interpretation when it fails to take legislative action to modify the enactment.....188

Courts are not free to add language, nor ignore language, contained in statutes...171

Courts cannot add language to statute that the General Assembly has not seen fit to include 147

Duty of courts is to construe the law as written.....147

Erroneous construction by those charged with its administration cannot be permitted to override clear mandates of a statute 192

Every act of legislature should be read so as to give reasonable effect to every word.....192

Every part of statute is presumed to have some effect and no part will be considered meaningless unless absolutely necessary.....192

Every word in the Constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify or enlarge it 68

General Assembly is presumed to have knowledge of Attorney General's published interpretations of a statute, and its failure to make corrective amendments evinces legislative acquiescence in the interpretation 157

If a statute is subject to more than one interpretation, we must apply the interpretation that will carry out the legislative intent behind the statute 130

In deciding the meaning of a statute, we must consider the plain language the General Assembly used in enacting the statute.....87

Plain, obvious and rational meaning of a statute is to be preferred over any curious, narrow or strained construction.....130, 152

Primary objective of statutory construction is to ascertain and give effect to legislative intent.....142

Retrospective laws are not favored, and a statute is always to be construed as operating prospectively, unless a contrary intent is manifest 171

Rules of statutory interpretation argue against reading any legislative enactment in a manner that will make portion of it useless, repetitious or absurd.....192

Statute is not to be construed by singling out a particular phrase; every part is presumed to have some effect and is not to be disregarded unless absolutely necessary.....20

Virginia courts will accord great weight to interpretation of a statute by the state agency charged with its enforcement.....143

We must construe the law as it is written 192

When language in a statute is clear and unambiguous, courts apply the statute according to its plain language 171

Where General Assembly has expressed intent in clear and unequivocal terms, it is not the province of the judiciary to add words or alter plain meaning.....147

Words in a statute should be interpreted, if possible, to avoid rendering any words superfluous 157

Legislative intent. Because General Assembly is presumed to be aware of the interpretation of its enactments by state agencies and the courts, legislature is deemed to have acquiesced in that interpretation when it fails to take legislative action to modify the enactment 188

Failure to amend provision in face of opinion construing similar language manifests acquiescence in Attorney General's construction of such statutes 120

General Assembly is presumed to be aware of agency construction of particular statute.....143

General Assembly is presumed to be aware of Attorney General opinions.....120

General Assembly is presumed to have knowledge of Attorney General's published interpretations of a statute, and its failure to make corrective amendments evinces legislative acquiescence in the interpretation 157

General Assembly knows how to express its intention 23

If a statute is subject to more than one interpretation, we must apply the interpretation that will carry out the legislative intent behind the statute 130

Intent is to be determined by words used 142

Legislature chose with the words it used when it enacted the relevant statute, and we are bound by those words as we interpret the statute 132

Legislature is presumed to have chosen with care the words it used when it enacted a statute.....23, 157

Legislature knows how to express its intention 140

Legislature, when it passes a new law or amends an old one, is presumed to act with full knowledge of how the law as it stands.....143

Primary objective of statutory construction is to ascertain and give effect to legislative intent.....142

We determine legislative intent from the words used in the statute, applying the plain meaning of the words unless they are ambiguous or would lead to an absurd result 130

We must give effect to the legislature's intention as expressed by the language used unless a literal interpretation of the language would result in a manifest absurdity 130

When agency construction continues without legislative alteration, the legislature will be presumed to have acquiesced in it 143

When statutory language is clear and unambiguous, the legislature is presumed to have intended what it plainly has expressed and statutory construction is unnecessary.....124

When statutory language is clear and unambiguous, the plain language used should determine the legislative intent, unless such a literal construction would lead to a manifest absurdity 20

Where General Assembly has expressed intent in clear and unequivocal terms, it is not the province of the judiciary to add words or alter plain meaning.....147

Where statute speaks in specific terms, an implication arises that omitted terms were not intended to be included within the scope of the statute.....152

May/Shall. Shall should be given its ordinary and usually accepted meaning of a command and should be construed as mandatory unless a different intention is manifest.....73

Use of shall in the Constitution or statute generally indicates that the procedures are intended to be mandatory, rather than permissive or directive 68

While 'shall' is primarily mandatory in effect, and 'may' is primarily permissive in effect, courts in endeavoring to arrive at the meaning of written language, will construe 'may' and 'shall' as permissive or mandatory in accordance with the subject matter and context 171

Plain and ordinary language/meaning. Absent ambiguity, statutes are to interpreted according to their plain meaning.....157

Absent statutory definition, words will be accorded their ordinary meaning.....142

Every word in the Constitution is to be expounded in its plain, obvious, and common sense, unless the context furnishes some ground to control, qualify or enlarge it 68

In deciding the meaning of a statute, we must consider the plain language the General Assembly used in enacting the statute.....18, 87

It is well settled that statutes should be construed according to plain language.....132

Statutes are to be interpreted according to their plain language 171

Statutes should be construed according to their plain language 147

Unless a contrary legislative intent is manifest, words used in a statute must be given their common, ordinary and accepted meanings in use at the time of the statute.....171

We determine legislative intent from the words used in the statute, applying the plain meaning of the words unless they are ambiguous or would lead to an absurd result 130

When language in a statute is clear and unambiguous, courts apply the statute according to its plain language 171

When statute is unambiguous, it is to be interpreted according to its plain language..... 73, 192

When statutory language is clear and unambiguous, the legislature is presumed to have intended what it plainly has expressed and statutory construction is unnecessary.....124

When statutory language is clear and unambiguous, the plain language used should determine the legislative intent, unless such a literal construction would lead to a manifest absurdity 20

Where General Assembly has expressed intent in clear and unequivocal terms, it is not the province of the judiciary to add words or alter plain meaning.....147

Strict construction. Exemptions of property from taxation shall be strictly construed 171

Fundamental rule of statutory construction is that penal statutes are to be construed against the Commonwealth and in favor of a citizen's liberty 104

Statutes granting tax exemptions are construed strictly against taxpayer.....171

TAXATION

There is statutory presumption that assessment of a tax is prima facie correct.....188

General Provisions (Local Taxes). Command of § 58.1-3003 is limited to filing in circuit court 164

Limited authority found in § 58.1-3003 does not authorize a Commonwealth's Attorney to appeal to the Supreme Court of Virginia an order from a circuit court with respect to the imposition of taxes by a local governing body.....164

Taxpayers who are aggrieved may appeal to the Supreme Court of Virginia at their own initiative and expense 164

License Taxes. Commissioner is charged with assessing license taxes.....166

Commissioner is free to audit taxpayers who pay license tax and to seek any necessary documentation in connection with deductions 166

Commissioners of the revenue are authorized to perform audits in connection with their duty to assess license taxes.....166

Deductions might include depreciation, compression, maintenance, transportation fees and personal property taxes.....166

Gross receipts are to be valued at the time gases are used or sold locally or placed in transit.....166

If gas extractor incurs additional expense after gases are put in transit, those expenses can be deducted.....166

If sale takes place outside the county, gross receipts received by the gas producer will be attributable in part to certain costs sustained after the point in time designated by the statute for valuation.....166

Persons engaged in the production and operation of severing gas from the earth in connection with coal mining may not take certain deductions.....166

Persons engaged in the production and operation of severing gas from the earth not in connection with coal mining may take certain deductions when sale occurs at a point outside the county or city where the gas was extracted and the producer has incurred additional expenses for the gas to reach its destination.....166

Point is to determine what the fair market value of the gas was before it was shipped outside the locality.....166

Such deductions are available only for expenses incurred after the gas was used or sold for use within taxing authority or after it is placed in transit for shipment from the taxing locality.....166

When locality chooses to levy license tax on extraction of coal or gas, it may also require companies to maintain records regarding quantities and receipts relating to the production or transportation of the gas or coal.....166

Real Property Tax. Fact that there are two payments made during course of the tax year does not alter the fact that tax year began January 1, 2011.....170

Legislation exempting from taxation real property of certain veterans would not apply to payments due for tax year that began on July 1, 2010, including payments due for the second half of the tax year.....170

Proposed legislation would not apply to tax year that began before January 1, 2011.....170

Taxpayer assessed with real property taxes is person or entity that owned the property on January 1 of the tax year.....171

Second half of bill for real property of disabled veterans would not be subject to exemption until the following tax year.....170

Real Property Tax – Exemptions for Disabled Veterans. Article X, § 6-A expressly grants General Assembly authority to prescribe restrictions and conditions for disabled veteran real property tax exemption 171

Exemption does not follow surviving spouse if he or she decides to relocate.....171

Exemption extends only to those spouses surviving a qualifying veteran who died on or after January 1, 2011 171

Exemption is dependent on a rating by the VA or successor agency indicating that under federal law, veteran has 100 percent service-connected, permanent and total disability 171

General Assembly is authorized to limit tax exemption for land to one acre.....171

It is necessary for the veteran in the first in order for his or her spouse also to qualify for the exemption 171

Implementing statutes do not direct or authorize Department of Veteran Services to interpret exemption provisions 171

Provisions relating to property tax exemption for certain veterans was part of Constitution on January 1, 2011 171

Relief afforded pursuant to Article X, § 6-A is not available when the real estate is i) titled in revocable inter vivos trust with spouse, ii) titled in revocable inter vivos trust with others, iii) titled in irrevocable trust.....171

Surviving spouse of otherwise qualifying veteran who dies before January 1, 2011 does not qualify for exemption 171

Tax exemption extends to veterans rated by the VA with total 100 percent disability on the basis of individual unemployability due to service-connected disability 171

Tax exemption is tethered to VA's rating system 171

Term 'real property' includes both land and dwelling occupied by veteran 171

There is no way, short of another constitutional amendment, to provide tax exemption to surviving spouse of veterans passing away prior to effective date of legislation 171

Veteran cannot occupy real property as his or her principal place of residence if he or she dies before the effective date of the real property exception.....171

Veterans' real property tax exemption is exclusive to the property the veteran qualified for and occupied as principal place of residence at the time of death...171

When surviving spouse of veteran who qualified for tax exemption moves to new property, she does not continue to occupy the real property that was exempt.....171

Retail and Use Tax. Connection resulting in taxable service exists when the service is incidental to a transaction whose dominant purpose is procuring a product 188

Supreme Court of Virginia has adopted and applied 'true object' test 188

Tire disposal fee charged as part of a transaction for the sale of new automotive tires is subject to the retail sales and use tax.....188

When transaction involves both the sale of tangible property and the rendering of a service, the true object of the transaction must be examined to determine whether it is subject to retail sales and use tax as a sale of tangible personal property or is exempt from taxation as a service 188

When true object of a transaction is the acquisition of a good and the service provided is incidental to that purchase, there is a connection between the sale and service that allows the imposition of the sales tax on the service.....188

State Recordation Tax. Consideration of fair market value occurs only when the amount of indebtedness is unknown 192

Example provided in Administrative Code is inconsistent with plain language of Virginia Code 192

Proper tax should be based upon the maximum amount for which the owners may be held liable under their guaranty 192

Recordation tax is not a tax on property but a tax on civil privilege 192

Statute allows for levying recordation tax based on the fair market value of the collateral legally conveyed to the trustee in situations where the loan amount secured by the deed of trust is not ascertainable.....192

Underlying purpose of statute confirms that recordation tax is ordinarily to be based on amount stated in the obligations that are secured, not the fair market value of the property.....192

When the amount secured by a deed of trust is known, the Clerk of Court should calculate the recordation tax based on the amount of indebtedness rather than the fair market value of the encumbered property.....192

Taxation of Corporations. Generators of electricity will be able continue to rely on these tax credits after July 1, 2016 195

If credit exceeds state tax liability for applicable tax year for the person with an economic interest in coal, the excess is redeemable by the Tax Commissioner as set forth in the Code.....195

Section 58.1-400 imposes a tax on corporate income.....195

Senate bill establishes a sunset date of July 1, 2016 for persons with an economic interest in coal who have received tax credits from an electricity generator to redeem these tax credits.....195

Under Senate bill, ability to redeem tax credits shall expire for persons with an economic interest in coal if the credits are earned on or after July 1, 2016.....195

Tax Exempt Property. Club's 1956 incorporation date entitles any land it acquired by to July 1, 1971 to liberal standard, provided it was exempt from taxation at the time 197

Constitution requires tax exemptions to be strictly construed 197

Grandfather clause retains rule of liberal construction to apply retroactively to determine whether certain property was exempt on July 1, 1971 and therefore should continue to be exempt 197

In addressing application of grandfather clause, the Supreme Court of Virginia held that the strict construction mandated by Article X 6(f) of the 1971 Constitution applied only prospectively to exemptions authorized under Article X, § 6(a)(6) 197

Pursuant to grandfather clause, property may qualify for exemption or remain tax exempt if the property qualified for an exemption under the law before July 1, 1971 197

Whether specific real estate is exempt from local taxation depends on whether, considering all of the relevant facts and circumstances, the property was used as an institution of learning or for activities that predominantly promoted charitable or benevolent purposes 197

Whether specific real estate is exempt from local taxation is a factual determination to be made by the Commissioner of Revenue 197